The Legal Complexity of Workplace Regulation and Its Impact upon Functional Flexibility in Australian Workplaces

Joel Fetter and Richard Mitchell†*

This article examines the legal interaction of Australian Workplace Agreements and other external regulatory instruments (including the contract of employment, awards and company policies), and argues that such interaction creates significant complexity and uncertainty in the legal regulation of the employment relationship. It investigates how these complex interactions between regulatory instruments may have the effect of impeding the legal ability of employers to pursue workplace flexibility. Although the focus of the article is upon Australian Workplace Agreements, the issues canvassed potentially arise equally in relation to the interaction of all such regulatory instruments.

Introduction

This article examines the problematic relationship between the pursuit of workplace flexibility by Australian businesses and the complexity of Australian workplace regulation. We seek to make two major points. First, that the interrelationship between the contract of employment and various other industrial instruments potentially creates enormous complexity in the legal regulation of the employment relationship. Secondly, that this complexity may legally obstruct or impede the introduction of desired work changes in particular cases. Although these and other associated issues are common to the relationships between all industrial instruments in Australia, the discussion in this article is centred on Australian Workplace Agreements (AWAs).[1]

It must be acknowledged from the outset that the issue of regulatory complexity is not new in labour law.[2] However, the introduction of AWAs into

* Centre for Employment and Labour Relations Law, University of Melbourne and Minter Ellison, Melbourne.

† Centre for Employment and Labour Relations Law, University of Melbourne. We thank our colleagues Breen Creighton and Andrew Stewart, and Justices Gray and North of the Federal Court, for their comments on an earlier draft of this article. Remaining errors are solely our responsibility.

1 For earlier work by the authors on AWAs see R Mitchell and J Fetter, *The Individualisation of Employment Relationships and the Adoption of High Performance Work Practices: Final Report*, Industrial Relations Victoria, Victorian Government, 2003; R Mitchell and J Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Jnl of Industrial Relations* 292. Utilising the data collected for this work we are able empirically to verify the extent of the potential interaction between AWAs and other industrial instruments.

2 E I Sykes and H J Glasbeek, *Labour Law in Australia*, Butterworths, Sydney, 1980, pp 582–7; R C McCallum and R R S Tracey, *Cases and Materials on Industrial Law in Australia*, Butterworths, Sydney, 1980, pp 190–201; R C McCallum, M J Pittard and G F Smith, *Australian Labour Law: Cases and Materials*, 2nd ed, Butterworths, Sydney, 1990, pp 15–26. The subject of regulatory complexity has also recently begun to attract the

Australian labour law in 1996[3] has brought the issue of regulatory complexity into sharper focus and at the same time given rise to questions concerning regulatory strategy in the pursuit of workplace flexibility. On the one hand, the introduction of AWAs (a statutory form of individualised employment agreement) notionally increases the complexity of the regulatory network, adding a new layer of regulation on to the employment relationship, such that an employee's conditions may be set with reference to the (often competing) terms of five or six instruments — the contract of employment, State and federal legislation, any applicable awards, any operative certified agreements, and the AWA itself. On the other hand, the legal characteristics of an AWA are such that it is possible to draft an AWA to cut away almost all of the other forms of regulation[4] (in a way not previously possible in the Australian system) with the consequence that the employee's conditions may be set effectively by a single instrument, the AWA itself. In this way AWAs encapsulate the irony of the juridification of labour law;[5] in order to introduce greater flexibility into the labour market, it has been seen as necessary at the same time to increase the complexity of the regulation in that market.

The introduction of AWAs also has related implications for the ease by which flexibilities may be introduced into the employment relationship. On the one hand, by cutting away external inflexible forms of regulation it may be possible to use AWAs to create a more flexible workplace. However, as the research results set out later in this article demonstrate, many AWAs (deliberately or inadvertently) draw back into the employment relationship terms and conditions contained in external instruments, thereby potentially compromising the flexibilities introduced in the AWA itself. As an added complication, the legal nature of the AWA may be such that certain inflexibilities introduced through the contract of employment might automatically be brought into the employment relationship.

This article proceeds, then, upon an examination of two linked issues — the potential for 'flexibilisation' through AWAs and the potential for the introduction of legal complexity and perhaps further rigidities through the same instrument. The structure of our argument is as follows. In the next section of this article we briefly outline the legal approach taken as the means of facilitating the pursuit of flexibility in workplace relations. We then explore some aspects of the complexity of the relationship between the contract of

attention of scholars in the field of industrial relations: see M Bray and P Waring, '"Complexity" and "Congruence" in Australian Labour Regulation', paper delivered at the 17th AIRAANZ Conference, Melbourne, 2003; D H Plowman, 'Awards, Certified Agreements and AWAs — Some Reflections', Working Paper 75, ACIRRT, University of Sydney, 2002.

3 See Pt VID of the Workplace Relations Act 1996 (Cth) (WR Act).

4 AWAs do not, however, exclude a number of important legislative entitlements of employees, such as federal legislation dealing with freedom of association, the unfair dismissal laws, unpaid parental leave, superannuation, the minimum terms and conditions for Victorian workers, as well as State legislation dealing with certain topics such as occupational health and safety: WR Act s 170VR. This does not affect the substance of the argument in this article.

5 R J Mitchell, 'Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia' (1998) 14 *International Jnl of Comparative Labour Law and Industrial Relations* 113.

employment and statutory regulatory instruments, as well as the complexity of the interrelationship between the various statutory instruments themselves. As part of this discussion we provide some empirical detail on the extent to which AWAs draw other public and/or private industrial instruments into the regulatory mix governing a particular workplace. In the final section of the article we examine by example the potential legal interactions between the content of AWAs and the other relevant regulatory devices, and the implications which these interactions have for the AWA as a tool of workplace flexibility.

Before turning to this examination, however, it is necessary to canvass two preliminary issues. First, there is, as yet, no authoritative ruling on the precise legal nature of an AWA.[6] There are two main, opposed, but equally respectable positions on this. One approach would be to regard the AWA as a mere statutory instrument, equivalent to an award or a certified agreement, providing only for minimum terms of employment.[7] One outcome of this might be that the AWA would be subject to being overridden by superior terms (in favour of the employee) contained in his or her contract of employment. The opposed view would see the AWA as also having contractual effect — terminating and replacing, or varying, the employee's contract of employment rather than merely sitting alongside it.[8] However, for the general purpose of illustrating our argument, which is already sufficiently complex in other respects, we have decided to adopt the view that an AWA is no more than a statutorily enforceable industrial instrument, similar to an award, and that therefore a contract of employment external to its terms remains in existence and regulates the employment relationship accordingly. We hasten to add that this is not a view with which we necessarily agree in principle.

Secondly, the argument in this article must be seen in its industrial context. AWAs cover approximately 2.25% of the Australian workforce, and with some notable exceptions, very little of this coverage is among employers in major sectors of the national economy.[9] There are reasons to argue, therefore, that technical issues arising from the operation of AWAs are not likely to be

6 But for preliminary investigation, see B Creighton and A Stewart, *Labour Law: An Introduction*, 3rd ed, Federation Press, Sydney, 2000, p 176; J Macken, P O'Grady, C Sappideen and G Warburton, *The Law of Employment*, 5th ed, Law Book Company, Sydney, 2002, pp 583–5; A Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' in S Deery and R Mitchell (Eds), *Employment Relations: Individualisation and Union Exclusion*, Federation Press, Sydney, 1999, p 32. See also *Hastings v J H Corporate Security Services Pty Ltd* [2000] SASC 216 (unreported, Debelle J, 6 June 2000, BC200003785).

7 See Stewart, ibid, p 32; Creighton and Stewart, ibid, p 176.

8 This is based on the argument that the agreement underlying an AWA also has effect as a common law contract since there is offer and acceptance, consideration, certainty and an intention to be bound. For a similar argument in relation to certified agreements, see *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (2003) 198 ALR 466; 123 IR 86 and *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation* (unreported, FC of A, Finkelstein J, 26 February 2004, BC200404666); see also *Construction, Forestry, Mining and Energy Union v AIRC* (2000) 203 CLR 645; 178 ALR 61 at [34].

9 See Office of the Employment Advocate (OEA), AWA Statistics, at <www.oea.gov.au>, 2004, p 3. AWAs feature prominently in the mining sector in Western Australia, for example.

of significant practical import in Australian employment regulation.

Nevertheless we believe that the points raised here are important for two reasons at least. First, AWAs remain a major priority in workplace *policy* for the present Federal Coalition government. The numbers of such agreements are growing, albeit slowly, and the number of larger employers utilising AWAs is also increasing. Secondly, as we have noted, the present legal status of AWAs, and how they legally interact with other employment instruments and regulation (public and private), is highly uncertain.[10] Although litigation on these issues to date has been slight, the investigation undertaken in this article suggests that the combined use of AWAs and other forms of regulation is an area of considerable legal complexity which, in due course, will be of some practical concern to courts, lawyers and employment consultants alike.[11]

Flexibility in Workplace Regulation

'Flexibility' in labour markets and workplace relations has been a major issue in Australian political and industrial debates for two decades or more as governments, employers and unions have struggled to come to grips with the demands of the global economy and the requirements of flexible production. In the course of the debate the concept of 'flexibility' has been carefully dissected and complexities revealed in its content. The debate has also revealed different kinds of beneficial outcomes that might flow to businesses and their employees as a result of adopting flexible work practices. Several different types of flexible practices have been identified. These include temporal flexibility, pay flexibility and functional flexibility through which businesses may seek to pursue cost reductions, greater productivity and higher profits.[12] Our particular concern in this article is with the issue of functional flexibility: that is, the freedom with which an individual worker's employment position may be changed, or their tasks, duties, responsibilities and so on may be added to or varied by managerial discretion.

In Britain, where a similar drive for flexibility has occurred, many employers chose the option of withdrawing from collective workplace regulation with unions because by doing so they could escape from what were characterised as 'rigid job and grading structures'.[13] The withdrawal from collective relations with unions restored to the employer much of the power to manage that had previously been shared with trade unions. In effect what occurred in this process was the formalisation within the employment relationship of the unilateral right of the employer to set terms and conditions more or less at will.[14] Thus in British industrial relations 'flexibility' has been

10 For an early attempt to examine some of the issues, see Stewart, above n 6, p 32.

11 One case presently before the Federal Court of Australia involves a dispute about the interaction between a remuneration clause in an AWA and the employer's right to alter payment arrangements: *Eamonn Sasseen v Telstra Corporation Ltd* (V592/03).

12 P Blyton and J Morris, *A Flexible Future?*, Walter de Gryter, Berlin, 1991; P Blyton and J Morris, 'HRM and the Limits of Flexibility' in P Blyton and P Turnbull (Eds), *Reassessing Human Resource Management*, Sage, London, 1992; I Campbell, 'Labour Market Flexibility in Australia' (1993) 5 *Labour and Industry* 1.

13 S Deakin, 'Organisational Change, Labour Flexibility and the Contract of Employment in Great Britain' in Deery and Mitchell, above n 6, p 130.

14 Ibid, pp 130–1.

connected with the withdrawal by employers from trade union recognition, and consequently with the process of 'individualisation'.[15] Individualisation in this context is taken not to mean 'individually bargained' agreements, but *legally* individualised arrangements through which standardised workplace regulation is processed.[16]

In Australia the pursuit of flexibility has required more than the withdrawal by employers from collective bargaining and joint regulation with unions. It is true, of course, that Australian trade unions have declined in organisational strength and industrial influence over the past two decades in much the same way, and to much the same degree, as British unions have declined. It is also true that, in several instances, the push by Australian businesses to introduce workplace flexibilities has also been associated with well publicised withdrawals by employers from longstanding collective arrangements with unions in favour of legally 'individualised' contracts with single employees.[17] However, be that as it may, the 'flexibilisation' of Australian workplace relations has, by virtue of its comparatively greater density of externally generated regulatory norms, required much more than a shift from 'collective' to 'individualised' negotiation and agreement.

First and foremost, the shift has required the removal of workplace 'rigidities' that are said to be imposed by legislation and industrial awards from the individual employment relationship. Thus the process of 'flexibilising' workplaces has involved a political struggle by employers with the legal regime of workplace regulation every bit as much, if not more, than an industrial struggle with trade unions at the industry or workplace level. And, given the close (some would say 'symbiotic') relationship between Australian unions and the system of industrial regulation,[18] the decline of Australian unions is arguably as much attributable to the changed regulatory regime as it is to other social, labour market and economic factors.

Australian labour law has, by dint of a steady process of legal reform from the late 1980s onwards,[19] moved to a position whereby much of the external legal regulation of the employment relationship, imposed through

15 W Brown, 'Individualisation and Union Recognition in Britain in the 1990s' in Deery and Mitchell, above n 6; W Brown, S Deakin, D Nash and S Oxenbridge, 'The Employment Contract: From Collective Procedures to Individual Rights' (2000) 38 *British Jnl of Industrial Relations* 611.

16 Deakin, above n 13, p 130; S Evans and M Hudson, 'Standardised Packages Individually Wrapped? A Study of the Introduction and Operation of Personalised Contracts in the Port, Transport and Electricity Supply Industries' (1993) 25 *Industrial Relations Jnl* 305.

17 J Fetter, *The Strategic Use of Individual Employment Agreements: Three Case Studies*, Working Paper No 26, Centre for Employment and Labour Relations Law, University of Melbourne, 2002; D Peetz, 'Individual Contracts, Bargaining and Union Membership' (2002) 28 *Australian Bulletin of Labour* 39.

18 P Scherer, 'The Nature of the Australian Industrial Relations System: A Form of State Syndicalism?' in G W Ford, J M Hearn and R D Lansbury (Eds), *Australian Labour Relations: Readings*, 4th ed, Macmillan, Melbourne, 1987; R Mitchell and M Rimmer, 'Labour Law, Deregulation and Flexibility in Australian Industrial Relations' (1990) 11 *Comparative Labor L Jnl* 1.

19 Mitchell and Rimmer, ibid; R McCallum and P Ronfeldt, 'Our Changing Labour Law' in P Ronfeldt and R McCallum (Eds), *Enterprise Bargaining: Trade Unions and the Law*, Federation Press, Sydney, 1995; M Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *AJLL* 62.

statutory-based collective agreements and/or the awards of industrial tribunals, may be avoided in favour of more 'flexible' regulation entered into by employers, unions, groups of employees and single employees at the workplace level. In the areas of employment governed by the federal jurisdiction, to which the discussion in this article is confined, parties at the workplace level are able, subject to considerable procedural and substantive limitations and qualifications,[20] to formalise agreements which allow the introduction of 'flexible' working arrangements diverging from, or directly opposed to, the conditions set down in the external regulation of awards and collective agreements. Such agreements may be made on a collective or an individual basis. Both individual and collective agreements may derogate from the terms of awards or other regulation subject to the limitations and restrictions adverted to. Our particular focus in this article, as we have noted earlier, is on individual agreements, though much of the argument would also extend in application to collective agreements. Individual agreements in the federal jurisdiction (AWAs) are statutory employment agreements which potentially add a further layer of regulation to the existing categories, albeit with the capacity to reduce the application of the other layers by completely or partially excluding them in the way, and to the extent, prescribed or authorised by the governing legislation, the Workplace Relations Act 1996 (Cth) (WR Act).

In an earlier research project, the present authors undertook a study of the content of AWAs in order to reveal how the intentional 'individualisation' of employment through the strategic use of AWAs was 'flexibilising' the employment relations of employers and businesses regulated within the federal jurisdiction.[21] The analysis was based on two sets of AWAs made available to us by the Office of the Employment Advocate (OEA). The first set consisted of 300 AWAs manually lodged with the OEA, and formalised under the processes of the WR Act towards the end of 1999. The second set of 200 agreements were randomly selected from agreements electronically lodged with the OEA, and processed accordingly, in a period of several months following June 2001. The first set of agreements tended to over-represent small-business employers. However the second set contained a more balanced group of large, medium sized and small employers. As a result of these combinations we were able to obtain an impression of the content of AWAs over a time frame, and with a different mix of enterprise size.

The results of our study revealed an extensive array of flexible employment practices, and wide-ranging employer managerial prerogatives as the AWAs purported to cut the businesses in which they applied away from the award in non-union supervised arrangements. One aspect of this study focused

20 See WR Act ss 170LT and 170LU (certified agreements) and ss 170VG, 170VPA and 170VPB (AWAs). Most importantly, agreements cannot be ratified by the AIRC if they result in a net disadvantage to the employees in relation to their conditions of employment compared to relevant laws and awards (the 'no disadvantage test') unless it is not contrary to the 'public interest' to do so: ss 170LT(3), 170VPB, 170XA.

21 See Mitchell and Fetter, *Individualisation of Employment Relationships*, above n 1; Mitchell and Fetter, 'Human Resource Management', above n 1. See also A Roan, T Bramble and G Lafferty, 'Australian Workplace Agreements in Practice: The "Hard" and "Soft" Dimensions' (2001) 43 *Jnl of Industrial Relations* 387.

specifically on functional (task or duties) flexibility. Generally speaking, we found a wide array of flexible practices usually facilitated through enhanced managerial prerogative. We found that a substantial proportion of the agreements provided the employer with express power, with little or no restriction, to change the employee's position, to add to or vary duties, or to transfer employees to other parts of the business.[22] In addition, in 27% of AWAs the question of job duties was not addressed.

Overall, we concluded that AWAs are being used to facilitate what are essentially employer-oriented flexibilities (that is, flexibility in the use of labour) by means of enhanced managerial prerogative. That prerogative may either come from instances in which the issue of job duties is not expressly addressed in the AWA or in those large percentage of agreements which specifically confer discretion to add or vary duties upon the employer. These findings broadly correspond with the outcomes found to result from the individualisation process in Britain.[23]

Legal Complexity in Workplace Regulation

In addition to revealing the extent of flexibility being produced in the process of individualisation through AWAs, our earlier research also uncovered another important phenomenon with potential implications for the parties to employment relationships, their agents, and the courts. That phenomenon is the propensity in AWAs for the drafters of those documents, whether they be employers, their agents, or lawyers acting in a professional capacity, to incorporate or refer to other relevant employment regulations and documents. As will appear, this inevitably introduces further legal complexity into the regulation of workplaces. This complexity is found in the potential collision between AWAs and other legal instruments, the question of legal ordering or legal hierarchy amongst competing terms and conditions, and a general uncertainty which goes with all of this.

A further consequence of this legal complexity is the impact which it has on the 'flexibility' equation. If the purpose of AWAs is principally to make employment relations simpler and more flexible, the practice of incorporating or referring to other documents or instruments potentially has the opposite effect, introducing, or re-introducing, legal elements and rigidities back into the employment relationship, and thereby cutting across the 'flexibilisation' goal.

Of course, as we have noted earlier, this issue is not one which is confined merely to the interrelationship of AWAs and other instruments of labour market regulation. In fact, it applies more generally to the interrelationship of all such regulatory instruments, including awards, certified agreements and the contract of employment. In general though, these issues have remained relatively obscure and unexplored until quite recently when questions such as the relationship between awards and the contract of employment began to

22 See Mitchell and Fetter, *Individualisation of Employment Relationships*, above n 1, Table 3. This table reports the results of the second set of 200 agreements only.

23 Deakin, above n 13; S Deery and J Walsh, 'The Character of Individualised Employment Arrangements in Australia: A Model of "Hard" HRM' in Deery and Mitchell, above n 6.

emerge as important in Australian labour law.[24]

The contract of employment and other forms of regulation in Australian workplaces

Central to any comprehension of the complexity of workplace regulation in Australia is an understanding of the role of the common law contract of employment and its relationship with other forms of regulation. As Deakin has noted of Britain, employment law 'has long viewed the employment relationship in terms of an individual contract between employer and employee'.[25] That proposition is equally true of Australian employment law. Thus prior to the introduction of the statutory individualised agreement in the form of the AWA it was beyond contention that employers and employees were in all cases parties to a common law employment contract which regulated their relationship separately from (and to some degree independently of) whatever other regulatory instrument or instruments applied to the relationship. That being the case, there was always at least a notional issue of the legal relationship which such a contract had with at least one of the other instruments or sources regulating the employment relation. Clearly enough that position still pertains as a general proposition, though, as will appear shortly, there is an unresolved issue as to whether the AWA has the same relationship with the employment contract as do other statutory instruments with which it seems comparable.

Secondly, the contract of employment potentially has a wide-ranging impact in these types of scenarios simply because of the largely indeterminate nature of the content of the contract taken on its face, and the many different sources of terms, both written and unwritten, which are potentially open to be pulled into the employment relationship through the contract or managerial prerogative exercised under it. As British and Australian authorities have noted, the legal concept of the contract of employment is able to be adapted and added to beyond the express agreement of the parties,[26] and, beyond that, industrial instruments may impact upon the employment relationship even if they do not in a strict legal sense become terms of the contract.

Additional terms governing Australian employment relationships may be drawn from implications made about the agreement by courts, from documents referred to by employers, from collective agreements with unions, from custom and practice in industry, from employment legislation, and from the awards of industrial tribunals. In particular, industrial awards have long been recognised as the major source of employment regulation in Australia. Further, awards are, for many critics, the major source of legal 'inflexibility' imposed upon employers in managing employment relationships, although the capacity of awards to introduce 'rigidities' of one form or another has been

24 R Mitchell and R Naughton, 'Collective Agreements, Industrial Awards and the Contract of Employment' (1989) 2 *AJLL* 252; G J Tolhurst, 'Contractual Confusion and Industrial Illusion: A Contract Law Perspective on Awards, Collective Agreements and the Contract of Employment' (1992) 66 *ALJ* 705; J de Meyrick, 'The Interaction of Awards and Contracts' (1995) 8 *AJLL* 1.

25 Deakin, above n 13, p 132.

26 Ibid, p 135; Macken et al, above n 6, p 113ff; Creighton and Stewart, above n 6.

reduced by the processes of award restructuring and simplification which have characterised Australian labour law since the late 1980s.[27]

It is evident, therefore, that the contract of employment itself, while a key legal component in the employment relationship for many reasons[28] is unlikely to be the sole, or even the major, source of employment conditions governing the relations of most Australian employers and employees. Rather, as is the case in Britain, its principal juridical significance is that it acts as a 'mechanism for expressing the impact upon the individual relationship of one or more of a number of external sources of governance or regulation'.[29] It follows also, of course, that the scope of 'flexibility' in the employment relation equally cannot necessarily be discovered from, or defined in terms of, the contract of employment expressly agreed to by the parties to the contract.

In a further parallel with the British situation, it is clear that not all forms of regulation external to the arrangements introduced by the parties themselves become legal terms of the contract of employment, no matter how much they might bear upon the conduct of the employment relationship. Some externally derived regulation plainly does take effect contractually. These implied terms include some of the core obligations in all contracts of employment (such as the employee's duty to obey the employer's lawful and reasonable orders, the employee's duty to serve the employer in good faith, and the employer's duty not to behave in such a way as to breach the relationship of trust and confidence between the parties).[30] Some of these implied terms are important in providing the employer with a source of managerial power *to introduce* flexibility into the relationship (for example, through the open ended power to issue instructions), while other implied terms (for example, the implied duty of trust and confidence) may, on the other hand, restrict such power especially when this relies on unfettered discretions.[31] In other types of cases, courts may imply terms which 'in fact' would have been agreed to by the parties had they considered them.[32] In some instances, courts have adapted this power to introduce 'flexibility' clauses into employment relationships, though subject to limitations.[33]

However, on the whole, most of the Australian regulation applying to employment relationships that is derived from external sources (from awards, collective agreements and statutes) does not become part of the individual

27 See the references above n 19.

28 B Creighton and R Mitchell, 'The Contract of Employment in Australian Labour Law' in L Betten (Ed), *The Employment Contract in Transforming Labour Relations*, Kluwer Law International, The Hague, 1995.

29 S Deakin and G Morris, *Labour Law*, 3rd ed, Butterworths, London, 2001, p 237; Creighton and Mitchell, ibid.

30 Macken et al, above n 6, p 113ff; Creighton and Stewart, above n 6.

31 See D Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 *Industrial Law Jnl* 79 and D Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30 *Industrial Law Jnl* 84 (case note); Creighton and Stewart, above n 6, pp 256–7; The Hon Mr Justice Lindsay (2001) 30 *Industrial Law Jnl* 1. On the duty generally, see Deakin and Morris, above n 29, pp 330–3. See also *Johnstone v Bloomsbury Health Authority* [1992] QB 333; [1991] 2 All ER 293.

32 See Creighton and Stewart, above n 6, pp 222–3.

33 See the discussion in P Davies and M Freedland, *Labour Law: Text and Materials*, 2nd ed, Weidenfeld and Nicolson, London, 1984, pp 297–306.

employment contract itself. In this respect the Australian position differs markedly from that of Britain.[34] In Britain the major source of externally imposed terms and conditions of employment, at least until recently,[35] has been collective agreements. Generally speaking, collective agreements in Britain are not legally enforceable in their own right. Rather, their terms become enforceable as incorporated terms in the individual contracts of employment of the workers covered by the agreement. In Australia, on the other hand, the major external sources of terms and conditions of employment — awards, collective agreements, and statutory individualised agreements (for example, AWAs) — are, with the exception of some private collective agreements, formalised statutory industrial instruments and hence are statutorily enforceable. One major consequence of this is that such instruments obtain legal force without the necessity of them being enforceable as part of the common law contract of employment, though hypothetically one would not necessarily rule out the other.

Following a period of doubt which lasted from the late 1980s until the mid-1990s it was eventually established that awards of the Federal industrial tribunal, the Australian Industrial Relations Commission (AIRC), did not become, in the absence of express provision otherwise, terms of the contract of employment. That is to say, unless the parties expressly agree in some way that an award governing their employment relationship is to be treated as part of the contract between them, the general rule is that the award is not contractually enforceable. In the absence of such express agreement it is not, in the alternative, an implied term of, or impliedly incorporated as part of, the contract.[36]As a matter of logic, it probably follows that collective agreements formalised under the federal statutory provisions will also not form part of the employment contract in the absence of express agreement between the parties to that effect.[37] And while there may be scope for a different interpretation in the case of AWAs because of their individualised nature, at the present moment it is at least open to suggest, also as a matter of logic, that these statutory-based agreements similarly may not be taken to form part of the contract as a matter of necessary implication or incorporation.[38] Moreover, Australian decisions on purely private collective agreements (that is, those which have not been formalised under statutory provisions) also strongly suggest that in the absence of express incorporation by the parties, there is no implied incorporation of collective terms derived from such agreements into the individual contract in the British mode.[39]

Broadly speaking, the position of the contract of employment in relation to

34 The one similarity is found in the statutory-based regulation. In most instances, the relevant terms of statutes regulating the employment relationship probably do not become part of the contract of employment in Britain or in Australia: see Creighton and Stewart, above n 6, p 230; Deakin and Morris, above n 29, p 245.

35 Deakin, above n 13, p 136.

36 See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; 131 ALR 422.

37 A Frazer, 'Individualisation and Collectivism in Agreement-Making under Australian Labour Law' in M Sewerynski (Ed), *Collective Agreements and Individual Contract of Employment*, Kluwer Law International, London, 2003, pp 64–9.

38 See Stewart, above n 6, p 32.

39 See *Ryan v Textile, Clothing & Footwear Union of Australia* [1996] 2 VR 235; (1996) 66 IR 258.

organisational change and workplace flexibility seems to be as follows.[40] It is generally conceded that it is extremely difficult and costly to attempt to draft contracts to anticipate in legally meaningful terms the kinds of flexibility which is likely to be required in an ongoing employment relationship. Very wide terms expressly incorporating open-ended unilateral managerial discretion may be disallowed for various reasons,[41]and may also be read down by implied reasonableness requirements.[42] Similarly, implied rights in the employer to introduce organisational change may be subject to reasonableness and other constraints.[43] Of course the parties may always vary the terms of the contract by express agreement to accommodate the change or flexibility sought as the occasion arises, but this may require costly negotiations, agreement on the part of the employee, and, technically at least, further consideration on the part of the employer.[44] Delay and cost are obvious barriers to bringing about change through this route. At the same time, attempts to dismiss the employee or employees who will be affected by the change, and re-hiring them on different terms, opens up the possibility of an action by the employee for unfair dismissal or redundancy compensation.

Most contracts of employment do not expressly define to any substantial degree the rights, obligations, terms and conditions of the parties' working relationship. They are, rather, drawn from instruments and documents external to the contract itself. As Deakin has observed of the British case:

> the multiplicity of sources [of the employment contract] means that in practice, there is considerable uncertainty over the point at which the contract ends and 'managerial prerogative', or the employer's unilateral decision-making power, begins.[45]

It follows that in Britain, where terms and conditions drawn in from extraneous sources become *part* of the contract of employment, they may only be altered by mutual agreement. Where, on the other hand, the externally imposed regulations and rules are *not part* of the contract, they do not limit the employer's right to make unilateral changes to employment arrangements by issuing orders that are otherwise contractually within its power to make.[46] However, the Australian situation is, as we noted, more complex. While almost the entire corpus of regulation external to the employment contract does not take *contractual* effect, it nevertheless is *legally binding* upon the parties, and is non-derogable (that is, the parties may not contract out of these award- and statutory agreement-based minimum standards). The extent of managerial prerogative in Australia is thus limited not merely by the terms of the contract of employment itself, but also by the extensive array of externally-derived regulation applicable to the contract. Consequently there is

40 See, generally, H Collins, *Employment Law*, Clarendon Press, Oxford, 2003, pp 6–14.
41 See Creighton and Stewart, above n 6, p 224.
42 See above n 31 and accompanying text.
43 See above nn 32–33 and accompanying text.
44 Though the degree to which the requirement for consideration, as compared with agreement, will in practice be a relevant consideration for the courts is open to question: see B Hough and A Spowart-Taylor 'The Doctrine of Consideration: Dead or Alive in English Employment Contracts?' (2001) 17 *Jnl of Contract Law* 193.
45 Deakin, above n 13, p 138.
46 Ibid, pp 138–9. See for example *Secretary of State for Employment v Associated Society of Locomotive Engineers & Firemen (No 2)* [1972] 2 QB 455; [1972] 2 All ER 949.

a great deal of corresponding uncertainty about whether or not particular terms of the contract do, or will if litigated be found to, conflict with (by lowering, reducing, or restricting) the rights given to the parties by the external regulation.

As might be expected, this interplay of managerial prerogative, employment contracts, awards and agreements is one of great legal complexity. However, leaving this to one side, the interrelationship between the external employment regulation and the contract of employment has, at a simplified level, one obvious potential effect. When an award or agreement sets down standards and rules which impose minimum protections for employees, the parties cannot by contract introduce more flexible standards and rules which derogate from those minimum standards, whether by direct explicit agreement, or by the incorporation into the contract of work rules and employment procedures and manuals formulated by the employer. It would follow of course that a court could not imply a contractual term in law or in fact, to bring about the desired flexibility either, if the effect of that would be to undermine the externally imposed standard in any way.

We can now place this discussion in the context of AWAs. Potentially this form of agreement offers a way around the problem outlined above by permitting employers and employees to *exclude* from the employment relation most external regulation taking the form of awards and certified agreements. There are, of course, statutory rules governing how this can be done, but if systematised properly the AWA can dislodge most external regulation (awards, certified agreements and some legislation) entirely, leaving very few externally imposed rules applicable to the employment relationship.[47] Hypothetically, therefore, the AWA can create more or less a clean slate upon which the employment relationship can be constructed. In terms of content, there are only a few conditions attached to this prospect. First, the weight of present legal opinion is that there must be a contract of employment already in place between the parties before an AWA can be made.[48] Necessarily, of

47 However, AWAs remain subject to a considerable body of legislative rules, as we noted above n 4.

48 See Creighton and Stewart, above n 6, pp 175–6. This is, however, only one view. Another reading of the WR Act would suggest that strictly speaking there need be no contract of employment in place before an AWA is formed. Section 170VF(1) of the WR Act states that an employer and an employee may make an AWA. 'Employee' in s 4 of the WR Act is defined to include a person whose usual occupation is that of employee, and 'employer' to include a person who is usually an employer. This seems to indicate clearly enough that a worker may negotiate an AWA with an employer though there be no *existing* employment contract and no employment relationship between them. Presumably, if this were so, such contract and such relationship might only come into existence when the AWA was approved and work started under it. If this alternative view was correct it would alter the situation considerably because it would increase the likelihood that the AWA would be seen legally to be both a statutory instrument *and* the common law contract, thus leaving less scope to argue that there are implied terms limiting the extent of managerial prerogative. Nevertheless, such an outcome would, most likely, be confined in any case to employees who had no contract of employment with the employer prior to the formation of the AWA (that is, new employees). These would be only a small minority of workers employed subject to AWAs. Of course, if work started after an AWA had been negotiated but before it was approved, then there could be no counter-argument against the view that a contract of employment already existed, even in the case of new employees.

course, this gives rise to the possibility that the contract might still bring some terms to the total agreement between the parties, and we return to this issue shortly. Secondly, there are two mandatory terms that must be included in the AWA, which pertain to discrimination and dispute resolution procedures.[49] Thirdly, an AWA must not, in an overall 'monetary value' sense at least, disadvantage the employee in comparison with the employee's entitlements under the relevant awards.[50]

None of these conditions on their face appears to pose any substantial obstacle to utilising an AWA as an instrument of employment regulation bringing about functional flexibility.[51] But there are unresolved issues of labour law associated with the role and status of AWAs and their relationship with the contract of employment of a similar nature to those raised earlier in the discussion of the relationship between the contract of employment and awards. It is unclear, for example, whether AWAs may be found to have implied terms of their own, which might compromise or qualify the express terms of the agreement, and perhaps thereby either limit the express clauses of flexibility or extend them.

Based upon our assumption that the AWA is no more than a statutory instrument, which is admittedly contentious,[52] it follows that the agreement will set out the minimum conditions of employment for the employee in much the same way, and with the same effect, as an award. Thus where the associated contract of employment sets down *superior* conditions of employment, these would consequently override the AWA terms to the extent of the inconsistency.[53] It would also follow that if the contract of employment was found to contain *implied* terms superior to those set out in the AWA, those implied terms might also set the legal standard for the relationship.[54] It is thus possible, that where an AWA sets out various flexible arrangements in favour of the employer, say for example in prescribing the employee's duties or in transferring employees between workplaces, those rights might be subject to being read down in light of an implied term in the contract of employment to the effect that such express rights would only be exercised reasonably, or without breaching the implied duty of trust and confidence and so on.

Real as these possibilities may be, it remains to be seen what courts will make of the relationship between the contract and the AWA. For the time being we must assume that since the courts have traditionally been reluctant to interfere with the express agreement between the parties through the implied term route, that position might also govern their approach to AWAs and implied terms. In other words, it is conceivable that the courts will be

49 WR Act s 170VG.

50 WR Act Pt VIE.

51 See R Mitchell, R Campbell, A Barnes, E Bicknell, K Creighton, J Fetter and S Korman, *Protecting the Worker's Interest in Enterprise Bargaining: The 'No Disadvantage Test' in the Australian Federal Industrial Jurisdiction — Final Report*, Workplace Innovation Unit, Industrial Relations Victoria, 2004.

52 Above nn 6–8, and accompanying text.

53 Unless the expression 'State law' in WR Act s 170VR is taken to refer not merely to statutory regulation but also to the 'common law'. In that case the AWA would exclude the contract to the extent of the inconsistency. However, this is not the favoured interpretation: see Stewart, above n 6, pp 31–2.

54 Stewart, above n 6, p 32.

reluctant to allow terms otherwise implied automatically into contracts of employment to disrupt express arrangements made by the parties to AWAs.

The earlier research of the present authors on flexibility in AWAs and similar work carried out by other researchers seems to indicate that there are few obstacles presented by the no disadvantage test to the purchase of workplace flexibility.[55] All in all, then, the AWA seems largely to offer something of a legal blank slate in so far as organisational change is concerned, a position made even stronger by the weakened status and power of trade unions, and by the kinds of negotiating pressure which employers are entitled to use in arranging or rearranging their employment relationships with employees.[56]

If there are serious legal barriers to functional 'flexibilisation' through AWAs, therefore, it is likely that they will arise from the complex pattern of regulation established through the AWA and its interaction with other relevant legal instruments. In other words, it may be the case that in seeking to bring about organisational change AWAs may at the same time include, incorporate,[57] or otherwise recognise various other regulations, conditions, documents and so on which might have the capacity to reduce rather than facilitate flexibility. We now turn to that issue.

AWAs and externally derived rules of workplace regulation

We have already canvassed some of the difficulties which will occur in the interrelationship between various sources of workplace rules, including AWAs, in the general context of Australian labour law. The next part of our argument proceeds to an examination of how, in practice, AWAs tend to interact with other forms of workplace regulation by explicit reference or recognition.

Although as we noted earlier it is theoretically possible to structure an AWA so as to exclude almost all other forms of regulation external to the employment relationship, of 500 AWAs examined in this research almost all incorporated or otherwise recognised some other instrument of regulation. The external instruments most frequently recognised in some way in AWAs included other public industrial instruments such as awards and certified agreements, and private documents such as company policies, position descriptions, and work rules and manuals. However, as we have also noted, an AWA also interacts with a contract of employment external to it and thus potentially with the documentation associated with that contract, including written terms and letters of offer, company policies and so on, even when these are not directly referred to in the AWA itself.

---

55 See O Merlo, 'Flexibility and Stretching Rights: The No-Disadvantage Test in Enterprise Bargaining' (2000) 13 *AJLL* 207; P Waring and J Lewer, 'The No-Disadvantage Test: Failing Workers' (2001) 12 *Labour and Industry* 65.

56 See S McCrystal and R Grossi, 'Duress and Australian Workplace Agreements: The *Schanka* Litigation and Other Developments' (2002) 15 *AJLL* 184.

57 It is not the purpose of this article to canvass in detail the technical legal rules relating to the incorporation of terms from an external source. For a brief discussion of how terms may be incorporated into the contract of employment, see Tolhurst, above n 24, at 712.

Complexity arises in both determining the meaning of each clause (that is, what relationship the parties intended the AWA to have with the other instrument, as evidenced by the language used) and in assessing the legal consequences of this language.

In the following discussion we set out five types of regulatory instruments external to the AWA which are most commonly recognised, through incorporation or reference, by the AWA itself.

The contract of employment

As we noted earlier, the contract of employment, of itself, has the capacity to introduce considerable complexity into the employment relationship simply because the sources of the contract are potentially so diverse and open-ended. Furthermore, as our discussion[58] has indicated, the relationship between the AWA and the contract of employment is also potentially exceedingly complex. It follows that references in AWAs to the contract of employment, or failure to rule out the existence of a contract of employment separate from the AWA, inevitably give rise to the possibility of all kinds of regulatory collisions.

Table 1: References to the contract of employment

	No	**%**
Agreements making no reference to the contract	456	91.2
Agreements denying the operation of an independent contract	32	6.4
Agreements recognising the operation of an independent contract	12	2.4

As Table 1 shows, the vast majority of the AWAs in our sample made no specific reference at all to the contract of employment. On the stated assumption that the AWA is a mere industrial instrument, then the consequence of silence about the contract in the AWA may be that the latter will set only minimum conditions, and that these will be subject to any superior express terms (and possibly implied terms) found in the contract.[59]

Perhaps this would also be the case for the 2.4% of agreements in our sample which expressly provided for, or at least recognised, a continuing role for the contract of employment in setting working conditions, for instance by using the following language:

> You are employed in accordance with the terms of letter of appointment attached to this AWA.
>
> Your contract of employment is confirmed for the period of the AWA.
>
> This agreement does not affect any other condition of employment.
>
> The provisions of this agreement are in addition to and not in derogation of the parties' common law rights.

However, even this kind of language does not make the status of the contract completely clear. Does the first example incorporate the contract of employment (or at least that part of the contract which is contained in the letter

58 Above nn 26–58 and accompanying text.

59 Also assuming the present understanding of the wording of WR Act s 170VR(1) is the correct one; see above n 53.

of appointment)? Does the language in the second example merely suggest that the contract will terminate when the AWA expires and hence that the AWA is the contract of employment? Do the third and fourth examples really intend by this language for the express and implied terms of the contract to prevail over inconsistent express terms in the AWA?

In contrast to the examples above, most of the AWAs which attempted specifically to deal with the question of the status of the contract of employment tried to achieve regulatory simplicity either by denying any continuing influence for the contract over the employment relationship or by asserting the paramountcy of the AWA where its terms collided with those of the contract (6.4% of our sample). Examples of the first approach are:

> This AWA operates to the exclusion of any pre-existing agreements.
>
> This agreement replaces all previous agreements between you and the company.
>
> The terms of your contract of employment with the Company are set out in this letter.
>
> All of your terms and conditions of employment are as set out in this Agreement.
>
> This agreement is the sole contract of employment between the parties and replaces any pre-existing agreements.
>
> This Agreement is also intended to be the common law employment contract between the Company and the Employee.
>
> The employer wishes to amend the terms and conditions of the employee through this agreement. This agreement describes the rights and responsibilities of the parties respectively. This agreement creates the relationship of employer and employee between the parties.
>
> . . . this letter establishes your contract of employment with [the employer] in the form of an Australian Workplace Agreement (AWA), under the federal Workplace Relations Act and covers all applicable employment terms . . . .

Typical clauses suggesting that the AWA merely prevailed over (rather than replaced) the contract include the following:

> . . . this AWA prevails over and replaces any . . . contractual arrangement that may otherwise apply to the Employee and [the employer].
>
> To the extent of any inconsistency, the provisions of this Agreement shall override the provisions of the Employment Contract for the term of this Agreement.

These clauses give rise to several questions. In the first place, as a matter of law, it is unclear whether an AWA is, or can be, a contract of employment.[60] There is some strong opinion that an AWA is not such a contract.[61] Whether that opinion would still hold in the face of express statements to the contrary in the AWA itself is also uncertain.

Secondly, if the AWA can constitute a contract of employment, several other questions arise. For example, would the language in the examples set out above achieve that result? And, assuming that it is, what happens to the original contract of employment (assuming one to have pre-dated the AWA)? Is it varied, replaced, or just rendered inoperative while the AWA is on foot? Does the AWA exclude just the express terms of the contract or also the terms implied by law? If the AWA functions as the contract of employment, does it

60 See above n 8.

61 'It is clear, therefore, that an AWA is *not* a contract of employment': Creighton and Stewart, above n 6, p 176.

also contain the same implied terms as a traditional contract of employment?

On the one hand, the ability totally to exclude all of the express and implied terms of the contract would allow AWA parties significantly to reduce the complexity which arises out of competing regulatory instruments. However, this poses problems for the assumption we have made about the notional independence of the contract from the AWA. On the other hand, if it is assumed that the parties cannot, through a mere industrial instrument, derogate from certain express or implied terms in the contract of employment, then the ability of the AWA to reduce the complexity of the regulation of the employment relationship (and hence perhaps its ability to facilitate functional flexibility) is presumably significantly compromised.

Position descriptions

As Table 2 shows, in almost a third of all AWAs in our study, a position description was referred to or recognised in some way in the content of the agreement.

Table 2: References to position descriptions

	No	**%**
Agreements making no reference to position descriptions	348	70
Agreements referring to a position description	152	30

The typical clause was:

> The Employee will diligently and faithfully perform all the duties and responsibilities of their employment in accordance with the Position Description contained in Attachment A to this Agreement . . ..

Our assumption is that the attachment of the document would probably incorporate the position description into the AWA as part of the agreement itself. In such cases, the complexity involved is that of resolving any conflict which may arise between the text contained in the body of the AWA and the text in the attached position description. As we note in the next section of the article, however, this interaction has considerable implications for the level of functional flexibility that can be procured through the AWA.

In many other instances the wording appears to fall short of clear incorporation, for example:

> You will undertake duties in accordance with the relevant position description, including all and any tasks which are incidental to those duties and responsibilities.
>
> You must perform the key role and responsibilities of an Executive as specified by the Company, consistent with the Position Description and the Employee's performance agreement.

Irrespective of whether the position description is given legal effect through incorporation into the AWA, or through the contract of employment or managerial prerogative exercised under it, there must always be some doubt as to whether the AWA overrides or is overridden by the position description to the extent of any inconsistency between them.

Another class of documents, which may be regarded as similar to position descriptions, referred to in some AWAs is what are called 'performance management plans'. These are written arrangements settled between an employee and employer about the Key Performance Indicators (KPIs) by reference to which the employee's performance would be measured.

References to these documents are usually made either in the duties clause (for example, 'You must perform your role in accordance with your performance agreement') or otherwise in the clauses dealing with pay (for example, 'Your bonus/salary increase will be determined in accordance with your performance agreement'). Occasionally the AWA lists some of the KPIs in the text of the AWA itself or in a schedule.

As we noted above with respect to position descriptions, it is unclear whether this usage incorporates the performance agreement into the AWA and, in cases where the agreement becomes legally relevant, whether the AWA overrides or is overridden by the performance agreement to the extent of any inconsistency between them.

Company policy

A large number of the AWAs in our sample (234 of 500 agreements: 46.8% of the total) made some reference to manuals, handbooks, codes of conduct and other documents containing 'company policy'.

Table 3: References to company policy

	No	%
Agreements making no reference to company policy	266	53.2
Agreements providing that the employee must observe company policy	189	37.8
Agreements providing that the employee must observe company policy where not inconsistent with the AWA	40	8.0
Agreements providing that the employer will consult with employees regarding changes to company policy	5	1.0

One hundred and eighty-nine AWAs (37.8% of the total) in some way expressly obliged the employee to abide by company policy. A number of AWAs explicitly incorporated company policy into the AWA, for example:

> All employer policies and procedures and work instructions (including those in the employer/employee handbook) form part of this Agreement.

However, the most prevalent type of clause was one requiring the employee to 'observe', 'abide by', 'adhere to', 'comply with' or 'perform in accordance with' company policy, or one specifying that company policy 'applies', 'binds the employee', 'supplements the agreement', or is to be 'read with' the AWA. Other common clauses provided that the employee's employment was 'subject to' or 'governed by' company policy.

Other references were more obscure:

> You must familiarise yourself with company policy as it contains obligations in respect of your employment

> Detailed policies defining a range of matters, some with implications for the terms and conditions of employment are set out in the Company Policy and Procedures Manual.
>
> All other terms and conditions of employment are as per the Employee Handbook issued with this document.
>
> This AWA is subject to the conditions as detailed in the attached Conditions of Employment document.

Self-evidently, these kinds of references in AWAs make the regulatory situation highly complex. If we assume that this kind of language does not suffice to incorporate the company policies, handbooks, manuals and so on into the AWA, there are numerous open questions as to whether the AWA takes precedence over inconsistent terms in those external documents, particularly because they may have some independent effect through the common law contract of employment.

In some instances (40 agreements comprising 8.0% of the total sample) this issue is directly addressed by a provision in the AWA that company policy must be observed *only where it is not inconsistent* with the terms of the AWA itself. In such cases, the question of legal ordering between the AWA and company policy seems fairly straightforward.

There are yet further problems which might be noted about the relationship between the AWA and company policy. For example, although most AWAs specify that the policy which applies is the policy 'as varied from time to time' by management, many clauses contained statements to the effect that alterations to company policy will 'not reduce your substantive entitlements'. Whether such a statement takes away from the contractual rights of the employer is unclear.

In several other cases the AWA listed 'key policies' within the body of the document or in a schedule. Once again, it is uncertain whether this usage suffices to incorporate those policies as terms of the AWA, although the fact that they are contained in the agreement at all may set up some sort of a presumption that they are intended as terms. The counter-argument is that the list of key policies is merely descriptive of the contents of the policy manual which is intended to remain external to the AWA. Perhaps this argument is strengthened by the fact that the policies most frequently listed were relatively trivial but were policies which the employer presumably wished to impress upon the mind of the employee (for example, smoking, courtesy or hygiene) rather than constituting an expression of legal intent.

Awards

As Table 4 indicates, 29% of all AWAs examined make no reference at all to an award. In these cases, the default rule operates to exclude the operation of any award which would otherwise apply to the employment of the employee.[62] A further 44% of agreements expressly exclude the operation of the award although, because of the default rule, such an express statement is unnecessary. In both of these cases, no questions of legal complexity arising out of regulatory conflict between the AWA and the award can arise.

62 WR Act s 170VQ(1). Note there are some minor exceptions for '170MX awards' and exceptional matters orders: WR Act s 170VQ(2), (3).

Table 4: References to awards

	No	%
Agreements making no reference to the award	145	29
Agreements excluding the operation of the award	220	44
Agreements preserving the operation of the award where not inconsistent	125	25
Agreements recognising the award in some other manner	10	2

However, difficulties do arise in situations where the AWA purports to adopt some parts of the award. It is hardly surprising that this practice occurs; it is a highly practical strategy. The most straightforward way that this can be done is to replicate provisions of the award in the text of the AWA itself, or else to incorporate by specific reference certain award terms. This is unlikely to give rise to any problems of interpretation other than those which occur from the interaction between the various clauses of the AWA itself.

Difficulties arise, however, in many instances where the AWA provides that the award is to 'continue to operate' in some way. Twenty seven percent of AWAs in our sample appeared to do this in one way or another. Typical clauses are:

> Except as provided by this AWA, the conditions of employment of the employee to whom this AWA applies shall be those contained in the award as varied from time to time. Where there is inconsistency between this AWA and the award, this agreement shall prevail.
>
> This Agreement shall be read and interpreted in conjunction with the current Metal, Engineering and Associated Industries Award and other relevant legislation.

One argument may be that this language merely makes compliance with the award a term of the AWA so that a breach of an 'award term' can be enforced as a breach of the agreement.

However, the language of some clauses seems to suggest that the parties intend the award to continue to operate *as an award*, so that a breach of the award can be enforced as such (including enforcement by a union or inspector). The problem with this approach is that it appears to contradict the express language of s 170VQ(1), which states that 'an AWA operates to the exclusion of any award that would otherwise apply'. It must be open to some doubt at least if the parties can reverse this legislative statement by agreement.

Difficult as these two typical clauses are to interpret, even greater complexity was found in a number of less typical clauses involving more challenging language, such as the following:

> An award may apply by force of law to your employment.
>
> Where any matter arises that is not included in the provisions of this AWA, the employer and the employee shall settle the matter by further negotiation with reference to the appropriate federal or state award.
>
> This agreement varies the Award; the status quo will operate with regard to all other terms and conditions of the Award.
>
> The Company will provide conditions generally in accordance with the Award. Where there is a conflict between the AWA and the Award, the AWA prevails.

While it is not possible to draw any generalised conclusions about the effect

of these differing forms of reference to awards in AWAs, the capacity for legal confusion and uncertainty is self-evident. In every case, there is significant complexity in working out, for any particular term of employment, how the AWA interacts with the award in relation to the particular rights and duties of the employee. In these circumstances the most important aspect of the complexity of the regulation will be that of calculating what parts of the award are or are not inconsistent with the terms of the AWA.

We note one final phenomenon about the interaction of awards and AWAs. Of those AWAs that expressly stated that the award *did not apply* (44% of AWAs), a small proportion nevertheless purported to give some effect to the award by later reference to it in the body of the AWA. These included clauses specifying that certain matters typically dealt with exhaustively in awards (such as parental leave) were to continue to be governed by the award.

It is not clear whether, or how, these clauses legally re-enliven the award or whether they merely create rights and obligations in the AWA that happen to mirror award provisions. Even if they do not re-enliven the award they do create regulatory complexity as the award retains some influence over the employment relationship. As a result, complexity may arise where the terms of the award conflict with the express terms of the AWA. The complexity then lies in working out how the contradiction is be resolved.

Certified agreements

Unlike the case of awards, the WR Act provides that (unless otherwise specified in the certified agreement) a pre-existing certified agreement which has not passed its nominal expiry date at the time the AWA comes into operation prevails over the AWA to the extent of any inconsistency. On the other hand, an AWA wholly excludes the operation of a certified agreement that is made while the AWA is on foot (that is, before the AWA passes its nominal expiry date).[63]

As Table 5 illustrates, 94.4% of the AWAs in our sample were silent as to the existence or operation of a certified agreement.[64] Only a very small number of agreements (27 in number, or 5.4% of the total) had anything to say about the question of the interaction of the AWA with certified agreements.

Table 5: References to Certified Agreements

	No	%
Agreements making no reference to a Certified Agreement	472	94.4
Agreements wholly excluding the operation of a Certified Agreement	11	2.2
Agreements preserving the operation of a Certified Agreement where not inconsistent	14	2.8
Agreements providing for a Certified Agreement to prevail over the AWA	3	0.6

63 WR Act s 170VQ(6).

64 Terms from certified agreements might nevertheless have been directly replicated in the text of the AWA, but this does not affect the substance of our argument.

Eleven AWAs in our sample purported to exclude the operation of the certified agreement. Typical clauses include the following:

> It is agreed that this AWA displaces the Certified Agreement.
>
> This agreement operates to the exclusion of any certified agreement that may otherwise apply.

A further group of AWAs in our sample purported to exclude the operation of 'all other agreements'. It is not clear whether this reference includes certified agreements or is rather a reference to the contract of employment or even a reference to uncertified collective agreements. Accordingly, for the purposes of our research we did not include these agreements in the figure contained in the second row of Table 5.

In any case, for this group of AWAs which purported to exclude the operation of certified agreements, the legislative rule contained in s 170VR(6) precludes these clauses from taking literal effect, at least in so far as they purport to exclude the operation of certified agreements that were on foot when the AWA was made. Nor are these clauses needed to exclude the operation of later-made certified agreements, as this outcome is already achieved by the last limb of the legislative rule set down in s 170VR(6). Accordingly, this type of clause is entirely redundant and creates no additional complexity in the interaction between AWAs and certified agreements.

On the other hand, some of the 17 AWAs which purported to accommodate the terms of a certified agreement did create additional complexity beyond the minimum interaction mandated by the legislative rule contained in s 170VQ(6). In the first instance, some of the AWAs purported to incorporate the terms of the certified agreement into the AWA. As is always the case with the attempted incorporation of an external document, some complexity arises in determining whether the particular reference used in the clause suffices legally to incorporate the document and also in assessing how the terms (if successfully incorporated) interact with the express terms of the AWA.

Examples of clauses which may successfully incorporate certified agreements include:

> The Certified Agreement shall apply to the employment of the employee as if they were included as express terms of this AWA
>
> To the extent permitted by the Workplace Relations Act 1996, the Employee's terms and conditions are those that apply from time to time to the Employee's classification as set out in the Certified Agreement or any successor agreement, except as expressly varied in this agreement.

Assuming the language of such agreements to have successfully incorporated the terms of the certified agreement, those terms may continue to be relevant even though the underlying certified agreement may have terminated, unless it is clear (as in the second example above) that its operation on the AWA is intended only to be effective consistent with its independent status. In addition, if the certified agreement referred to happens to have been one which had passed its nominal expiry date at the time the AWA was made, the effect of incorporation is to include the terms of that agreement as terms of the AWA when otherwise, under the default rule, the certified agreement would be wholly excluded. Accordingly, the incorporation of certified agreements may create additional interactions and additional complexities.

The scope for interaction (and hence complexity) may also be extended by those clauses which provided as follows:

> Your employment remains subject to any applicable certified agreement
> This agreement shall operate in conjunction with the Certified Agreement or replacement.

Although the legislation already achieves this result with respect to the class of pre-existing certified agreements which have not passed their nominal expiry dates at the date on which the AWA came into operation, these clauses purport to save *all* pre-existing and future certified agreements from the operation of the provision in s 170VQ(6)(c) which suggests that those agreements are wholly excluded.

As we remarked in relation to awards, it is not clear that the parties can agree to dispense with this rule. However, assuming that they can, what these clauses do is draw back into the employment relationship a number of provisions which otherwise would not apply. This in turn creates significant complexity as it is not clear on the face of these clauses whether the AWA is to prevail over inconsistent terms in the certified agreement or vice versa. For example, does the first clause given above make the AWA 'subject to' the certified agreement? And does it necessarily follow from the second clause that to read the AWA 'in conjunction' with the certified agreement is to read the terms of the AWA as prevailing over inconsistent terms in the certified agreement?

* * *

There has always been considerable legal complexity in Australian workplace regulation — complexity involving the interaction of various industrial regulations and instruments including legislation, awards, statutory-based agreements and the contract of employment. However for various reasons this complexity appears to have had little practical impact upon workplace relations and industrial disputation. For example, questions of conflict between the contract of employment and awards, or between awards and statutory agreements, while occasionally canvassed in legal texts,[65] have rarely emerged before the courts.

As we have noted in this section, however, recent labour law developments have altered this outlook. First, there has been the emergence of some judicial activity in matters concerning the contract of employment and its relationship with awards and agreements over the past decade or so.[66] Secondly, the introduction of the AWA has created a far more volatile mix of regulatory instruments which seems almost certain in due course to give rise to legal and, perhaps, industrial controversy.

Examining the interrelationship between the AWA and these various other

---

65 Sykes and Glasbeek, above n 2, pp 75–9, 582–7.

66 *Gregory v Philip Morris Ltd* (1988) 80 ALR 455; 24 IR 397; *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 36 FCR 20; 41 IR 452; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; 131 ALR 422; *Ryan v Textile, Clothing & Footwear Union of Australia* [1996] 2 VR 235; (1996) 66 IR 258; *Hastings v J H Corporate Security Services Pty Ltd* [2000] SASC 216 (unreported, Debelle J, 6 June 2000, BC200003785); see also the authorities cited above n 8.

external forms of regulation, a couple of important points can be made. First, although it is undoubtedly possible to structure employment relationships under AWAs so as to exclude most external forms of regulation (such as awards and certified agreements) there are serious doubts over the capacity of an AWA to exclude entirely the operation of the contract of employment unless, perhaps, this is done explicitly in the terms of the AWA itself.

Secondly, our research demonstrates clearly enough that employers, lawyers, bargaining agents and others responsible for the drafting of agreements are not in practice usually seeking to construct the AWA as the sole mechanism for regulating the employment relationship. Just to restate some of our reported findings outlined above, four fifths of AWAs deliberately or inadvertently preserve the operation of the contract of employment; almost a third of AWAs recognise the continued operation of the award; half of them anticipate the impact of company policy on the relationship and one third make some form of reference to an externally derived position description.

As we have noted, these regulatory interactions necessarily give rise to tremendously difficult questions of legal complexity in their own right. However, moving from this level of generalisation, it is also clear that the collisions between AWAs and other forms of regulation appear to have specific consequences for the issue of functional flexibility. Why and how this is so are issues dealt with in the next section of the article.

The Impact of Legal Complexity on Flexibility in AWAs

One central purpose in this article has been to indicate the potential for legal complexity caused by the interaction of various regulatory instruments in Australian labour law, and in particular the added complexity induced with the introduction of AWAs into the regulatory mix in 1996.[67] In what amounts to one variation on this general theme, we have attempted to expose through close examination of the terms of AWAs the potential legal problems created by their tendency to incorporate expressly, or to refer to or otherwise acknowledge, in whole or in part, the contract of employment, awards, managerial policies, collective agreements and so on, in what would otherwise be a largely stand-alone statutory instrument regulating the employment relationship.

The second purpose of this article is to show that as a simple by-product of this legal interaction between regulatory instruments it is commonly the case that flexibility clauses in AWAs, designed specifically to avoid the inflexibility of certain external regulations, may be compromised legally, if not in practice, by the incorporation of externally derived regulations. In many instances these incorporations directly contradict the clear intent of the AWA. In others there is capacity for them to do so depending on interpretation.

As we noted in the second section of this article, AWAs typically address the issue of employee functional flexibility through broadened managerial prerogative. In the absence of a specific duties clause, we may suppose that the employer, subject to other introduced legal constraints, has a fairly open

67 Plowman, above n 2.

discretion to alter the employee's duties and functions at will. Many AWAs, however, go well beyond the 'open' contract approach. A very high percentage of AWAs, for example, give the employer the express discretion to add or vary duties. Sometimes this discretion is fettered, but very often it is completely at large. The conclusion reached on the basis of our research was that the achievement of functional flexibility through the relatively unrestricted capacity of the employer to alter the nature of the employee's job, its associated duties and functions, and also its location, is a very important item on the agenda of most employers seeking to utilise AWAs in regulating the employment relationship.

How do the legal complexities and potential regulatory collisions we have identified in the previous sections of this article impact upon the exercise of the employer's discretion to utilise labour flexibly in the manner outlined above? We are not able to examine all of the possibilities here. However certain potential collisions between AWA discretions and externally derived rules are obvious.

Perhaps the most important of our examples is the situation where the AWA interacts with the *contract of employment*. For various reasons, which we have outlined earlier, the exact relationship of these regulatory instruments is as yet largely unexplored. However, if the assumption that the AWA is a minimum standard statutory instrument is correct, and/or if the AWA incorporates or otherwise interacts with the contract of employment, the survival of unlimited discretions in the AWA must be open to question.

It is highly likely in such cases that either the express terms or the implied terms of the contract of employment will interfere with the employer's discretion. Although it could well be (on our stated assumption about the nature of AWAs) that the express terms of the contract would prevail over the powers given in an AWA, the further important question is whether the implied terms of the contract will also do so. There are already some indications that the courts will be prepared to impose implied limitations in this way.[68] It is thus open to suggestion that the evolution in the common law of implied terms requiring the reasonable use of discretions by the employer, perhaps elements of good faith, and an obligation not to undermine the trust and confidence inherent in the employment relationship, might all be expected to compromise the employer's express discretions under the AWA.[69]

The terms of AWAs do, quite regularly, extend very wide discretions to employers in the flexible use of labour. For example, one AWA we saw, between a major media company and a 'cadet journalist', provided that:

> [The employer] may, in its absolute discretion, change [the employee's] duties from time to time.

Another interesting example of a very broad employer discretion was found in an AWA concluded between a hairdresser and a salon. The AWA contained the following clause:

---

68 See *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] IRLR 66; *Johnstone v Bloomsbury Health Authority* [1992] QB 333; [1991] 2 All ER 293. See further Deakin and Morris, above n 29, pp 243–5. See also Stewart, above n 6, p 32.

69 See Brodie, 'Beyond Exchange', above n 31; Brodie, 'Mutual Trust', above n 31.

> Any term or condition of employment not otherwise applicable by law that has not been addressed by this agreement, will be in accordance with the employer's policy, which may be varied from time to time. Where no policy exists, the terms and conditions will be as agreed to between the employee and the employer. Failing agreement, the terms and conditions will be as reasonably determined by the employer.

Our expectation is that no matter how broad the employer's discretion is expressed in the terms of the AWA, such as those above, it is more than likely to be read down in some respects, in the context of the contract of employment, to limit the extent of the employer's exploitation of this right, particularly in view of the imbalance of bargaining power between the parties to AWAs.

If the AWA were a contract then it is at least arguable that the second of the above clauses might conceivably render the contract 'illusory' and hence void. To save the contract from invalidity, a court would either have to sever the clause or else to read it as subject to some implied limitation. However, since this clause appears (on the basis of our assumption in this article) not in a contract but in a statutory instrument, it is not clear that a court has the power either to sever the term or else to read it down subject to an internal implied AWA term. Accordingly, the only way to prevent the clause from operating to its full extent would be to reach a conclusion that these express AWA clauses are subject to implied limitations in the contract of employment.

The direct incorporation or inclusion of *position descriptions* and *performance plans* might also be expected to place limits on the legal rights of employers to utilise labour freely. On the one hand, most AWAs permit the employer to reassign the employee to new or different duties. On the other hand, a position description would seem to more precisely define, and perhaps restrict, the range of duties which the employee can be asked to undertake.

For example, one AWA between a take-away food chain and its staff sought a highly flexible employment outcome by including the following clauses:

> **Job Duties**
>
> The Employee will diligently and faithfully perform all the duties and responsibilities of their employment in accordance with the Position Description contained in Attachment A to this AWA, and such other duties as may reasonably be required by the Employer from time to time.
>
> **Flexibility**
>
> The parties agree that in our organisation it is necessary for us to respond quickly to the needs and workload across the organisation. Therefore, while the Employee may normally work in the kitchen, bar, or front of house area, employees need to remain flexible, and work as a team and in line with this, the Employee may be directed to and will:
>
> a) assist by working in other areas;
> b) vary their starting or finishing times; or
> c) perform other tasks which are consistent with the Employee's skills and abilities.
>
> **Workplace Change**

> The Employer agrees to provide the Employee with the relevant training to improve the Employee's skills when work changes take place, and the Employee agrees to be flexible and to accept any changes to their work positions or work methods within the business as may be required in the best interests of the Employer.

However, at the same time, the AWA had attached to it a position description listing the following duties:

- Cleaning, tidying and setting up of kitchen food preparation and customer service areas, including the cleaning of equipment, crockery and general utensils;
- Assembly and preparation of ingredients for cooking;
- Handling pantry items and linen;
- Setting and/or wiping down tables, removing food plates, emptying ashtrays and picking up glasses.
- General cleaning, gardening and labouring tasks.
- Heating pre-prepared meals and/or preparing simple food items such as sandwiches, salads and toasted foodstuffs;
- Undertaking general waiting duties of both food and/or beverages, including cleaning of restaurant equipment, preparing tables and sideboards, clearing tables, taking customer orders at a table;
- Taking orders by telephone or whilst stationed at a fixed ordered point, serving food and/or beverages to tables;
- Service from a snack bar, buffet or meal counter;
- Receipt of monies, giving change, operation of cash registers, and use of electronic swipe input devices;
- Greeting and seating guests under general supervision;
- Supplying, dispensing or mixing of liquor, including cleaning of bar areas and equipment, preparing the bar for service, taking orders and serving drinks and assisting in the cellar;
- Receiving, storing and distributing goods not involving the extensive use of documents and records;
- Attending a cloakroom
- Laundry and specialised cleaning duties involving the use of specialised cleaning equipment and/or chemicals;
- Allocated building, maintenance and/or gardening duties.

This example confirms how complex (and potentially inconsistent) interacting documents may be. At first glance, the express clauses contained in the AWA appear to confer a very wide discretion upon the employer to assign, add or vary job duties. But upon closer inspection, one finds that those discretions are expressly restricted by notions of reasonableness, the employee's 'skills and abilities' and by the obligation to provide training. Moreover, irrespective of the terms of the express clauses found in the AWA, we also suggest that the attachment of a highly specific position description calls into question the ability of the employer freely to utilise the flexibilities purportedly conferred by the express clauses of the AWA. Indeed, this might also be the case even if the position description was not formally attached to the AWA. Given the very narrow scope of the position description, one would think that it is at least highly questionable whether a court would permit the employer in this case to require the employee to act as a security guard, as a general cleaner,

or as a replacement cook in emergency situations, notwithstanding the breadth of the express discretions to require workplace changes 'in the best interests of the Employer'.

When we turn to the issue of the incorporation of *company policies, manuals, handbooks* and so on into the AWA, or their influence on the employment relationship brought about through the contract of employment or through the exercise of managerial prerogative, similar problems of complexity, inconsistency and even regulatory collision may be anticipated. We have noted in our earlier discussion that AWAs have a high propensity to draw in further regulation from this source. It is in the employer's interests to attempt to maximise the flexibility of the deployment of labour through company policies. However, in many cases — particularly in highly bureaucratised workplaces which create an ever-evolving set of duty statements and performance indicators for employees — the effect of company policy (either by inadvertence or design) may well be to limit the extent of flexibility potentially available under the AWA.

One typical example would be where such policies place restrictions on the transfer of employees to new positions or to new locations. Although we cannot say in how many instances this occurs (since company policies are generally not publicly available), we do suspect that in many cases company policy tends to undermine the degree of flexibility otherwise available through AWAs. On the other hand, in the one relevant court case of which we are aware,[70] the argument for the employer has been that its policies permit it a *greater* degree of flexibility, in the context of pay, than would otherwise be admitted by the AWA.

The re-introduction of *award* terms into the employment relationship by incorporation or reference may also directly or indirectly circumscribe functional flexibility. Functional flexibility clauses, as we have seen, do permit employers to add to or vary employees' positions and duties, often very widely. Award terms do not describe positions or jobs as such. However, they do contain, importantly, classification structures which are indicative of the typical kinds of work which employees might be required to carry out. These are often quite specific. One example is taken from the Security Employees (Victoria) Award 1998 as follows:

> **15.2 Security officer — level 2**
>
> A Security officer — level 2 is an employee who performs work above and beyond the skills of an employee at level 1 to the level of their training.
>
> Indicative of the tasks which an employee at this level may perform are the following:
>
> 15.2.1 Duties of securing, watching, guarding/protecting as directed, including responses to alarm signals and attendances at and minor non-technical servicing of automatic teller machines, and to patrol in a vehicle two or more separate establishments or sites.
>
> 15.2.2 Monitor and respond to electronic intrusion detection or access control equipment terminating at a visual display unit and/or computerised printout (except for simple closed circuit television systems).

70 See above n 11.

15.2.3 Monitor and act upon walk through electromagnetic detectors; and/or monitor, interpret and act upon screen images using x-ray imaging equipment.
15.2.4 The operation of a public weigh-bridge by a Security officer appropriately licensed to do so.
15.2.5 May be required to perform the duties of Security officer — level 1.[71]

In addition to these kinds of classification descriptions, awards will typically provide that employees are required to perform a 'wider range of duties including work which is incidental or peripheral to their main tasks or functions' or 'such duties as are within the limits of the employee's skill, competence and training'.

In our view, these award provisions, at least implicitly, recognise a certain defined scope within which the employee carrying out the relevant type of work is understood to be engaged. Where the award is incorporated into the AWA, such provisions may therefore set some outer legal limits on the employer's disposition of the employee's intellectual or physical labour. It is less clear what the position will be should the AWA merely refer to the award without directly incorporating the relevant provisions.

The most important point to note about the interaction of *certified agreements* and AWAs is the fact that the former in most cases will override the latter. Even in cases where the AWA purports to preserve its supremacy with respect to the certified agreement this will usually be ineffective. It is most important therefore to assess whether or not certified agreements tend to place limits upon employee functional flexibility. This is essentially an empirical question. Relevant research has been carried out on this matter as part of a series of projects in the Centre for Employment and Labour Relations Law at the University of Melbourne. This research indicates that in the case of s 170LK agreements, which are likely to be the most relevant for present concerns, only 25% permit the employer to add new duties or vary existing ones. And of this minority of agreements more than 80% permit such additions or variations to take place only where such changes are 'within the limits of the employee's skill, training and competence'.[72] In other words, such agreements rarely permit employers to vary or add duties to a position at will such as occurs in many AWAs. The consequences of this for our discussion are self-evident.

Conclusion

The purpose of this article has been to explore some consequences of the interaction of various forms of workplace regulation and their impact upon one aspect of workplace flexibility in Australia. It is made clear in the body of the text that this is a partial exploration only. We have made certain assumptions about the legal nature of AWAs, and we have confined our discussion to the way in which the complexities of regulation may rebound

71 AW796143.
72 K Creighton, 'Section 170LK Agreements and High Performance Work Systems: An Analysis', unpublished paper, Centre for Employment and Labour Relations Law, University of Melbourne, 2003.

upon provisions for functional flexibility found in AWAs. There are several key points that we should note in conclusion.

First, this is not an argument that complexity necessarily compromises flexibility in employment relations. All we are saying is that the complex interaction between different regulatory instruments may compromise the flexibility found in AWAs if insufficient thought is given to how those regulatory instruments are constructed and how they relate legally and practically to one another. Secondly, it is quite clear that much of our argument would apply just as readily to the relationship between certified agreements and other forms of workplace regulation, and that many similar issues would arise for exploration in the context of other forms of employment flexibility which such agreements might attempt to introduce in derogating from awards. Thirdly, we acknowledge the fact that there have to date been very few cases touching upon the issues raised in this article, and also that there is very little evidence that the interaction between various forms of regulatory instruments is producing in practice complications for the parties to industrial relationships.

Nevertheless, we point out that the complex nature of Australian workplace regulation has recently been taken up as an issue by industrial relations scholars,[73] and in our view it is only a matter of time until questions such as those raised here become of some legal and practical relevance. Our purpose has been to foreshadow the potential for difficulty in the legal ordering of AWA terms and externally-derived provisions impacting upon the employment relationship.

73 See Bray and Waring, above n 2; Plowman, above n 2.