AUSTRALIAN WORKPLACE AGREEMENTS

James Judge

Problems with maintaining minimum award conditions.

The *Workplace Relations Act 1996* (the Act) introduced into the federal industrial relations system a new form of instrument for regulating the employment relationship known as Australian Workplace Agreements (AWAs). In a major shift away from the traditional Australian model of collective bargaining, Part VID of the Act enables employers to negotiate terms and conditions directly with individual employees. In an effort to ensure the maintenance of some minimum employment conditions, agreements have to pass a 'no-disadvantage' test as a prerequisite for their final approval. Agreements fail the no-disadvantage test if the conditions they offer employees represent an overall reduction when compared to the conditions contained in the relevant (or a designated) award, or relevant conditions granted under another law.

The Employment Advocate

Based on the assumption of workplace conditions being negotiated between free and independent contracting parties, the provisions governing AWAs in the first incarnation of the Bill provided little to compensate for the unequal bargaining position of the average employee. AWAs were to be formalised through a simple filing process with the Employment Advocate, an independent statutory officer with powers and functions laid down in the legislation. To make AWAs easier to conclude, agreements which failed to provide for seven minimum conditions laid down in the legislation, or those without a suitable dispute resolution procedure, were deemed to incorporate 'model' provisions in relation to those matters.

Among other changes made to the Bill in the Senate, the 'no-disadvantage test' was introduced. This was one of the measures that expanded the role originally envisaged for the Advocate. The final form of the legislation provides that the Advocate must approve an AWA if it meets the no-disadvantage test and some other additional approval requirements. If the Advocate has concerns about an AWA passing this test it can seek further undertakings from the employer, but if still not satisfied, must refer the AWA to the Australian Industrial Relations Commission (the AIRC). As will be argued below, despite these requirements, the no-disadvantage test offers minimal protection to workers who are negotiating AWAs. In practice, the legislation fails in its attempts to meet one of its principal objects, 'to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment' (s.3(d)(ii)).

The no-disadvantage test in context

One problem with the no-disadvantage test is that AWAs are compared with awards rather than any certified agreement that might be currently operating. This means that AWAs now coming before the Advocate are compared to awards in which the rates of pay may not have been updated for a number of years (at least until the award simplification process is completed). The fact that the Advocate has no power to refuse an AWA if it appears to fail the no-disadvantage test essentially reduces its

James Judge is a researcher at the Australian Centre for Industrial Relations Research and Training (ACIRRT) at the University of Sydney.

role to checking the filing requirements and some additional requirements relating to matters such as the presence of dispute resolution procedures and the genuine consent of the employee (s.170VPA).

There is no requirement for the involvement, or even the notification, of a union in the making of an AWA.[1] Although either party in an AWA negotiation can appoint a bargaining agent, the situation in most small businesses is that there will be no union presence at the workplace. The likelihood of the average worker having the money or inclination to hire a lawyer to act as their bargaining agent is slim. That being accepted, most employees in small businesses will be left with Hobson's choice and end up acting for themselves. Even if the majority of employees facing AWA negotiations sought to appoint a union as their bargaining agent, the resource implications in negotiating potentially thousands of discrete agreements are immense. Measures within the Act prohibiting the disclosure of the identity of the parties to an AWA by the Advocate, forbidding the AIRC to disclose the identity of the parties, specifying that the hearings must be in private, and disallowing any intervention make the process secretive. Closing off these avenues of external scrutiny must at the very least reduce the perception of fairness in the AWA approval process.

While the Act sets out a framework allowing for employees to take collective action in an AWA negotiation, the rights afforded are stronger on paper than they will ever be in practice. One of the rights that an employee does have when faced with an AWA is to take protected industrial action (Part VID, Division 8). An employer must not dismiss, injure or alter the employment of an employee for taking action as part of an AWA negotiation. Employers, however, are also entitled to take protected action and may stand employees down or refuse to pay them for failing to perform work as directed (s.170WE). There is also nothing to stop employers negotiating with individuals at different times to ensure that they will not be able to act collectively. A prohibition in the Act against offering comparable employees agreements that are dissimilar in terms is not of much assistance in this scenario. Although it is an offence to discriminate against or dismiss an employee for trying to negotiate better conditions in an AWA, as one commentator has noted, 'a good industrial lawyer will usually be able to structure a dismissal on valid grounds, thereby overcoming the legislative attempts to nullify the negative effects of employers entering into agreements with individual workers'.[2] The current events in the waterfront dispute also raise questions about the effectiveness of the unfair/unlawful dismissal sections of the Act.

The no-disadvantage test in operation

On 26 September 1997, the AIRC handed down a decision which provides a useful example of the application of the no-disadvantage test provisions. Because of s.170WHC, the parties to this matter cannot be identified by the AIRC in its decision.

In this decision, the Employment Advocate referred three separate AWAs to the AIRC under s.170VPB(3) of the Act. The three AWAs were in identical terms, except in relation to the parties bound. The Employment Advocate had concerns as to whether these AWAs passed the no-disadvantage test, and these concerns were not resolved by the undertakings offered by the employer. The Employment Advocate's concerns related to provisions in the AWAs allowing the employer to roster employees to work any day of the week with no limit on daily hours, in circumstances where penalty rates would not be available. In the Advocate's view, there were no apparent offsets in the AWAs to counterbalance the resulting financial disadvantage which would be suffered by workers.

Following referral by the Employment Advocate, the role of the AIRC is to approve the AWA if it is satisfied that the AWA passes the no-disadvantage test (s.170VPG(2)). If the AIRC considers that it is not contrary to the public interest to approve the AWA, it must approve the AWA. This is irrespective of whether the AIRC is required to approve the AWA under s.170 VPG(2). Section 170VCA of the Act makes provision for the performance by the AIRC of its functions in relation to AWAs. This provides that 'the Commission must, as far as practicable, perform its functions under this part in a way that furthers the objects of this Act'.

The AIRC's findings

The AIRC shared the concerns expressed by the Employment Advocate as to whether the AWAs passed the no-disadvantage test. In fact, the AIRC considered that the AWAs failed the no-disadvantage test comprehensively. On balance, there was found to be a reduction in the terms and conditions of employment when the agreements were compared to the relevant award. The AIRC also agreed that the undertakings offered by the employer did not make the total agreement, meet the no-disadvantage test. However, on balance, the AIRC concluded that to approve the AWAs in question would not be contrary to the 'public interest'. Accordingly, the AIRC approved the AWAs under s.170VPG(4) of the Act.

The public interest

The Act does not attempt to define the circumstances in which the approval of an AWA would not be contrary to the public interest. However, a note to s.170VPG(4) provides:

> An example of a case where the Commission may be satisfied that approving the AWA is not contrary to the public interest is where making the AWA is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, a business or part of a business.

The AIRC thought that the determination of whether approval of an AWA would not be contrary to the 'public interest' required a 'discretionary value judgment' on the part of the AIRC. That 'discretionary judgment' was to be made by reference to 'undefined factual matters' confined only by the objects and purpose of the Act (see the High Court case of *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216). The AIRC also considered that the 'public interest' test in subsection 170VPG(4) required the balancing of benefits to be derived approving the agreement as against the likely detriment from the point of view of the general public interest as opposed to an individual detriment (see *Re Associated Booksellers* (1962) NZLR 1057 at 1065).

The AIRC examined the objects of the Act, but found this examination to be inconclusive as to whether approval of the AWAs would not be contrary to the public interest. The employer argued that approval would further the objects of the Act, particularly those objects stated in s.3(a), (b) and (c). That is, the employer argued that approval would be consistent with the objects of:

- encouraging the pursuit of high employment, improved living conditions, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

- ensuring that primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and
- enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances.

On the other hand, the AIRC noted that approval would be contrary at least to the object in s.3(d)(I) which provides for

> wages and conditions of employment to be determined in so far as possible . . . upon a foundation of minimum standards.

The AIRC also observed the possibility of a decline in living standards, contrary to the object in s.3(a). However, the AIRC thought that these aspects could possibly be offset by increased security of employment and the fact that there was evidence that the agreements were the 'primary responsibility' of the parties at the workplace level (s.3(b)) and was, in practice, a form appropriate for particular circumstances (s.3(c)).

Having found that the objects of the legislation did not clearly indicate whether approval of the AWAs was not in the public interest, the AIRC noted evidence that clearly established there was a crisis in the business created by the direct intervention of a public authority. The AWAs under consideration were part of a strategy to deal with this crisis. The AIRC cited evidence that, in practice, not much work was done on Sundays and that management were of the view that weekend work was not good practice. The AWAs, having terms of one year, were also said to have a short term. In deciding to approve the AWAs on the balance of these factors, however, the AIRC observed that the approval was based on circumstances existing at the time, and that approval, even at the same site, may not be forthcoming in different circumstances.

Observations on the decision

Several significant issues arise from this decision. First, the no-disadvantage test must in effect be ignored if the employer can show that approval would not be contrary to the public interest. Given that a decision as to whether an AWA is not contrary to the public interest is a discretionary matter for the AIRC, there is a lack of precision in evaluating the probable outcome of any referred matter. This is especially so when the decisions are being made in a field like industrial relations, characterised by firmly held but completely conflicting views as to what measures will ultimately produce the better public benefit.

Second, in attempting to balance the benefit derived against the detriment to the public interest, the conflicting objects of the Act in s.3 only add to the general confusion. While some economic theories argue that driving down wages will promote employment, such a policy will not necessarily result in improved living standards. The answer is, as always, 'flexibility' does not necessarily result in fairness. The way the legislation has been framed and interpreted in relation to AWAs means that fairness has become a subordinate concern. It is also important to note that the unusual framing of the public interest test probably represents a lesser burden to those seeking to have AWAs approved than if the test was positively framed (then the test would be to show approval was actually in the public interest).

Conclusion

The no-disadvantage test is effectively unimportant as a test when the public interest is raised as an issue in the approval process. Confusion is also caused by the inherent subjectivity in judging what is not contrary to the public interest. This accentuates the lack of protection afforded to employees under the AWA process. Other measures impeding the right of employees to act on their own behalf include the narrowness of the protected industrial action period and the ability of employers to circumvent collective action through single, outcome concealed, bargaining. Another problem lies in the comparison with award minimums rather than those that might have been subsequently negotiated in successive rounds of enterprise agreements. Taken as a whole, AWAs cannot be viewed as a vehicle for achieving fair wage and conditions outcomes for Australian employees.

References

1. The Act's predecessor, the *Industrial Relations Act 1988* (Cth) had this as a requirement for Enterprise Flexibility Agreements in s.170ND(7).
2. Catanzariti, J. and Baragwanath, M., 'The Workplace Relations Act — A User Friendly Guide', Newsletter Information Services, Manly, 1997.

Andrades article continued from p.62

But many of these measures were inserted following representations from concerned groups at a Senate Committee inquiry into the Bill on which the Act is based.[12] The unfortunate result is that they operate in a piecemeal fashion, unsupported by a coherent foundation. Even where the provisions formed part of the original scheme of regulation, they are insufficient to redress the difficulties introduced by other aspects of the Act. The likelihood is that such provisions will in time be seen as mere window dressing rather than a positive commitment to a balanced and fair system of regulation.

Conclusion

Formal options for choice are meaningless if the law of the jungle is simultaneously permitted to apply. If those who framed the Act really want to provide a 'fair go for all',[13] attention must be given to the substantive operation of the Act as well as to incidental protective devices. Strong bargaining parties will exert their influence whatever the system of regulation. For vulnerable workers, the danger is that the damage done through their isolation and erosion of their conditions will be irreparable.

References

1. The Workplace Relations and Other Legislation Amendment Bill 1996.
2. Outline to the Explanatory Memorandum.
3. 'A Competitive Australia', Address to the Committee for Melbourne by the Hon. John Howard MP, 18 July 1995.
4. Section 89(a)(ii) *Industrial Relations Act* 1988.
5. Award Simplification Decision, Print P7500, 23 December 1997, a decision of the Full Bench of the Commission.
6. Award Simplification Decision, above.
7. 'Better Pay for Better Work', the Federal Coalition's Industrial Relations Policy; February 1996.
8. See the discussion in Cartwright, J. *Unequal Bargaining*, Clarendon Press, 1991, Ch.7.
9. ILO, Report of the Committee of Experts, Convention No. 98, March 1997.
10. Explanatory Memorandum to s.170WG of the Act.
11. Part VIA, s.170VPB of the Act.
12. Refer the Senate Economics Reference Committee Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996, August 1996.
13. Outline to the Explanatory Memorandum.