



**AUSTRALIAN CENTRE FOR INDUSTRIAL
RELATIONS RESEARCH AND TEACHING**

University of Sydney

**INDIVIDUAL CONTRACTS:
BEYOND ENTERPRISE BARGAINING?**

Jonathan Hamberger

**ACIRRT Working Paper No. 39
December 1995**

**A
C
I
R
R
T**

**INDIVIDUAL CONTRACTS:
BEYOND ENTERPRISE BARGAINING?**

Jonathan Hamberger

Jonathan Hamberger is a Visiting Research Associate at ACIRRT.

ISBN 1 86451 203 2

December 1995

by

Australian Centre for Industrial Relations Research and Teaching (ACIRRT)
Building H03
University of Sydney
NSW 2006 Australia
Phone (02) 351 5626
Fax (02) 351 5615
Email acirt@sue.econ.su.oz.au

Formatting Michelle Spartalis

Printing University Printing Service

CONTENTS

Introduction	1
Individual Contracts and Collective Bargaining	1
Individual Contracts in New Zealand	6
Individual Contracts in Australia	11
Developments in the Federal Jurisdiction	14
The Victorian System	27
Individual Contracts in Western Australia	28
Beyond Enterprise Bargaining?	35
Some Final Comments: Issues for Consideration	41
References	47

INTRODUCTION

The debate about industrial relations in Australia in recent years has largely been about the extent to which Australia should embrace enterprise bargaining, whether the existing award system should be retained, and if so, what the relationship should be between awards and enterprise agreements. However, the ACTU's national industrial campaign in support of award workers at CRA's Weipa operations has recently shifted the debate on to some fundamental issues that go to the very heart of industrial relations; in particular, whether our system for determining conditions of employment should be based on collective, representative processes or whether the system should place greater emphasis on the relationship between the individual employee and employer.

Australia already has a system which involves elements both of collective bargaining and individual employment contracts, as well as compulsory arbitration. All employees have a contract of employment with their employer. However, for the majority of employees, the pay and conditions contained in that contract are determined largely by awards, possibly supplemented by a collectively negotiated enterprise agreement.

However, while this 'mixed system' is likely to remain the case for the foreseeable future, we may be seeing a significant shift in the balance between collective and individual regulation.

In two States, the legislative scheme has been amended to give explicit recognition to individual employment contracts, and to enable them to override awards. In the Federal jurisdiction, a number of companies have sought to introduce individual contracts in areas traditionally governed by awards and/or collective agreements. This is in spite of the lack of legislative support for such arrangements. Moreover, it is likely that a future Coalition Government would legislate to provide greater scope for individual contracts.

This paper looks at why we are seeing this change, and considers some of the implications.

INDIVIDUAL CONTRACTS AND COLLECTIVE BARGAINING

Traditionally, collective bargaining is where an employer, a group of employers or an employer association determines the wages and conditions of employment to apply to a given group of employees by negotiation with a union or unions representing those employees. It is generally an integral part of the process that the employer employs new employees under the terms of the collective agreement.

Collective bargaining appeared at the early stages of the industrial revolution, and met with varying degrees of resistance from employers. However, by the mid 20th century, it

was accepted by most Western governments as the preferred model for determining wages and conditions.¹

The Australian industrial relations system has been unusual in the extent to which it has relied on compulsory arbitration, rather than collective bargaining, though in fact collective bargaining has always played an important role, both in negotiating awards and in determining overaward pay and conditions. Moreover, compulsory arbitration has been based on collective forms of representation.

The last decade has seen a shift away from arbitration, with terms and conditions of employment increasingly being determined by enterprise level negotiations.

In the 1980s, critics of the system generally stressed the need to move towards an enterprise focus. As support for enterprise bargaining grew, the main arguments became about how untrammelled the enterprise focus should be - for example, to what extent agreements should be subject to scrutiny by the Industrial Relations Commission.²

However, in recent years, more attention has been placed on who the bargaining should actually be between. The traditional understanding of collective bargaining is that it, by definition, means bargaining with unions. However, as the industrial relations system has increasingly embraced an enterprise focus, it has become harder to ignore the fact that many enterprises - at least in the private sector - are non unionised.

The Federal Labor Government gave some recognition to this fact when it introduced provision for Enterprise Flexibility Agreements (EFAs) to be reached directly with employees, as part of the Industrial Relations Reform Act 1993.

EFAs are essentially a modified form of collective bargaining. There is still considerable scope for union involvement. Moreover, EFAs must be approved by a majority of employees, and must cover all the (federal award) employees at the enterprise.

By contrast, there is a growing interest on the part of some employers in moving away from collective bargaining altogether, and embracing a system where employees' pay and conditions are settled by individual contracts of employment.

The 'traditional view' is that most employees lack sufficient bargaining power genuinely to negotiate individual contracts. Individual contracts are unlikely to be determined by a genuine process of agreement, but would in practice be determined unilaterally by the employer.

¹ E. Cordova 'Collective Bargaining' in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* R. Blanpain (ed.), Deventer: Kluwer, 1990

² For example, cf J. Niland *Transforming Industrial Relations in New South Wales* Sydney: NSW Government Printer, 1989

The Webbs in their classic *Industrial Democracy* (1897)³ regarded collective as opposed to individual bargaining as a means of preventing management from taking advantage of competition between workers eager for a job to drive down the price of labour. This view of individual bargaining is still common among industrial relations academics today:

'The realities of the capitalist mode of production are such that very few workers are in a position to 'agree' terms of employment with an employer on anything like an equal footing. Indeed the only element of 'agreement' to be found in most employment contracts, is the initial decision to enter into the relationship of employer and employee. The corollary of the power imbalance is that the employer is in a position unilaterally to determine the content of most employment relationships. It was in response to this reality that workers first sought to establish trade unions which could represent their interests in negotiations with employers, and through the exercise (actual or potential) of collective strength, to strike a more equitable bargain on their behalf.'⁴

From this perspective, those calling for individual contracts to displace awards and/or collective agreements simply wish - to a greater or lesser extent - to take workers back to the 19th century, where managerial prerogative would be dominant, and employers would be able to reduce wages and conditions.

Supporters of collective bargaining see it as having benefits for employers as well as employees. Especially in large organisations, the transaction costs of collective agreements could be seen as substantially less than those of individual contracts. Collective bargaining can also be seen as conducive to greater 'industrial stability'.

'[Collective bargaining] has come to be seen by many as a valuable and even indispensable mechanism for negotiating and preserving order over the large aggregates of employees and complex occupational structures increasingly characteristic of industrial society'⁵

According to this view, collective bargaining, by giving employees a say, through their representatives, in decisions of importance to them, increases their willingness to comply with the rules governing the workplace.

Collective bargaining can also be seen to benefit management by providing a 'collective voice'. Employees will be loath to tell management of their concerns as individuals, because of fear of victimisation but if management doesn't appreciate these concerns, the result will be higher labour turnover and poor employee commitment.⁶

³ S. Webb and B. Webb *Industrial Democracy* 1897

⁴ B. Creighton, W. Ford, and W. Mitchell *Labour Law* Sydney: Law Book Co. 1983

⁵ A. Fox *Man Mismanagement* London: Hutchinson 1974

⁶ R. Freeman and J. Medoff *What Do Unions Do?* New York: Basic Books, 1984

If collective bargaining can be of benefit to employers as well as employees, why are a growing number of employers, including some with relatively sophisticated employee relations strategies, seeking to move from collective bargaining to individual contracts?

The push for individual contracts can be seen as part of a broader agenda of achieving greater labour market flexibility. This is largely in response to growing competition in both domestic and international product markets. According to Paul Barratt, the Executive Director of the Business Council of Australia:

'In a rapidly changing world, enterprises must be enabled to respond quickly to changing circumstances, without the intervention of outside parties.'⁷

According to this perspective, the aim is not to reduce wages:

'It cannot be emphasised too strongly that wage rates are not the main issue - the main issues are the efficient utilisation of plant and equipment, the efficient organisation of work, the enhancement of management and shopfloor skills, and the development of a focus on the needs of customers, relating to price, quality, delivery and service. These can only be achieved in a climate in which employers and employees have a genuine sense of common purpose, and in which employees feel motivated to give of their best, including the ideas which only they can produce regarding how improvements can be made. There is no way to coerce these attitudes from people.'⁸

The aim of reform is to promote 'common purpose' between employers and employees. This is best achieved, it is claimed, through the exclusion of 'external forces' in determining wages and conditions.

'The key requirement for common purpose to be established is for all of the terms and conditions of employment to be settled directly between the parties . . .'⁹

This may or may not exclude a role for unions. At the very least however, business reformers strongly support 'individuals' rights to agree a contract with an employer without trade-union involvement'¹⁰

This approach to reform sees changing the way pay and conditions are determined as leading to a more fundamental change in the relationship between management and employees. Most of the issues listed by Barratt are not directly concerned with pay and conditions at all. The notion appears to be, however, that by settling the terms and

⁷ P. Barratt , Executive Director, Business Council of Australia, *Weekend Australian*, 7-8 January 1995

⁸ P. Barratt *op cit.*

⁹ P. Barratt *op cit.*

¹⁰ P. Barratt *op cit.*

conditions of employment without the involvement of 'third parties', there will be a greater sense of 'common purpose', leading to greater flexibility and a higher level of employee commitment to the goals of the organisation.

Those advocating individual contracts as opposed to collective bargaining see the former as more likely to encourage employees to contribute to improvements in work practices. In particular:

' . . . the employee ceases to be in a work environment in which improvements in work have a tradeable value in the collective context and are therefore to be hoarded up and sold in the collective negotiations . . . In a staff relationship . . . the inbuilt constraints on the free flow of work improvements are removed because each individual knows that he or she will be subjectively judged on his or her work performance . . . We know that that form of employment is more productive for the company and therefore more cost effective, more enjoyable for employees, and enables the company to grow, to be more internationally competitive, and to make a greater contribution to the Australian economy.'¹¹

Firms adopting this approach see individual contracts, which involve a direct relationship with their employees, as an integral or at least logical component of what can be termed a 'high trust' strategy¹² According to this view, traditional collective bargaining is rejected as reflecting an adversarial 'them and us' view of the world at odds with the principles of cooperation and 'common purpose'.

This 'high trust' strategy is consistent with an approach based on strategic human resources management (HRM), which places a great emphasis on tapping the creativity and commitment of the work force, to ensure that products and services consistently meet or exceed customer expectations.

Comprehensive implementation of an HRM philosophy typically involves:

1. The provision of extensive and company controlled channels of 'employee voice' like team briefings and employee involvement.
2. The use of contingent reward systems, such as skills based pay, performance based pay and profit sharing or employee share ownership.

¹¹ J. Giudice (advocate for Comalco during AIRC Weipa dispute hearings) transcript C No 20166 of 1994, p.92 20 November 1995

¹² P. Boxall 'Management Strategy and the Employment Contracts Act 1991' in *Employment Contracts: New Zealand Experiences* R. Harbridge (ed.) Wellington, N.Z.: Victoria University Press, 1993

3. Broadly defined jobs, wide spans of control, flat organisational hierarchies and extensive use of team and project forms of work organisation.¹³
4. Design and implementation of enterprise-based grievance procedures (eg. 'fair people systems'.)
5. Improved managerial leadership and behaviour.

HRM's values stress commitment by the workers with the goals of the organisation, and assume no underlying and inevitable differences between management and workers. To the extent that individual contracts are designed to avoid adversarial relationships and promote 'common purpose', they are compatible with a strategic HRM approach.

INDIVIDUAL CONTRACTS IN NEW ZEALAND

Any discussion of the growing interest in individual contracts in Australia must include the New Zealand experience. There is no doubt that experience with the NZ Employment Contracts Act has been a major influence on the increasing support for labour market deregulation by some Australian employers.

This appears to be partly because many large Australian firms have NZ subsidiaries, along with the perception that NZ shares many cultural features with Australia, including an historically similar industrial relations system. From this point of view, if something can work in New Zealand, then it should also work in Australia. And, from many employers' point of view, the NZ Employment Contracts Act has been a considerable success.

The New Zealand Employment Contracts Act (1991) is based on the principle that the primary parties to the bargaining process are the individual employee and his or her employer. There is scope for both individual and collective contracts. Whether an individual or collective contract is to apply in any given case is a matter for negotiation. Where employees choose to bargain through a representative (eg. a union) they must individually authorise that representative.

Where a representative has obtained an authority, the other party must recognise that the authorised person is the representative. In a recent decision, the Employment Court found that, once a bargaining representative has been appointed by an employee or group of employees, it is illegal for an employer to make any advances or offers to its employees, except through that representative.¹⁴

There has been much debate in New Zealand about whether the Employment Contracts Act encourages individual contracts over collective contracts. The Government position is

¹³ W. K. Roche and T. Turner 'HR Policy Effects on Trade Union Recognition in Ireland' *International Journal of Human Resources*, 5(3), September 1994

¹⁴ IV Amy and Ors. v the NZ Fire Service Commission 14 July 1995

that the Act provides freedom of choice between individual and collective bargaining, and on who, if anyone, is to represent the parties. Nevertheless, the Act certainly represents a decisive shift in the direction of individualising the employment relationship.

The International Labour Organization (ILO) Committee on Freedom of Association has criticised the Employment Contracts Act (ECA) for putting individual and collective contracts on the same footing, rather than encouraging and promoting collective bargaining, which for the ILO involves trade unions, by definition¹⁵.

The introduction of the Employment Contracts Act has led to a rapid decline in collective bargaining coverage. By August 1993 (ie. just over two years since the Act took effect), the number of private sector employees in firms employing four or more employees covered by collective contracts had fallen from 72% prior to the Act to 41%.¹⁶

In the last year, there appears to have been some move back to collective bargaining by some employers. This has been put down to the high transaction costs of administering individual employment contracts and the difficulties of varying those individual contracts.¹⁷ Nevertheless, individual contracts have become the predominant method of determining pay and conditions for most workers employed in smaller firms in the private sector, particularly in service industries, such as retailing, hotel and restaurants. Individual contracts have been most common in firms with low pre-Act union memberships, while collective contracts have been more common amongst larger workforces with high pre-Act union memberships.¹⁸

A survey conducted by McAndrew¹⁹ over the first year of the Act found that of those firms that put new individual contracts in place under the Act, 88% reported that the move to individual contracts was initiated by management. In the remainder, individual contracts were either first or simultaneously suggested by employees. However, few of the firms that implemented individual contracts reported that either employees or unions had suggested having a collective contract instead. Moreover, 59% of employees responding to a 1993 survey conducted by the Heylen Research Centre for the NZ Department of Labour considered that they had a choice about whether to have a collective or individual contract.²⁰

¹⁵ ILO 295th Report by the Committee on Freedom of Association to the 261st Session of the Governing Body of the ILO. Case no. 1698 November 1994

¹⁶ Survey conducted by Heylen Research Centre for NZ Dept. of Labour reported in R. Whatman, C. Armitage, and R. Dunbar, 'Labour Market Adjustment Under the Employment Contracts Act', *New Zealand Journal of Industrial Relations* 19 (1), April 1994

¹⁷ R. Harbridge and P. Kiely *The Employment Contracts Act. Bargaining Trends and Employment Law Update 1994/95* Victoria University of Wellington, August 1995

¹⁸ I. McAndrew and M. Ballard 'Negotiation and Dictation in Employment Contract Formation' in *New Zealand Journal of Industrial Relations* 20 (2), August 1995

¹⁹ Reported in I. McAndrew *The Process of Developing Employment Contracts: A Management Perspective* in R. Harbridge (ed) 1993 *op cit.*

²⁰ Whatman et al *op cit.*

In other words, the decision to negotiate individual, rather than collective contracts has generally been a management decision, and has generally reflected whether the work force was unionised or not. However, where management has sought to negotiate individual contracts, this appears to have generally been accepted by the employees concerned.²¹ A small majority of firms (56%) reported that the firm's initial proposals for individual contracts were developed by management without consultation with employees. The remainder generally consulted staff either informally, or through staff meetings.

The McAndrew survey suggested that there did not appear to be many changes to management's proposed contract when presented to employees. Only 6% of firms with new individual contracts reported that there were significant modifications made to management's initial position as a result of individual negotiations with some or all employees. 62% made some minor modifications during individual negotiations, though generally only in relation to a quite small percentage of employees. Interestingly, it does not appear that employers pursuing individual contracts were as aggressive in pursuing employee concessions as firms engaged in collective bargaining.²² On the other hand, employers negotiating individual contracts were generally far more successful in having their proposals accepted, particularly in relation to what might be termed 'flexibility' issues.²³

There has been much debate about whether employers have used the ECA to cut wages and conditions. The evidence suggests that relatively few employers have been willing (at least initially) to risk the negative productivity impact of a demotivating pay cut, preferring to hold wages or offer pay rises in exchange for productivity enhancements.²⁴

An analysis of the 1993 Heylen Report by Whatman, Armitage and Dunbar²⁵ sought to establish a typology of enterprise responses to the ECA. This included a category of 'cutters' who pursued widespread cuts to terms and conditions of employment. However this group represented only 4% of firms, employing 4% of employees. The largest category (employing around half of all employees) were defined as 'inactives', making relatively few changes to wages and conditions. Twenty four per cent of enterprises, employing 29% of employees, were categorised as 'trainers'. These firms had increased training provisions and take home pay, and had generally not sought to cut penalty rates, or trade union rights. Ten per cent of enterprises employing 8% of employees were defined as 'savers', who had cut costs as a percentage of turnover. They had not cut terms and conditions, or trade union rights or increased take home pay.

Another category (employing about 11% of employees) was defined as 'reformists'. These employers focused on reducing the role of trade unions, increasing the use of

²¹ I. McAndrew 1993 *op cit.*

²² I. McAndrew 1993 *op cit.*

²³ I. McAndrew and M. Ballard 1995 *op cit.*

²⁴ P. Boxall 1993 *op cit.*

²⁵ Whatman et al. *op cit.*

individual contracts - and improving pay and conditions.²⁶ This category clearly includes firms pursuing a strategy based on a strategic human resources management philosophy, with an emphasis on promoting the commitment of employees through improving employer-employee relations, while minimising the role of third parties.

One firm that would appear to fit this category is New Zealand Aluminium Smelters Ltd (NZAS), a subsidiary of the Australian firm Comalco (part of the CRA group of companies).

The experience at NZAS is interesting not only in its own right, but because it appears to have had a significant influence on CRA's decision to introduce individual contracts in its Australian operations.

NZAS operates an aluminium smelter at Tiwai Point, Invercargill. The smelter employs around 1,200 people, and exports about 90% of its production. Prior to the ECA, the vast majority of employees were unionised, with four unions having work coverage. Between 1971 and 1990, employment conditions were regulated by a 'composite agreement' (akin to an enterprise agreement) negotiated annually. The agreement negotiations were conducted on site with the company team consisting of about ten managers. The unions were represented by a team of officials from each union and nine site senior delegates plus a convenor. Negotiations were invariably protracted and frequently acrimonious. Up until 1982, work stoppages were frequent; however, these ceased after an eight day strike in 1982 failed to lead to any employer concessions.

From the company's point of view, the agreements were seen as increasingly unwieldy and restrictive. In 1985, the company embarked on a program of trying to eliminate, through negotiation, some of the most undesirable aspects of the agreement. Progress was slow, with extensive management resources being tied up in the negotiation process.

The company was increasingly dissatisfied with the process of collective bargaining, and welcomed the opportunity for direct bargaining opened up by the ECA.²⁷

Specific problems perceived by management with the collective bargaining process included the following:

- it gave the unions the opportunity to perpetuate a 'mythology' that all gains for the employees had been hard fought for by the unions and that the employer held its employees in low regard;
- it involved management abdicating its prime responsibility to communicate directly with its employees;

²⁶ Whatman et al *op cit*.

²⁷ G. Mark, Principal Industrial Adviser NZAS. Address to NZ Employers' Federation Convention 13 May 1992

- the agreement contained restrictive provisions, such as those relating to the use of contractors;
- the need 'to virtually seek the permission of senior delegates' to bring contractors on site led to unnecessary delays and frustration, and was destructive of good working relationships;
- a number of discretionary allowance payments were contained in the agreement: 'Because they were discretionary, shift changeover times became very stressful for all concerned, with frequent arguments between supervisors and their work groups over eligibility for such payments. Again these situations did not help relationships and further reinforced the conflict mentality.'
- 'minimum manning agreements, although not even mentioned in the registered document had grown informally around the plant in negotiations between line managers and senior delegates. These were anathema to improving productivity and led to excessive overtime levels being generated in many areas of the plant. The resultant high earnings caused some people to fail to report to work for rostered shifts and so more overtime was generated for the absent worker. The system was corrupted and abused.'

A senior Australian union official, Max Ogden, has commented about NZAS:

'For a long time the officials and most of the shop stewards resisted management overtures to discuss changes such as 12 hour shifts, elimination of demarcation, greater flexibility etc. They persuaded mass meetings to reject such proposals. As a result the unions allowed management to set the agenda.'²⁸

When the ECA was enacted, the company prepared an education package on the legislative reforms, which was used by managers to brief all employees.

The decision was taken to move to a 'single status' work force. It was felt that any upfront cost would be more than compensated by significant benefits that would ensue with a very short pay back period. The company wrote to all employees, indicating the company's desire to pursue the option of individual contracts, and inviting people to advise management if they were interested in further discussion. 'Over 3 months the employer quietly interviewed virtually every worker on site.'²⁹

Almost all employees decided to take up the offer of individual contracts.

The company claimed very substantial benefits from individual contracts, including:

²⁸ M. Ogden *Toward Best Practice Unionism: The Future of Unions in Australia* Sydney: Pluto Press, 1993

²⁹ M. Ogden *op cit.*

- The elimination of demarcation, and greater multiskilling.
- The introduction of 12 hour shifts, something the company claims had long been requested by the work force but rejected by the union;
- Building overtime into the monthly salary, thereby eliminating the incentive to create artificially the need for overtime. The amount of overtime worked dropped dramatically. The result appears to have been that most workers received similar take home pay, but had to work substantially fewer hours a week, while output actually improved.
- The elimination of discretionary allowances, thereby doing away with many of the disputes they previously generated.³⁰

The two key elements of the strategy appear to be the determination of pay and conditions directly with employees (and a concomitant marginalising of the role of unions), and greater flexibility in working arrangements (including a higher level of managerial discretion). It appears that there was little formal bargaining with individual employees (though quite extensive informal discussion). Nor does there appear to have been much scope for individual contracts actually to vary between individual employees.

Comalco presented data to the Australian Industrial Relations Commission hearings on the Weipa dispute that the ratio of output of metal to power use at Tiwai Point jumped from 90.7% prior to the introduction of contracts, to 92.5% after the shift of nearly all workers to staff employment in September 1991. It now stands at 94% 'which is as good as the best in the world for this technology' according to the Chief Executive of Comalco Smelting, Karl Stewart. In addition, a superior grade of metal was achieved more frequently. For example, off-specification metal fell from about 12% to less than 5% within five months of the introduction of contracts, and has fallen steadily since³¹.

It would be wrong to suggest that the NZAS experience was typical of the way in which most New Zealand employers responded to the availability of the individual contracts option. However, the analysis of the Heylen survey cited above does suggest that a significant minority of firms adopted similar strategies. At any event, the category of 'reformists' appears to be greater than those who have used the ECA to embark on wholesale reduction in wages and conditions.

INDIVIDUAL CONTRACTS IN AUSTRALIA

There have always been substantial numbers of employees in Australia who are not covered by awards or collective agreements. The most recent Australian Bureau of

³⁰ G. Mark *op cit.*

³¹ 'CRA Draws Strength From the Data' *Workforce*, Issue No. 1048, 24 November 1995.

Statistics (ABS) data are for 1990. They indicate that 20% of wage and salary earners were not covered by awards.³² (The figure is likely to have increased since then).

According to the ABS statistics, 62% of managerial and administrative employees were not covered by awards. Tribunals have, in the past, generally refused to make an award in respect of employees fulfilling a supervisory or management function on the ground that such employees are an integral part of management and thus required to adopt the employer's perspective. In some cases, the dividing line between non award covered managerial staff, and award employees is hard to determine. This is further complicated by provisions in some clerks' awards which provide that certain award provisions do not apply, if the employee is in receipt of a salary above a certain level.

However, the ABS data indicates that it was not only managerial/administrative employees who were not covered by awards. 26% of professionals, 21% of clerks and 19% of salespersons and personal service workers were also award free.

The employment arrangements of non award employees are largely governed by common law individual contracts (which may or may not be in writing), though in some states, legislation prescribing certain conditions of employment (eg. annual leave) applies to all employees, including those not under an award.

It should also be appreciated that many awards merely set out minimum rates, and that there is considerable scope for terms and conditions to be set on an individual basis above this floor. The Australian Workplace Industrial Relations Survey, undertaken by the Department of Industrial Relations between October 1989 and May 1990 indicated that 77% of private sector workplaces paid overaward pay to at least some employees.³³ In the majority of cases, overaward payments were determined on an individual basis, with 59% of managers in workplaces that paid over-awards claiming that they were paid principally for merit or as a reward for effort. An analysis of the Workplace Bargaining Survey conducted in December 1992 as part of the DIR Workplace Bargaining Project (which looked at over 700 workplaces with 20 or more employees throughout Australia) indicates that 27% of award covered employees were in receipt of over award pay.

Overall, the Workplace Bargaining Survey³⁴ referred to above confirms the widespread incidence of individual bargaining over pay and conditions.

The survey found that there had been management negotiations with individual employees about changing their rates of pay or entitlements at 30% of the workplaces surveyed. This form of pay determination was far more common in private sector workplaces (36%) than public (17%). It occurred in 43% of non unionised workplaces, but

³² ABS Catalogue No. 6315.0 Award Coverage Australia (May 1990)

³³ R. Callus, A. Morehead, M. Cully, J. Buchanan *Industrial Relations at Work: The Australian Workplace Industrial Relations Survey*, Canberra: AGPS, 1991

³⁴ R. Callus *Change and Bargaining at Australian Workplaces: A Descriptive Account of the Workplace Bargaining Survey* (unpublished)

only 23% of unionised workplaces where a delegate was present. The incidence of individual negotiation did not appear to vary with the size of the workplace.

Finally, it needs to be noted that a number of certified agreements make specific provision for some employees to be employed under individual contracts. For example, the ABC (Journalists, Reporters and Related Classifications) Employment Agreement 1994-96, in addition to full-time, part-time and casual employment, provides for fixed term contractual employment, with the terms to be specified in a letter of engagement or contract.

Provisions for fixed term contracts have existed since 1986, and are now the predominant method of employing journalists in ABC TV.

All contractual employees are offered a written contract, which contains, the awards upon which the contract is based, the term of the contract (usually 12 months), the salary and any applicable allowances, position and location, and to whom the employee is responsible.

In addition, the agreement specifies that the ABC and an employee may negotiate a 'salary package proposal' to meet circumstances where the ABC determines that the award does not provide sufficient flexibility to satisfy a particular activity. The employee is advised of their right to union representation. Any agreement is to be in writing. Following negotiations between the ABC and the employee, the ABC has to forward the proposal simultaneously to the AIRC and the federal office of the relevant union.

Unless the union or the AIRC formally advises the ABC of its objection to the proposed agreement within 14 days from receipt of the written proposal, the salary package will be deemed to have effect from the date stated in the agreement. Where there is an objection by the union, the ABC may refer the package proposal directly to the AIRC for determination.

The salary package, to the extent of any inconsistencies, will override the terms and conditions of the awards in all matters except weekly ordinary hours of duty and annual leave. The salary package may include one or more of the following: salary, penalty rates and/or overtime provisions (including accrued days off), public holidays, shift arrangements, allowances, hours of work and/or non cash benefits.

A contractual employment provision also exists in the ABC - CPSU Employment Agreement 1994-96. Contractual employment in that Agreement is explicitly restricted to employment based on the following:

1. the person to whom the contract is to apply is known to excel in his or her field, or there is a need for skills (which are not normally used or available in the ABC) to fulfil the requirements of a project for a finite duration;
2. the overall remuneration package is superior to the provisions of the award and the person will not accept the standard salary and conditions applicable to the duties performed; and

3. advice is given to the union that a contract has been entered into and the provisions of that contract are consistent with the agreement. The advice will include the reason for its formation and duration. However, there is no provision for the contract to be lodged with the union or the AIRC.

Obviously, individual contracts are not new in Australian industrial relations. However, we could now be on the verge of a major shift, with increasing numbers of employees who have traditionally had their pay and conditions set by collective processes moving on to individual contracts.

DEVELOPMENTS IN THE FEDERAL JURISDICTION

The role of individual contracts under the Federal Industrial Relations Act is being fought out in cases such as that in relation to Weipa. While the Act makes no specific provision for individual contracts, the award system, as noted above, has mainly set minimum conditions, and has not generally sought to prevent employers and employees having individual arrangements about pay and conditions on an over-award basis. Moreover, as pointed out, the Commission has approved a number of certified agreements that contain provisions for individual contracts. Nevertheless, the general thrust of the Act is quite clearly supportive of a collective approach to industrial relations.

A number of recent developments within the Federal jurisdiction point to a steady rise in the significance of individual contracts. Some have received more publicity than others.

Some companies - particularly in the resources sector - have sought to use Enterprise Flexibility Agreements as a vehicle for introducing a form of individual contracts. For example, Woodside Offshore Petroleum, negotiated three Enterprise Flexibility Agreements covering its operations at the Onshore Gas Plant at Burrup Peninsula, the North Rankin A Platform, and the King Bay Supply Base.

The agreements were all approved by the AIRC in November 1994 and have terms of two years. They completely displace the terms and conditions set out in the relevant award.

The agreements reflect an HRM/Total Quality Management (TQM) philosophy. Workshops are to be held involving a cross section of employees of all levels to develop values and change goals.

The agreements set out a number of objectives including 'adoption of a continuous improvement philosophy', the creation of 'motivating and satisfying jobs', maximising work flexibility and enabling employees to work to the extent of their skills and ability, developing a teamwork approach to work activities, minimising staffing within a flat organisation structure, providing opportunities for participation in the planning and operation of the facility, with responsibility located as low in the organisation as practical, and providing increased employment security.

The agreements are designed to further develop 'work relationships based on mutual trust and cooperation' by effectively extending staff conditions to the employees concerned. The agreements provide for terms and conditions of employment to be 'in accordance with provisions applicable to staff in the Personnel Policy Manual of the Woodside Group of Companies as revised from time to time.'

It should be noted that the company gave an undertaking to the AIRC that it would not reduce overall terms and conditions of employment during the life of the agreements, unless it was in serious economic difficulty, and then it would consult workers and unions. The agreements provided employees with all inclusive salaries with no additional penalties or overtime, and a real increase of 12-18%. On top of the base salaries the agreements cashed out existing award allowances with flat annual allowances. Job levels, salary bands and routinely applicable allowances are set out in an attachment to the agreements. However, the salary bands are very broad (allowing pay to be moved 20% above or below a central point), and employees' progression through the salary range is based on an individual annual salary review.

The agreements set out a grievance procedure, which inter alia, permits an employee who is dissatisfied with a change in the Personnel Policy Manual to take the matter to the AIRC, either personally, or through a union bound by the EFA. This reflected concerns expressed by the unions with an earlier proposal.

The agreements provide for regular reviews of their operation, with meetings of employees, through their work groups, with supervisors and senior managers every six months. Two months prior to the expiry of the agreements, there would be a meeting, which would include the relevant unions to discuss whether to continue with the agreements.

These EFAs really represent a sort of half way house between collective and individual contracts. In particular, employees are employed under staff conditions based on the company's personnel policy manual, which can be unilaterally varied, without consultation either with the unions or even the employees. While the grievance procedure permits an employee to go to the Commission, through the union if necessary, if unhappy with any such change, there is no requirement in the normal course of events to notify either the Commission or the union of such a change. Moreover, while the pay scale is set out in the EFA, considerable discretion is given to management to place employees on the scale based on an assessment of individual performance.

The EFAs can however be distinguished from full-blown individual contracts, in that all the employees in the enterprise are covered by the same document setting out terms and conditions of employment (though actual pay will depend on individual performance), while under individual contracts, the terms and conditions for each employee are set out in individual documents, which may vary between employees (at least in theory).

Since the Woodside EFAs were approved, the AIRC appears to have toughened up its approach, and emphasised the collective basis of EFAs. In particular, the Full Bench in the Enterprise Flexibility Test Case decision of May 1995³⁵ found that:

'... it would generally be inconsistent with the intent of the Act to permit the approval of agreements which may be unilaterally varied by one party without recourse to the Commission.'

It is hard to see how the Woodside EFAs could meet this test. The Commission also suggested that agreements would be unlikely to be acceptable where they provided for the parties to opt out of some or all the agreement's provisions by consent.

This toughened stance may be partly due to the Commission's response to the strategy by CRA to introduce individual contracts.

CRA has devoted considerable management and legal resources to the introduction of 'staff contracts' in a number of its subsidiaries, including some which operate within the Federal jurisdiction. Despite this, CRA appears committed to introducing individual contracts at most of - if not all - its workplaces. Its efforts have met with varying degrees of resistance from the unions and elements of its workforce, however, by November 1995, it appears that the majority of its Australian employees were working under individual contracts.

Public attention has only recently focused on this issue, as a result of the dispute at CRA's Weipa operation, in far north Queensland. However, many of the issues had already been played out in relation to the introduction of contracts at Comalco's Bell Bay Smelter. The introduction of contracts at this smelter provides a good illustration of the CRA strategy, and the response of the unions, the federal Labor Government and the Australian Industrial Relations Commission (AIRC).

The Bell Bay smelter has been regulated by an enterprise award since 1977. Unusually, the award was established as a 'union members only' award. Up until 1991, the company operated an effective 'closed shop' whereby the company made payroll deductions for union dues, and every new employee was provided with an application form for union membership by the company.

During 1992, various discussions were held between the unions at the smelter and the company about what structures should be put in place to facilitate the development of an enterprise agreement. The company wanted plant level discussions with representatives of employees, but did not want to include union officials. While the unions eventually conceded that union officials need not be directly involved, it argued there should be plant level working parties, with employee representatives who would be union members.

³⁵

AIRC Print M0464, 11 May 1995

The company, on the other hand, decided that instead of working parties, there should be a consultative process involving all employees. In March 1993, the company forwarded a proposal to all employees which invited them to enter into a staff contract of employment.

This was heavily influenced by the experience with staff contracts at the Comalco's NZ subsidiary, New Zealand Aluminium Smelter Ltd. It was felt that a similar approach at Bell Bay could yield significant productivity benefits.

However, the unions opposed their exclusion from the process, and actively organised to defeat the company's proposal. Following a series of meetings with employees to outline the offer, a ballot was organised in July 1993, and 83% of employees voted against the company proposal.

In April 1994 the company advised the unions of its intention to seek an Enterprise Flexibility Agreement with its employees. The unions meanwhile presented their own draft enterprise agreement. The company rejected the unions' proposal on the basis that it did not involve direct cost savings, or an option for employees to 'move to staff' - both of which were non negotiable from the company's point of view. The company made no bones about the fact that its ultimate objective was to achieve a 'single status workplace' in which all employees would work under individual contracts of employment.

One of the problems the company faced in pursuing this strategy was that the award was regarded by all the parties as at least nominally a paid rates award, setting out actual pay and conditions for employees. In May, the company formally offered staff contracts to tradespeople and operators in the hope that large numbers of them would accept. The intention was then to apply to have the award converted to minimum rates.

It was recognised that this approach was risky, as it involved a deliberate policy of 'breaching' the paid rates award, and was premised on a strong ground swell of employee support. While all but 12 employees accepted the offer, the success of the second leg of this strategy was at the mercy of the Commission. As an internal CRA document noted:

'We would be placed in a position of having to argue the benefits of an individual relationship between employer and employee in the face of accusations that we only want to remove the protections offered by a paid rates award so that we can reduce terms and conditions in the future. We would be putting our arguments to a tribunal whose very existence is founded on an assumption of adversarial relationships between employers and employees and whose members are unlikely to take our promise on good faith.'

In the event, this turned out to be prescient.

The unions applied for an interim award that would extend the terms and conditions of those employees who had accepted staff contracts to all employees.³⁶ The unions argued inter alia that:

'Enterprise bargaining is collective bargaining and the promotion of collective bargaining is now a specific object of the Act (consistently with Australia's international obligations.) If Comalco Bell Bay is permitted to destroy the very conditions which are necessary for the proper conduct of enterprise bargaining in order that it can introduce a system based on individual contracts, which is the very antithesis of enterprise bargaining, then the emphasis which is now being given to that concept is fundamentally threatened

'It is against the interests of the community to undermine a union's role in enterprise bargaining and workplace representation. The objects and scheme of the Act continue to provide an important role for unions in the system of industrial relations in Australia. The eradication of a collective process for the determination of employment conditions substantially undermines the capacity of ordinary workmen and women to obtain fair and reasonable conditions of employment as they are placed in an unfair bargaining position with the substantial balance of power residing in the employer.'

The company argued that the contracts were not just about setting higher wages but involved 'new contracts' and 'mutual obligations' that did not exist under the award. The higher wages replaced a consideration for 'discretions inherent' in the contract. The company claimed that there was a 'high degree of trust' within the contract system. The company claimed that significant improvements in plant performance occurred at the Bell Bay smelter in the months following the introduction of staff contracts.

(During the hearings on the Weipa dispute, Comalco presented data to the AIRC that the ration of output of metal to power use had risen from a 91% average in the two years before staff contracts were introduced to about 92.5%. Off specification metal fell sharply and the cost of production per tonne of saleable metal stayed relatively stable, despite the closure of a pot line, cutting a third of capacity, which would generally have indicated a rise in production costs.)³⁷

While the contracts clearly reduced the role of the union, there was no deunionisation as such. In particular, while 133 members resigned from AWU-FIME, another 170 remained as members, at the time of the AIRC case.

³⁶ Many of the details in this paper concerning Bell Bay are taken from the proceedings in that case, and the AIRC's decision of 8 December 1994, Print L7499.

³⁷ CRA Draws Strength From the Data' *Workforce*, Issue No. 1048, 24 November 1995

The Commonwealth argued in the AIRC that the system of conciliation and arbitration under the Industrial Relations Act is predicated on the existence of viable organisations of employees which act as parties principal for the class of persons for which they have eligibility rights. The Act provided sufficient flexibility and scope both in the Bell Bay Award and in the collective bargaining processes contained in the Act for employers to enter into direct bargaining with their employees, subject to the involvement of relevant unions.

The Commonwealth argued that it was contrary to the Industrial Relations Act for an employer, through the use of individual contracts, to promote the marginalisation and exclusion of unions from representation of members in the employer/employee relationship.

There were two slightly different types of contracts offered to employees at Bell Bay - one for day workers and one for shift workers. The differences related to hours of work and shift allowance. It is worth noting that, as at NZAS, there appears to have been little scope for the contracts to vary between individual employees. The contract took the form of a letter of appointment.

The salary contained in the contract was all inclusive, taking into account and exceeding all obligations on the Company to make payments under the contract or any award or agreement that may apply. The contract provided for an annual salary review, and would be adjusted to reflect economic conditions and individual work performance. (The Commission noted that there appeared to be no scope for two-sided negotiation in any review.)

Other features of the contract were:

- salary details were to be kept confidential;
- minimum 40 hour week with spread of hours 7:00 am to 5:30 pm;
- employees would, on occasions, be required to work overtime;
- no additional payment for overtime - included in salary;
- could be transferred from day work to shift work at the discretion of the company;
- amount of sick leave unspecified;
- annual leave loading incorporated in salary;
- personal and parental leave in accordance with company policy;
- membership of CRA Group Superannuation Fund compulsory;

- employment could be terminated by either party on one month's notice, or by the company by payment in lieu, or by the company summarily for misconduct.

The contract which applied to shift workers was essentially the same as that applying to day workers, but there was provision for a shift allowance, a minimum 42 hour week, and 5 weeks annual leave.

The terms and conditions set out in the contracts were expressed to be provided in accordance with company policy which could be varied by the company from time to time. The company was also given the freedom to alter the position to which the employee was appointed, and his or her work location. Salaries could be adjusted in line with the annual review. Overtime was at the discretion of the company, there was no upper limit on the level that could be required by the company, and there was no specific payment for overtime, which was taken into account in the salary. Workers could be transferred from day shift to night shift and vice-versa.

While the contracts gave considerable discretion to the company, the concept underlying the contracts was that management could be trusted not to abuse its power. For example, while there were no set working hours, management would not assign tasks in ways which would lead to unfair working time.

The AIRC commented in its decision concerning the unions' application for an interim award:

'We are satisfied on the evidence, that the company has for a period of time had a policy of seeking to have all employees at Bell Bay employed under individual staff contracts. The company seems to have formed a corporate view as to the presence of unions and of the Commission in relation to their business. That view is that these institutions should be excluded from having any real role. In the case of unions they are seen to be a barrier to company loyalty and hence the development of a workplace culture in which employees are able to identify their aspirations with those of the company. The Commission on the evidence appears to have been viewed as a body which did not understand the needs of the company. This view seems to have been extended to industrial instruments such as awards and collective agreements. These seem to be regarded as incompatible with the company's desire to develop its workplace culture based on company loyalty because awards and collective agreements involve the participation of both unions and the Commission. It seems to have been assumed that they would constitute a barrier to achieving a world class performance. The company appears to have adopted the view that it is only by removing third parties and replacing them with individual staff contracts that the company will achieve a loyal workforce committed to the company's objectives.'

The Commission was sharply critical of the company, which it described as trying to achieve 'the effective elimination of registered employee organisations in the employer/employee relationship.'

While the Commission acknowledged that there was no evidence that employees were coerced or threatened by the employees into signing, it cast doubt on whether the employees had freely chosen 'the contract system as their preferred system of employment.' In particular, it noted that the employees were being offered increases in wages of between 11% and 13% in circumstances where the employees had not had a wage increase since 1991, and there was little likelihood of an enterprise agreement with the unions in the foreseeable future.

'The employees were also confronted with a company that conveyed a view that company loyalty was bound up in staff contracts and hence an award with union involvement meant, at least inferentially, disloyalty.'

The Commission also drew attention to economic uncertainty hanging over the smelter, and the 'well organised campaign' conducted by the company, including the allegedly misleading advice to employees that the award would provide a 'safety net' for those going on to staff contracts.

(Interestingly, Comalco has announced a \$200 million upgrade of the smelter since the decision, which it claims has been justified partly because of the improved performance arising from the introduction of staff contracts.)

The Commission noted that the Industrial Relations Act had as a central plank a framework for collective bargaining between parties to an industrial dispute. Employers could negotiate directly with their employees for the purpose of reaching agreement on terms and conditions of employment, which could then be certified as an Enterprise Flexibility Agreement.

'However, what took place in May and June 1994 was not a case of the company entering into negotiations with its workforce. It was a case of the company deciding what it considered to be in the interests of its employees and the company and then making a non-negotiable offer on terms which precluded any role for the unions or the Commission.'

The Commission also criticised the fact that the contracts contained provisions whereby conditions of employment could be altered at the discretion of the company, without the need for consultation or agreement of the individual employee and without any involvement of the unions or the Commission.

'The establishment of conditions of employment at an enterprise level through a system of individual contracts between a company and each of its employees is one at variance with our system of industrial relations, a system which, since its inception, has been based on collective processes as the means of providing terms and conditions of employment at the workplace.'

The present IR Act is based on a system of collective regulation in which registered organisations of employers and employees acting as parties principal are an integral part of the collective processes which operate under the Act.'

The Full Bench of the AIRC, in its decision of 8 December 1994, made an interim award covering all employees (not just union members) which set out pay rates based on those provided for in the staff contracts. The interim award also contained a grievance procedure which contained a provision that an employee could elect to have either a shop steward, union delegate or official present in any meetings with management concerning a dispute or grievance the employee may have.

Subsequently, Comalco negotiated an Enterprise Flexibility Agreement at Bell Bay, which was supported by 345 of the 411 eligible employees. The EFA provided that employees could choose to work either on an individual staff contract of employment or under award-based conditions. For employees opting to work under staff conditions, terms and conditions would be provided in the employee's contract letter. These would be in accordance with company policy, which could be varied from time to time. There was a commitment that the benefits received by an employee on a staff contract, taken as a whole, would be no less favourable than benefits provided under award-based conditions, taken as a whole. Moreover, employees would be free to opt in or out of staff contracts at any time

Comalco submitted the EFA for approval by the AIRC in April 1995. The AIRC refused to approve the EFA in a decision of 4 July 1995³⁸. This decision was probably inevitable, given the EFA Test Case decision in May.

This decision reaffirmed the limited scope to use EFAs as an enabling mechanism to move to individual contracts. In particular, the Commission said that during the life of the agreement any proposed changes or the introduction of new policies must be made available to employees, the unions and the AIRC at least 14 days prior to implementation. This was to enable the Commission to review new or changed policies to assess them in the light of the 'no disadvantage test'. In addition, the company would need to provide the Commission and/or the unions with information about salaries and their adjustment.

The Commission also suggested the company needed to review all its policies to ensure consistency with the Industrial Relations Act. The company and the unions were 'encouraged to have discussions about a new agreement with a view to the unions being party to such an agreement.'

In the meantime, the Commission's interim award was quashed by the Industrial Relations Court of Australia, in a decision of 27 September 1995, on the grounds that the Commission had been mistaken in thinking that the Bell Bay award was a 'paid rates' award, as it contained a clause setting out minimum rates for junior employees.

³⁸ AIRC Print M3302

The Court found that, while the AIRC had a general discretionary power to make an award of the kind it did, it did not exercise that power. Instead, wrongly thinking that the award was a paid rates award, it gave effect to what it wrongly thought was the duty imposed on it by s.170UB(2) of the Act to maintain the paid rates award. This was enough to make its decision invalid.

The Court also found that 'the mere fact that an award was created, and is perpetuated, as a paid rates award does not prohibit an employer providing additional entitlements'.

CRA has tried to use EFAs to further its strategy at other workplaces. For example, a CRA subsidiary, Boyne Smelters Ltd, of Gladstone Queensland negotiated an EFA with its employees, which was approved in a ballot on 13 April 1995³⁹ (as well as twice subsequently).

The EFA contained a clause, which was described to the Commission as follows:

'Clause 4 (Staff Conditions of Employment) provides that the Company may during its life choose to offer staff conditions of employment to employees covered by the EFA. The general conditions of employment and the specific level of remuneration for those employees who wish to consider accepting staff employment will be set out in an individual letter of offer at the time of the making of such offers. Staff conditions of employment may be different from specific provisions of the award and the EFA but, overall, will be better than the terms and conditions set out in the award and the EFA when taken as a whole

Clause 4 also provides that any employee who chooses staff conditions of employment may, at any time, choose to revert to the conditions provided by the award and by the EFA.

The clause also provides that every employee has a right to choose to be a union member whether the employee works under the provisions of the award and EFA or staff conditions of employment

Clause 11 (Disputes) relies in the first part upon the provision for disputes or resolution of industrial disputes clause within the award and the second part endorses the Company's Staff Fair Treatment System should the Company offer employees staff conditions and such offer is accepted.'

The Commission refused to approve the EFA on the grounds that clause 4 of the proposed EFA would allow for employee conditions of employment to be varied during the life of the agreement without complying with any of the conditions prescribed by 170NE(1). (These provide that , in order for an agreement providing for its own variation to be approved, the Commission must be satisfied that the agreement 'specifies the terms that

can be so varied, and the circumstances in which, and the ways in which, they can be so varied.')

The Commission considered that an EFA which provides for staff contracts within which unilateral changes may occur out of management policy without the prior opportunity for the Commission to review such a change, and also without the opportunity for those unions who have a right to be heard having an opportunity to consider any changes, is contrary to the Act.

This is because the Commission would be unable to determine whether the agreement would disadvantage the employees, without being able to see the full terms and conditions of employment which are to apply during the life of the EFA.

The Commission recommended that a number of changes would need to be made to the EFA before it could be approved. Inter alia, the EFA would need to include a provision that, should the Company wish to vary any of the conditions of the EFA, then the Commission and the unions who have a right to be heard and the employees would be advised at least 14 days prior to the implementation of any such variation.

The Commission also advised that the Company Fair Treatment System should be rewritten to provide for shop stewards and union officials to be involved. The Commission also commented:

'... to endorse a working arrangement which did not provide for collective bargaining would not only be against the Australian system but would not meet our international obligations.'

CRA subsequently revised the EFA, and re-submitted it for approval. However, while the decision was pending at the time of writing, the AIRC was reported to have again criticised the company's push for individual contracts.⁴⁰

In particular, Commissioner Merriman is reported to have said at the hearing considering the revised application that collective agreements appeared to be unacceptable to CRA even in circumstances where, collectively, workers committed to the terms and conditions sought by the company under individual contracts. He is reported to have criticised the proposed EFA for making additional pay rises available to employees who agreed to sign individual staff contracts, compared to other employees. 'The individual having accepted staff employment is valued more highly by the company than the person who does not accept staff employment'.

CRA representatives are reported to have said the company did not support the implementation of 'collective staff agreements'. The CRA advocate told the Commission that 'to say that an employee who accepts staff employment is valued more highly is to ignore the obligations imposed on workers accepting individual contracts . . . Staff

⁴⁰

The Australian, 31 October 1995

employment was not a one-way street', but a system in which employees voluntarily subjected themselves to a company assessment regime.

The issue of individual contracts was launched into national prominence by the ACTU campaign against the introduction of individual contracts by Comalco at Weipa.

Comalco originally made 'staff contracts' available to its employees at its Weipa operations in late 1993 and early 1994. The company claims that individual contracts were only offered after the unions rejected an enterprise agreement (that had been accepted by the local site committee) that would have introduced annualised salaries and performance assessments⁴¹.

The contracts are similar to those offered at Bell Bay. In particular, salaries are on an 'annualised basis', with no specific payment for overtime. Employees are advised that remuneration is for the performance of their role and not hours spent at work.

As well as an area allowance, employees may be eligible for a role allowance, where the role involves:

- 'a) directed hours of work significantly greater than the normal, and/or;
- b) patterns of work including back shifts, weekends, or public holidays, and/or
- c) very frequent but unpredictable requirements to attend to work matters during off-duty hours.'

There is no set limit on sickness or bereavement leave, though the length of time for which salary continues in the event of sickness is at the discretion of the General Manager.

There is an annual salary review, which takes into account economic factors as well as the employee's 'personal effectiveness' over the preceding year. Employees receive the benefit of a company sponsored staff insurance scheme and a staff medical assistance scheme.

Termination is with one month's notice, except in cases of serious misconduct. Employees may be transferred to another of the CRA Group's operations within Australia. Grievances are to be dealt with under the company's 'Fair Treatment Process.'

Acceptance of staff contracts could mean an increase in annual earnings of several thousand dollars. (The average premium over the award appears to be in the vicinity of \$7,000).

⁴¹ J. Guidice, Transcript C. No. 20166 p.96, 20 November 1995

By late 1995, 380 employees had signed the contracts. However, a group of 70 workers who had chosen to stay on the award went on strike in October 1995 and blockaded the port of Weipa in support of their right to receive equal pay to that of the contract workers.

The company's position was that equal pay was inappropriate as the contract employees had accepted greater risks and obligations than employees under the award.

'When employees enter into staff contracts, a number of conditions change. They become responsible for getting the job done better, not just being on the job for a set number of hours. Also, overtime is not paid. Importantly, they are taking on the increased obligation and risk inherent in an individual relationship with the Company and their manager. The risk is taking responsibility for their own actions and having their performance regularly assessed by their manager.'⁴²

Following a failure by the strikers to obey a Commission recommendation to return to work, Comalco issued writs against the strikers and their unions. This substantially lifted the stakes in the dispute, and brought a strong response by the ACTU.

The ACTU initiated an industrial campaign by its members designed to force CRA to alter its industrial strategy. This included national stoppages on the waterfront and in the coal industry.

This industrial action, and the failure of negotiations to achieve a resolution, led to the President of the Industrial Relations Commission calling an urgent compulsory conference, and then referring the dispute to a Full Bench.

At the Full Bench hearings, the ACTU asked the Commission to adopt or endorse a set of principles that would establish the framework in which the parties to the Weipa dispute would enter into further negotiations to resolve the dispute. These principles would not be confined to Weipa, but would cover negotiations in all CRA operations.

The Commission directed the parties to confer with a view to resolving the dispute taking into account a series of points. In particular, the Commission reaffirmed that

the system of collective bargaining is an essential part of the industrial relations system, fostered and encouraged by the Industrial Relations Act 1988 and underpinned by international conventions and standards which Australia has ratified. The Commission also stressed that members of unions should not be discriminated against on the basis of their preferred form of bargaining, and that unions are entitled to be part of the collective bargaining process.

⁴²

'Weipa Industrial Dispute' Bulletin issued by Comalco to staff on 13 November 1995

At the time of writing, the AIRC had ordered Comalco to grant all award workers at Weipa an 8% pay increase, backdated to March 1994. Further hearings were taking place to consider a union application for further increases based on 'equal pay for equal work'.

THE VICTORIAN SYSTEM

Unlike the Commonwealth industrial relations system, the Victorian system makes specific provision for individual contracts.

Under the Employee Relations Act (1992), all State awards are deemed to have expired from March 1993. Employers and employees are empowered to negotiate individual or collective employment agreements, which do not require the approval of any third party. Where no written agreement has been entered into, employees are deemed to be under an individual employment agreement (IEA) with the same terms and conditions of the expired award. Similarly, upon the expiry of a collective agreement, the employees are deemed to be bound by an IEA with the same terms as the former collective agreement.

Individual employment agreements continue indefinitely, until replaced by another agreement, individual or collective. The Employee Relations Commission is empowered to determine minimum wage rates for particular work classifications. In addition, the Act contains certain minimum employment conditions covering annual leave, long service leave, sick leave, and parental leave that cannot be undercut by employment agreements.

Individual employment agreements do not need to be lodged. However, every employer in Victoria is meant to notify the Chief Commission Administration Officer of the number of individual agreements by which it is bound as at 30 June of each year.

According to the Employee Relations Commission, there were around 350,000 employees under individual employment agreements as at 31 October 1994. However, this figure may be an underestimate (particularly, as there is no penalty for failing to notify the Commission).

There has, of course, been a major campaign by the unions to move employees from the Victorian to the federal jurisdiction. This has clearly distorted the impact of the legislation. In particular, it has meant that many unionised, private sector workplaces, which might have been expected to negotiate collective agreements under the State Act, have instead been removed from the system.

It is estimated that around 400,000 workers have moved to the federal jurisdiction. However, at least 680,000 employees remain within the Victorian state system. This includes around 300,000 employees who would have traditionally been award free. However, that leaves a further 380,000 employees in the State system that would have been award covered, prior to the introduction of the Employee Relations Act.

While there are 462 collective agreements, most employees covered by such agreements are probably in the public sector. A rough estimate is that there could be as many as

150,000 to 200,000 former State award employees in the private sector who would now be covered by IEAs. These would mainly be employed in small and medium sized businesses in the private sector, particularly in sectors such as retailing, personal services and real estate.

There appears to have been no attempt so far to conduct any systematic research on what has happened in relation to these employees, and the following is based purely on anecdotal evidence. It appears that the response of Victorian employers to the legislation has not been dissimilar to their counterparts in New Zealand. While a small minority initially sought to take advantage of the legislation and cut pay and conditions (such as annual leave loading), the response of most employers was to introduce few changes, preferring to stick with the conditions contained in the expired award. Many of those employers who initially sought to cut pay and conditions have apparently been forced to 'reel back' due to 'market conditions'.

It is likely that most employees covered by IEAs still do not have written agreements, and are paid in accordance with the terms of the former applicable award. However, it appears that an increasing number of employers and employees are negotiating agreements with new terms and conditions. These often appear to include higher hourly rates, in exchange for changes in conditions such as overtime, allowances, penalty rates and loadings.

This would suggest that an increasing number of smaller employers are using individual contracts to simplify payroll arrangements and increase flexibility over issues such as working time, rather than cutting the overall remuneration paid to their employees. However, there is clearly a need for more research on the effect of the legislation before any definitive conclusions can be drawn.

INDIVIDUAL CONTRACTS IN WESTERN AUSTRALIA

The WA Workplace Agreements Act (1993) introduced both collective and individual workplace agreements. However, unlike in Victoria, they operate as an alternative to the award system, which significantly changes their dynamics.

Western Australian workplace agreements - like their Victorian and NZ counterparts - are documents made between employers and employees - rather than with representative organisations, such as unions or employer associations.

- Workplace agreements totally displace any (State) award that would otherwise apply to the employer or employee that is a party to the agreement.
- Individual employment agreements may be entered into between an employer and one of his or her employees.
- Workplace agreements must comply with certain minimum conditions of employment.

- Agreements must contain an expiry date, which cannot be later than five years after they are entered into. Unless a further workplace agreement is entered into, employees revert to award conditions.
- Agreements must be in writing and signed by the employer and each employee covered by the agreement.
- Agreements must contain a procedure for resolving disputes about the meaning or effect of the agreement, which must allow for any party to refer such a dispute to binding arbitration.
- Individual agreements have effect from the date on which they are signed, but must be registered with the Commissioner for Workplace Agreements within 21 days.
- Before registering an agreement, the Commissioner must be satisfied that each party to the agreement appears to understand his or her rights and obligations under the agreement, and that no party was threatened or intimidated into signing the agreement.
- Agreements are confidential, though it is possible to release information that is of a statistical nature, or could not reasonably be expected to lead to the identification of any person to whom it relates.
- A person must not by threats or intimidation persuade or attempt to persuade another person to enter into - or not enter into - a workplace agreement. Employers are specifically prohibited from dismissing, or otherwise discriminating against employees because they failed to enter into a workplace agreement.

According to information released by the office of the Commissioner for Workplace Agreements, there were over 35,000 employees covered by workplace agreements that had been lodged for registration by the end of October 1995. It appears that around three quarters of these employees are covered by individual, rather than collective, agreements.

The rate at which agreements are being negotiated appears to be growing, with 6,641 agreements being lodged in the three months to October 1995, compared to 2,499 for the same period in 1994.

An interesting case in the AIRC arose earlier this year which gives an illustration as to how WA employers are using the Workplace Agreements Act. The case relates to an application by the AWU, CEPU and AFMEU to establish a federal award covering Tiwest Pty Ltd and its employees, to replace an expired certified agreement. Tiwest operates in the mineral sands industry. Two of its sites (Chandala and Cataby) had enjoyed a good employer-employee relationship, while at the third (Kwinana) the relationship between the unions and the employer had been 'quite stormy'.

Tiwest proposed that the scope of the proposed federal award should be limited so that the award would not apply to those employees of the company who had entered into

individual workplace contracts under the WA Workplace Agreements Act. Employees under this proposal would have the opportunity to opt out of the workplace agreements and be covered by the award. As well, the employer was prepared to provide a guarantee that any workplace agreement would not be less favourable overall than existing workplace agreement conditions and that all new employees would be offered a choice of workplace agreement or the award.

At the time of the application, because the certified agreement had expired, the company was award free, though Tiwest continued to pay the rates provided for in the agreement. However, Tiwest was paying an additional 4% to employees who had agreed to enter into a workplace agreement. Tiwest proposed that the award contain a provision that it would not apply to an employee who had entered into a workplace agreement under the Workplace Agreements Act, while that agreement was in force.

Employees could cancel a workplace agreement by giving 14 days notice. During this period the employee would consult with the company about the reasons for cancelling the agreement. A bargaining agent could be used in this consultation. Cancellation would take place if the employee wished it to do so, and the employee's terms and conditions of employment would revert to those contained in the award. The company also gave an undertaking that it would - for the duration of the proposed award - not enter into a workplace agreement that was less favourable than the one currently offered to employees.

The company argued that the Commission should permit the parties, and in particular the employees, to exercise their freedom of choice: a choice to enter the agreement or to change their minds and to escape the agreements and to return to award coverage. The Commission was obliged, the company argued, to take the views of the employees into account. In this instance, some 67% of employees had chosen the agreements, and there was no evidence of any coercion or duress being applied. The company wanted its employees to be comfortable with their agreement, and that is why the opportunity to withdraw was provided.

The company noted that the capacity to conclude individual agreements was far from unique and that precedent existed to exclude those who voluntarily entered into individual agreements from a new award, for example in relation to the SECWA and past clerks awards. The rationale for the agreements included the objectives of the company in having employees in tune with the company's plans and directions and the need to obtain improvements in past behaviour. It was the latter issue that the company considered most important as it was interested in employing people who were 'prepared to share the company vision' and in its view this could not be achieved unless the emphasis was on the direct employer employee relationship.

The Commission noted, in its decision of 18 April 1995⁴³ that the company clearly considered the existing situation where it was obliged to negotiate with employees through their unions as suboptimal, and while it was prepared and would continue to deal with employees as represented by their unions, it preferred to have a more direct relationship without third party involvement. The Commission acknowledged that the company had attempted to be scrupulously fair with its employees in relation to the workplace agreements. It noted that the company had provided the opportunity for employees to confirm their personal situation, had given each employee all the information available, had provided the opportunity to each employee to discuss it with the relevant authorities and had provided the additional capacity to withdraw.

The unions argued, *inter alia*, that to agree to the employer's proposal would be inconsistent with collective outcomes and community interest, and would therefore be contrary to the scope and purpose of the Commonwealth Industrial Relations Act. Moreover, it would limit the role of the representational bodies which were meant to be encouraged by the objects of the Act.

It appeared from evidence provided to the Commission, that the workplace agreements offered were all in the same terms (though it was intended that this might change in the future) and were not negotiable. They offered additional financial benefits equal to 4% in wages, and a sickness and accident scheme. There were few conditions, and the benefits were described by senior management as a demonstration of commitment by the company to employees who were prepared to make a commitment to the company.

The company had ceased union fee deductions on the grounds that union membership was a matter for individual employees. Some of those employees who had signed individual agreements had remained union members, though it appears that union representatives had been denied access to new employees during working hours prior to the new employees signing the workplace agreements. The Commission noted that there had been a 'small diminution' of union membership, though there was no evidence that the employer had been responsible for the reduction.

The Commission refused to be drawn on whether the company was merely seeking a closer and more harmonious relationship with its employees or whether it was intent on reducing employee benefits and reducing union power and influence.

The Commission instead noted that it had to comply with the obligations of the Commonwealth Industrial Relations Act. That Act obliged the Commission to encourage and facilitate enterprise agreements, and in the words of the Commission (to interpose a system of individual agreements in the face of opposition of the unions concerned would likely inhibit rather than facilitate agreement).

The Commission expressed concern that the employer's proposal would lead to some employees being under a federal minimum rates award, while others would be under

⁴³

State-based workplace contracts, with employees changing from one to the other as they decide, which was considered to be undesirable industrially.

The Commission expressed doubt as to whether the employees could be regarded as having clearly expressed a preference for workplace contracts, given that they had not been able to make a direct comparison between the contracts proposed and the terms of the new award.

'The choice has been one of some additional benefits as against none in an environment where no award applies where delay had become commonplace and frustration has arisen.'

The Commission also expressed some concern about aspects of the Western Australian legislation. For example, it expressed doubts about the capacity to enforce confidential agreements. While it was confident that the company would abide by its commitments 'the process needs also to be seen to be open and to have integrity.'

The Commission also argued that the State Workplace Agreements legislation - unlike the Federal Act - provided no role for employees who wished to engage with their workmates in combined negotiations and contractual relationships (though this seems to ignore the capacity for collective workplace agreements.) The Commission also noted that in the case of Tiwest there had been no capacity to negotiate even by individuals as only one form of contract was offered by the company and it was not negotiable.

While it was agreed that certain 'opting out' provisions had previously been accepted by the Commission, these did not usually involve the complete separation of individual contracts from award coverage. Moreover, since some of these arrangements had been adopted, the Act had been amended

'to provide even heightened emphasis on collective agreements and the protections offered under that process as well as of Australia's international obligations.'

The Commission suggested that there were a number of other options Tiwest could pursue to achieve the improvements it was seeking, such as an enterprise flexibility clauses, overaward arrangements, certified or enterprise flexibility agreements. The Commission suggested that individual arrangements may well be possible under these options.

The Commission also noted:

'... while the company's desire to have a closer relationship with the employees is acknowledged and may even be applauded there is no particular reason why individual contracts are the only alternative. Indeed, they may be counterproductive and divide the workforce ...'

Not surprisingly, given the overall policy of its parent company, CRA, Hamersley Iron was one of the first companies in WA to use the workplace agreements legislation.

As of March 1994, about 1300 of the company's operational employees at Paraburdoo, Tom Price and Dampier had accepted individual staff conditions which moved them from award to salaried status and provided a substantial pay rise.⁴⁴ The agreements rolled award allowances such as overtime, weekend penalties and leave loadings into a salary package, and the working week was adjusted from 38 to 40 hours.

The company claimed that, combined with an across the board pay rise, the agreements ensured that staff had a more stable and consistent income, which was higher than they earned under the awards. Blue collar workers also became members of the CRA superannuation scheme, with employer contributions of 11%, compared to 8% under the award.

200 employees rejected the offer, and continued to be paid under the award.

There would be annual performance appraisal to determine the individual's pay within their salary band. The rates within each band would move according to economic factors.

A Hamersley Iron executive, Tony Finucane said:

'We've had collective enterprise deals since the introduction of our award in 1972 and we've concluded there's greater benefit for us and employees in individual agreements.

We felt we would develop much better relationships with people if we dealt with them one to one, instead of on a company to collective basis . .

I think it comes down to trust. If there isn't a high level of trust between employers and employees then the process won't be as effective.'

The company has claimed that labour productivity has increased by 33% since the introduction of staff contracts, and industrial disputation has been eliminated.⁴⁵

Other examples of companies introducing individual contracts include CSBP, a Kwinana-based fertiliser and chemical producer. More than 70% of CSBP's employees signed individual agreements providing salaried staff status, a 5% pay rise, improved company funded superannuation, comprehensive insurance cover and a guarantee against forced retrenchment. In return, employees agreed not to take any industrial action.

⁴⁴ *Workplace Focus* Issue No. 5, March/April 1994. WA Department of Productivity and Labour Relations.

⁴⁵ A. Kohler *Sydney Morning Herald*, 18 November 1995

CSBP's Managing Director, Warren Murphy, is reported to have said that the company had improved its operations enormously through enterprise bargaining, but was still struggling to gain the full commitment of its employees.

'Enterprise bargaining allowed us to remove demarcation disputes, give workers time off in lieu of overtime, provide comprehensive training as a basis for skills/competency based pay, improve career paths and raise pay rates.'

'The flexibility gained through bargaining improved our productivity greatly and elevated the CSBP workforce to the top quarter of Australian wage earners.'

'What it failed to overcome was non-productive conflict with some unions. Some unions are more committed to their own survival than to the future of the business and that has hampered our relationship with some employees.'

'The Workplace Agreements Act has given us and our employees a real choice for the first time We are no longer restricted to award and enterprise system where everything is decided between the company and the union.'

"We have offered all employees salaried staff positions under five year, individual workplace agreements. We believe this will remove the traditional 'them and us' conflict between white and blue collar workers which has hindered productivity and growth."⁴⁶

The terms and conditions were described as better than under the award, though they did involve 'the occasional longer shift, weekend or public holiday'.

'The value for us is the opportunity to develop trust and cooperation between management and staff without interference from third parties.'

Hughans' Saw Service is an example of a smaller company using individual contracts.

The agreements gave the five workshop employees pay increases from \$95 to \$150 a week. In exchange annual leave loading was abolished, and overtime pay was eliminated. Workers could be asked to work up to 12 hours in a shift, or take time off, depending on work flow.

A profit sharing scheme was introduced, with a dividend paid to employees if the company exceeded a profit target. A limit was placed on the accrual of sick leave, with any leave over 30 days cashed out. Future pay rises were to be determined by an annual review of

⁴⁶ *Workplace Focus* Issue No 6 May/June 1994

employee performance.⁴⁷ In short, the agreement appears to meet the typical small business model, involving a higher base rate of pay, in exchange for more flexible working time arrangements, and the elimination of certain allowances to make payroll administration easier.

BEYOND ENTERPRISE BARGAINING?

Clearly a significant number of relatively sophisticated organisations are showing an increasing interest in individual contracts.

A survey conducted in mid 1992 of Chief Executive officers of BCA members⁴⁸ found that 25% agreed with the proposition:

'Truly achieving world class productivity in my company requires individual employment contracts'

This was still a minority view (32% were neutral on the proposition, and 42% disagreed with it) However, it appeared to be an idea with growing support. Whereas individual contracts did not rate at all in a 1988 survey of Business Council CEO's 10 most preferred changes to Australian industrial relations, by 1992, individual contracts had become number 8 on the list. It is likely that individual contracts would have moved higher since then.

It is far fetched to see the desire for individual contracts on the part of a significant number of CEOs of Australia's largest companies as reflecting a wish to return to the sort of individual bargaining in which workers compete with each other to drive down wages. Certainly, companies such as CRA seem willing to pay a premium on wages and conditions to persuade workers to take up individual contracts.

Peter Boxall has commented on the New Zealand experience⁴⁹

'A group of more innovative employers is going further in seeking the higher returns that may come from more cooperative, direct relationships based on greater consultation, demonstrably fair dealing in pay negotiations and better training. It is possible that some of these employers will succeed in replacing what we know as traditional collective bargaining with a relationship which is more akin to sophisticated consultation.'

This strategy is firmly based on the notion that the interests of employers and employees have more in common than separate them. It sees collective bargaining as unnecessarily

⁴⁷ *Workplace Focus* Issue No. 10 May/June 1995

⁴⁸ reported in F.G. Hilmer et al. *Working Relations: A Fresh Start for Australian Enterprises* (BCA Employee Relations Study Commission) Melbourne: The Business Library, 1993

⁴⁹ P. Boxall 1993 *op cit.*

adversarial - *creating* conflict between workers and their employers, rather than simply *expressing* and *regulating* that conflict.

This philosophy has in the past been heavily criticised by the majority of industrial relations academics, and it has been given the (pejorative) label of 'unitarism'. Alan Fox has described managerial rejection of collective bargaining in this way:⁵⁰

'By its behaviour it demonstrates that it regards the employee collective as having no legitimate functions which involve it in challenging managerial prerogative in any area of decision making whatever, or in promoting to employees a rival focus of leadership and loyalty which interposes itself between them and management. Refusing thereby to concede any legitimacy to the collective, it remains alert to any opportunity to undermine its position in the organisation or weaken its appeal to employees.

Such a stance is likely to derive from the view that the organisation must be maintained as a unitary structure with but one source of authority and leadership and but one focus of loyalty . . . the union is apt to be seen as a purely external, self seeking force trying to assert itself into an otherwise integrated and unified structure.'

For Fox, this view of the world reflects a heavily flawed managerial ideology. This is because, whatever, the employer says, there is a fundamental conflict of interest that cannot be glossed over. The high degree of division of labour required by contemporary capitalism means that work must be organised in a way that gives little discretion to the ordinary worker, breeding a lack of trust between employer and employee. This cannot simply be overcome by talk of common interest and the introduction of some limited form of management controlled participation program.

While these are sobering reflections, it can legitimately be asked to what extent they reflect the contemporary workplace.

The ideas, if not always the practice, of total quality management (TQM) are becoming increasingly widespread. TQM puts a very high premium on gaining the commitment of all employees in meeting the organisation's goals. There is nothing particularly new in this. Fox has described the never ending (but in his view, inevitably unsuccessful) quest of management to gain the 'moral involvement' of the worker in his job. However, TQM and related human resource management (HRM) strategies also emphasise giving workers much greater responsibility and discretion, with less supervision, flatter hierarchies and the greater use of self managing teams.

A central part of Fox's analysis is that

⁵⁰

A. Fox *op cit.*

'The greater degree of discretion extended to a person in his work, the more he feels that the relevant rules and arrangements embody a high degree of trust.'⁵¹

If modern human resource management really involves giving workers more discretion, then the pursuit of 'high trust' relationships, with a stronger sense of 'common purpose' might be attainable. At CRA it appears that the policy of putting all employees on to staff contracts is closely linked to a substantial reduction in the number of organisational layers.⁵² The intention is to devolve more responsibility to workers down the hierarchical chain, to ensure that every job adds value, to improve information flow, and to create a more efficient and rewarding work environment. Breaking down 'artificial barriers' between management and blue-collar workers is seen as a necessary part of this management philosophy. In principle, this should help engender a greater degree of trust between management and employees. Nevertheless, it remains to be seen whether CRA's strategy has yet succeeded in winning the 'trust' of its employees. A survey into employee attitudes conducted by external consultants at the CRA subsidiary CM&A⁵³ suggests that a substantial proportion of lower level workers at the company's Weipa operations had little or no trust in the company.

Experience here and in New Zealand suggests that there are broadly two categories of employers who would be interested in individual contracts. The first, which includes some larger companies such as CRA, is made up of companies pursuing a deliberate strategy to reduce the role of third parties, as part of an overall HRM strategy. The second category is made up of companies that are already (and have probably always been) non unionised. Most of these businesses would be small or medium sized, and would be unlikely to have adopted formal human resource management techniques. Indeed, many would not even know what HRM stands for.

This does not mean that the majority of such businesses would primarily be interested in individual contracts to reduce wages and conditions. The NZ data referred to above suggests that companies who negotiated individual contracts after the introduction of the ECA (predominantly smaller firms) were less aggressive in pursuing change, but were more likely to receive employee support for the changes they were seeking. This suggests that for many such companies, individual contracts were associated with a relatively 'consensual' style of employee relations, compared to traditional collective bargaining.

The evidence suggests that it is probably only a relatively small minority of small employers who would take advantage of individual contracts to downgrade wages and conditions, when taken as a whole. Many smaller employers would however be likely to

⁵¹ A. Fox *op cit.*

⁵² D. James 'The Intellectual Muscle Behind CRA's Management Style', *Business Review Weekly* 9 October 1995

⁵³ CTRI Strategic Interactions *CM&A Cultural Survey*, July 1995. (Unpublished Report).

use individual contracts to introduce greater workplace flexibility, especially in relation to issues such as penalty rates, working hours etc.

Given the choice, most larger employers would probably continue to handle industrial relations collectively. However, a significant minority would wish to use individual contracts as part of an overall strategy to improve human resource management. While this would involve the introduction of greater flexibility, it is highly unlikely to be associated with a general downgrading of pay and conditions - Indeed, the converse is more likely, in that large employers engaging in this strategy would probably need to offer a wage premium.

Whether it is a good strategic decision for large firms to deliberately seek to individualise industrial relations remains to be seen. Certainly, the evidence is that TQM and HRM techniques designed to boost productivity are by no means incompatible with unionisation.

The overseas evidence concerning the linkage between HRM and the decollectivisation of industrial relations shows that there is clearly not a simple relationship. There is no evidence that the introduction of HRM has been the main driving force behind the decline in collective bargaining in countries such as the UK. Moreover, despite some conceptual tension between the collectivist notions underlying unionism, and the individualist values of HRM, there is no doubt that the mere presence of unions and collective bargaining is not intrinsically inconsistent with the adoption of an HRM approach.⁵⁴

Indeed, where unions are present, it is likely to be much easier to introduce such changes with their support, than without it.

It is reasonable to assume that much depends on whether the particular unions in question are likely to be receptive to the sorts of reforms being pursued by the company. If the unions are willing to cooperate with the introduction of greater flexibility, then there may be real benefits for the company in working with the unions. In particular, the active involvement of the unions may increase the willingness of the work force to participate in change. Unions can also act as an effective collective voice, enabling management to know what their employees are thinking. This sort of information is critical in adopting a TQM approach. In the absence of unions, management is likely to have to invest in expensive mechanisms (maybe by using consultants) to research employee views.

A possible danger in adopting a system without an effective collective voice is that management will be complacent about employee attitudes. Failure to recognise grievances can lead to higher quit rates and poor work commitment - precisely the opposite of what is intended. There does appear to be a tendency for management to be overly optimistic about how much employees really trust them. For example, the 1993 Heylen report in New Zealand referred to earlier found that while 43% of employers

⁵⁴ cf. K. Sisson 'In Search of HRM' *British Journal of Industrial Relations* 31 (2), June 1993

thought there was increased trust of management by employees since the introduction of the Employment Contracts Act, only 15% of employees believed this to be the case.⁵⁵

However, it cannot always be assumed that unions act as an effective collective voice. For a start, a decreasing proportion of the work force may actually belong to the relevant union. Moreover, unions have their own agendas, which sometimes have little to do with the wishes of their members at a particular workplace. Max Ogden has pointed to the union failure at NZAS as a result of the local union leadership being out of touch with the aspirations of the members. Clearly, in this situation, to talk of unions as providing an effective collective voice is inappropriate.

One large Australian company that has pursued a major change program with many HRM features in conjunction with the unions is Telstra. Interestingly, this has included the explicit rejection of the concept of 'bargaining'.

According to a recent media report "Bargaining' is now a dirty word at Telstra'.⁵⁶ While there is still an enterprise agreement between the company and its unions, the emphasis is away from collective bargaining, and towards 'participation' and 'consultation'.

Keith Andersen, communications group manager with Telstra's employee relations task force is reported as saying:

"Bargaining' implies trade-offs and an adversarial approach to industrial relations. It's really not like the old days of 'well if you want this, then you're going to have to give me that for it.' We look at what will promote the growth and success of the organisation, and through that improve the position of employees."

The unions are explicitly recognised by the company as equal partners with management, and are given a role in both strategic planning and significant business initiatives.

The idea is that a more participative approach with improved communication will establish greater trust between management and employees, making workers more inclined to support the changes necessary in a rapidly changing market.

It has been notable that in general individual contracts, either in New Zealand, or in Australia, have not involved much of what would traditionally be understood as bargaining. The New Zealand survey suggests that in most cases the employee accepted the contract as originally proposed by the employer, with at most only minor modification. The contracts offered by CRA at Bell Bay were also largely non-negotiable, though there was a degree of consultation with the employees before the contracts were offered.

⁵⁵ R. Whatman, C. Armitage & R. Dunbar *op cit.*

⁵⁶ *Inside Enterprise Bargaining* Issue No. 39 September 1995

From one perspective, this can be seen as evidence that the critics of individual contracts are right - individual contracts involve management dictating pay and conditions to employees.

However, it may not be a simple matter of management asserting their interests over those of the employees. Instead, the employer may be making a good first offer, that is acceptable to the employee. Part of the point of the exercise is precisely to avoid bargaining, with its adversarial connotations.

An analysis of a number of enterprise bargaining case studies as part the DIR Workplace Bargaining Project - Cross Case Analysis⁵⁷ suggested there were three general approaches to managing change at work. These were:

- management unilateralism;
- consultation; and
- joint regulation.

'Management unilateralism' refers to situations in which decisions affecting the workplace or enterprise are solely determined by management. The second approach to managing change involves management consulting with unions and employees. This approach usually involves management discussing options for change with employees and seeking their suggestions and input. While management makes the key decisions it attempts to involve the workforce in the process by sharing information and incorporating employee suggestions it finds useful. The third approach to change involves joint regulation between management and unions over some of the issues concerning workplace operations. Such agreements represent compromises between the parties and usually involve unions that have a strong presence in the enterprise concerned.

'Joint regulation' is clearly closest to traditional collective bargaining. What we may be seeing is a general shift away from the 'joint regulation' model to a 'consultation' model. Under this approach, rather than the focus being on bargaining (whether individual or collective), there would be greater emphasis on determining changes to working arrangements in consultation with employees.

CRA has chosen to take this approach through individual contracts, while Telstra has chosen to involve the unions. But the two approaches still have a great deal in common. Both have adopted a broadly unitarist philosophy, and have rejected traditional collective bargaining as inconsistent with a philosophy based on 'common purpose' between management and employees. However, while CRA has sought to marginalise the unions, Telstra has sought to co-opt the unions into the process.

⁵⁷ J. Buchanan, R. Callus, L. Watts and M. Rimmer *DIR Workplace Bargaining Project - Cross Case Analysis (unpublished)*

SOME FINAL COMMENTS: ISSUES FOR CONSIDERATION

Issues for Management

There are obvious attractions for management in pursuing individual contracts over collective bargaining, of either the union, or non-union variety.

Collective bargaining with unions inherently involves management giving up a degree of power to organise the workplace as it thinks fit. Moreover, it involves accepting, at least implicitly, a 'pluralist' conception of the workplace, where there is at least some degree of conflict of interest between management and employees.

Some firms are clearly willing to pay a significant wage premium in moving away from traditional collective bargaining, in the expectation that this will lead to improved performance. The reasoning appears to be that overall, unit labour costs will actually fall because eliminating collective bargaining will lead to greater trust between management and employees, better employee commitment, and more flexibility. This will lead in turn to sufficiently higher productivity to outweigh the costs of higher wages.

There is some recent empirical evidence from the UK to support the assertion that non-union firms employing HRM policies may indeed have better productivity performance than firms with collective bargaining.

Fernie and Metcalf⁵⁸ have used establishment level data from the 1990 British Workplace Industrial Relations Survey to assess the link between different models of workplace governance and six economic and industrial relations indicators.

In particular they look at three types of workplace governance: 'collective bargaining', 'employee involvement', and 'authoritarian'. Collective bargaining workplaces are defined as those with either a closed shop, or where management recommends union membership. Employee involvement workplaces are those with no union, but a range of HRM policies (eg. performance appraisal, contingent pay systems, and communication between management and employees.) Authoritarian workplaces have no union and no HRM characteristics.

The analysis found that the non union, 'employee involvement' workplaces performed better than their counterparts with collective bargaining in relation to absenteeism, the industrial relations climate, jobs growth and productivity performance.

To this must be added the empirical data presented by CRA to the AIRC during the Weipa hearings in November 1995 which it argued provided a clear demonstration of the benefits to productivity and quality of adopting individual contracts.

⁵⁸ S. Fernie and D. Metcalf *Participation, Contingent Pay, Representation and Workplace Performance: Evidence from Great Britain* Centre for Economic Performance Discussion Paper No. 232, April 1995

However, before embarking on a non-union, HRM strategy, management should at least consider a few issues. First, and most obviously, the current institutional arrangements favour the involvement of unions. Any attempt to marginalise the role of unions is likely to be met with considerable resistance, not only by the unions themselves, but by the Industrial Relations Commission - even where part of the strategy is to improve pay and conditions.

Secondly, there is a risk in pursuing individual contracts, of dividing the work force. This could lead to industrial disruption, as has occurred at CRA's Weipa operation. Moreover, it is not unlikely in a large work place that at least a significant minority of employees will not wish to sign such contracts. The company may have to manage its operations with some employees covered by contracts, and others by the relevant award.

This may create significant difficulties. A survey of employee attitudes at CRA's Weipa operations revealed many accusations of discrimination against workers who had chosen not to sign individual contracts. This was undermining the development of trust in the company not only amongst the workers directly affected, but by their colleagues. The consultants who conducted the survey commented that 'bad treatment affects the whole work group not just the person most affected.' They went on:

'If the company is genuine in saying that it is wanting to build better relationships with its employees, by giving them the choice of award or contract, then it needs to ensure that opportunities exist for both and that there is no discrimination.'⁵⁹

An alternative view would be that the existing award system creates arbitrary distinctions (for example, between blue collar and staff workers) and that these undermine trust.

Thirdly, it needs to be considered whether the same objectives can be achieved by working with the unions. Certainly, the evidence both overseas and in Australia is that unions can coexist with an advanced human resources management approach - indeed, they may even help contribute by acting as an effective channel of employee voice.

Fourthly, there appears little evidence that de-collectivisation by itself will do anything to increase trust and employee commitment. While marginalising unions may remove the most obvious forms of employer-employee conflict (eg. industrial action), there is a danger that removing collective bargaining will simply drive mistrust and conflict below the surface, leading perhaps to worsening employee commitment and high labour turnover.

This strongly suggests that firms should be wary about pursuing individual contracts unless there is *already* a reasonably high degree of trust between management and employees, and management is willing to invest significant resources in maintaining effective and meaningful two-way communication with employees, as well as generally improving management behaviour and systems.

⁵⁹ CTRI Strategic Interactions *CM&A Cultural Survey*, July 1995. (Unpublished report).

This leads to the final point, which is that - at least in large firms - there may be substantial transaction costs in administering individual contracts, even where there is little actual variation in the terms of the contracts themselves. Indeed, recent evidence from New Zealand⁶⁰ is that some firms are reintroducing collective bargaining in response to such costs.

If a firm wants to pursue a non union strategy, how should they do it? Under the WA and Victorian legislation, clear provision is made for individual contracts. However, the issue is far more complicated in the jurisdictions of the Commonwealth and the other States (as the CRA experience has demonstrated). What about the EFA alternative?

Despite the experience at Woodside, the AIRC appears opposed to the use of EFAs as a mechanism for introducing individual contracts. In practice, EFAs must be seen as a modified form of collective bargaining. The ACTU emphasised in its submission to the Bell Bay case that :

'the intention of the legislation is that a pre-condition to an employer applying for approval of implementation of an EFA is that the agreement reflects the outcome of relevant negotiations with relevant employees and eligible unions. This emphasises a statutory scheme of enterprise bargaining which is predicated on the concept of collective negotiation.'⁶¹

The appeal of EFAs, does appear to be somewhat limited, and the evidence suggests that for many non union employers they are a second best option compared to individual contracts.

In the first 15 months since the commencement of the EFA provisions (ie. from March 1994 to June 1995) only 68 EFAs were approved - and of these, only 16 pertained to small business.⁶²

Many small businesses, in particular, are likely to be put off EFAs by the complex procedural rules, the need to have AIRC hearings, and the scope for union intervention. While individual contracts would be seen as giving businesses a very high degree of freedom to organise their own employment relationship, the prospect of formal bargaining, workplace balloting and highly specific collective agreements - as required by EFAs - would be seen by many employers as unnecessarily bureaucratic, too collectively oriented and potentially confrontational.

Of course many small businesses, most of whom are already non-unionised, and covered by minimum rates awards already have significant freedom. However, many such

⁶⁰ R. Harbridge and P. Kiely *op cit.*

⁶¹ Transcript C No 32110 of 1995 p. 188, 26 May 1995

⁶² R. Barrett 'Enterprise Flexibility Agreements in Small Business: Rhetoric or Reality?' *Journal of Industrial Relations* 37(3) September 1995

employers might be interested in pursuing individual contracts, if the legislation were changed, particularly to address penalty rates and more flexible hours of work.

A survey conducted in late 1992 (ie. before the introduction of EFAs) of small business members of affiliates of ACCI members found that over one third of respondents were

dissatisfied with the existing award/agreement arrangements.⁶³ Of those small employers who were dissatisfied with the system, two fifths wanted individual contracts (compared to one fifth who wanted enterprise agreements).

A 1994 *Small Business Index* survey conducted by Yellow Pages, Australia⁶⁴ indicated that 48% of small business proprietors preferred individual contracts over both awards or enterprise agreements.

Issues for Employees

The limited empirical evidence that is available is hardly sufficient to form a view that individual contracts are either consistently good or bad for employees.

Employees should understand that their capacity actually to bargain with an employer in a structured way is likely to be very limited, unless the employee has special skills that are in high demand. However, that does not necessarily mean that moving to an individual contract will lead to the employee being worse off. Employers generally appreciate that they must pay the 'going rate' for a particular type of job, if they want to recruit, retain and motivate employees. Employers may be willing to pay a premium for the added flexibility that is likely to be associated with an individual contract.

An employee's reaction to an employer proposal to negotiate an individual contract will to a significant degree depend on the extent of trust that employee has with his or her employer.

Obviously, the employee should determine what relationship the individual contract has with the relevant award (if there is one). Another issue, that can easily get glossed over, is how the individual contract will be re-negotiated (if at all). The employee should also clarify what grievance mechanisms are available, in the event of future disagreements.

An award employee offered an individual contract should also understand that in all probability, the employer is expecting a more significant change in the employer-employee relationship than is directly evident from the terms and conditions set out in the contract.

⁶³ J. Isaac, S. Kates, D. Peetz, C. Fisher, R. Macklin and M. Short *A Survey of Small Business and Industrial Relations* Canberra: Department of Industrial Relations, 1993

⁶⁴ *Small Business Index: A Special Report on Industrial Relations and the New National Training Wage* Sydney: Yellow Pages Australia, September 1994

The higher productivity that seems to be associated with non-union HRM strategies is likely to go together with greater demands on employees, greater work intensification and less room for 'managerial slack and for indulgency patterns.'⁶⁵

Issues for Unions

There is no doubt that the trend towards individual contracts poses a very real threat to unions. While there is a theoretical role for unions in representing employees under individual contracts, for many companies, at least part of the point of individual contracts is to marginalise the role of third parties - including unions.

Union opposition to individual contracts (except perhaps under highly regulated conditions such as those applying under the ABC's certified agreements) is understandable. However, unions need to think very clearly about how they respond to individual contracts. A recent speech by Tony Maher, Vice President of the CFMEU's Mining and Energy Division, to that union's national conference described individual contracts as part of a push by employers to impoverish and exploit workers. He described individual contracts as leaving 'you as naked as a newborn baby at the mercy of your employer', and linked them to a strategy based on 'pure unadulterated *hatred* of workers and particularly the organisations that empower them.'

Much of the rhetoric surrounding the Weipa dispute was in similar terms.

If that is really what individual contracts were about, unions would probably not need to worry. Their membership would be growing, and employees would be rejecting individual contracts at every work site where they were offered.

However, there are clearly problems in arguing that management in companies like CRA is out to attack workers, when employees are in fact being given better pay and conditions.

Unions need to develop a far more sophisticated understanding of individual contracts, including the fact that they are *not* about taking the workplace back to the nineteenth century, but in many cases are part of a sophisticated HRM strategy. Moreover, there is clearly a danger in over reliance, in the longer term, on sympathetic legislation and the support of the AIRC. Otherwise they run the risk of winning the battle and losing the war.

Policy Implications

This paper has not made any attempt to discuss the macro-economic implications of a shift towards greater use of individual contracts. These will clearly be highly dependent on

⁶⁵ J. Parcels 'The Challenge of Human Resource Management for Industrial Relations Research and Practice' *International Journal of Human Resource Management* 4(3), September 1993

the context within which this shift occurs, in particular, what is happening to the award system at the same time.

If the claims of their proponents are accepted (and there is at least some empirical evidence to support their claims) then the spread of individual contracts alongside a retention of the award system should lead to higher productivity. If the productivity improvements outweigh any associated increase in wages, then the reduction in unit costs could help reduce inflation and increase employment.

If greater scope for individual contracts were brought in together with the abolition of the award system (as in New Zealand) the economic implications are likely to be far greater. Some economic modelling⁶⁶ suggests that the NZ reforms had no wages effect, but were positive for employment, probably because they led to reduced unit costs through higher productivity.

While the evidence does not suggest that individual contracts can generally be equated with exploitation, the New Zealand experience suggests that without adequate safeguards at least some employers would use them to downgrade pay and conditions.

Very few of those proposing greater scope for direct bargaining do so on the basis that there should be a reduction in wages and conditions. Organisations such as the Business Council of Australia consistently argue that their aim is higher productivity. Accordingly, they should have little difficulty in accepting some form of protection to prevent the use of contracts to downgrade pay and conditions.

The precise form such protection should take, if the system is to be amended to facilitate the scope for individual contracts, is not a matter for this paper; however there are clearly a number of options. This could include a no disadvantage test much like the current one administered by the AIRC, or a legislated safety net of conditions. Certainly, an opting out model, where employees have the choice of staying with an award or moving to an individual or collective contract, would be much less likely to lead to a downgrading in wages and conditions than a model involving the abolition of awards.

The challenge would be to design a form of protection that effectively prevented employers taking advantage of individual contracts to reduce wages and conditions, while providing sufficient flexibility not to undermine the rationale for permitting the contracts in the first place.

Unfortunately, there is still relatively little empirical information on individual contracts. It is hoped that this paper will stimulate further research on a topic that is unlikely to go away.

⁶⁶ T. Maloney 'Estimating the Effects of the Employment Contracts Act on Employment and Wages in New Zealand' Australian Bulletin of Labour 20(4), December 1994

REFERENCES

- Australian Bureau of Statistics (ABS) (1990) Award Coverage Cat.no.6315, Canberra: ABS.
- Australian Industrial Relations Commission (AIRC) 8th December 1994. Print L7499.
- AIRC. 11th May 1995. Print M0464.
- AIRC. Print M0863.
- AIRC. Print M2828.
- AIRC. Print M3302.
- Barratt, P. (1995) in *Weekend Australian*, 7th-8th January.
- Barrett, R. (1995) 'Enterprise Flexibility Agreements in Small Business: Rhetoric or Reality?' *Journal of Industrial Relations*, 37(5), September: 343 - 358
- Boxall, P. (1993) 'Management Strategy and the Employment Contracts Act 1991' In R. Harbridge (ed.) *Employment Contracts: New Zealand Experiences*, Wellington, N.Z.: Victoria University Press.
- Buchanan, J., Callus, R., Watts, L. and Rimmer, M. *DIR Workplace Bargaining Project - Cross Case Analysis*. Unpublished.
- Callus, R. Change and Bargaining at Australian Workplaces: A Descriptive Account of the Workplace Bargaining Survey. Unpublished.
- Callus, R., Morehead, A., Cully, M. and Buchanan, J. (1991) *Industrial Relations at Work: The Australian Workplace Industrial Relations Survey*, Canberra: AGPS.
- 'CBSP Switches to Workplace Agreements' (1994) *Workplace Focus*, Issue No. 6, May/June: 4-5.
- 'CRA Draws Strength from the Data' (1995) *Workforce*, Issue no. 1048, 24th November: 3
- CTRI Strategic Interactions (1995), *CM and A Cultural Survey*. (Unpublished report).
- Cordova, E. (1990) 'Collective Bargaining' in R. Blanpain (ed.) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, Deventer: Kluwer.
- Creighton, B., Ford, W.J. and Mitchell, R. J. (1983) *Labour Law: Materials and Commentary*, Sydney: Law Book Company.

- Fernie, S. and Metcalf, S. (1995) *Participation, Contingent Pay, Representation and Workplace Performance: Evidence from Great Britain* Centre for Economic Performance Discussion Paper No.232. London: CEPR.
- Fox, A. (1974) *Man Mismanagement*, London: Hutchinson.
- Freeman, R. and Medoff, J. (1984) *What Do Unions Do?*, New York: Basic Books
- Giudice, J. (1995) Transcript C No.20166 of 1994.
- Harbridge, R. ed. (1993) *Employment Contracts: New Zealand Experiences*, Wellington, N.Z.: Victoria University Press.
- Harbridge, R. and Kiely, P. (1995) *The Employment Contracts Act: Bargaining Trends and Employment Law Update 1994-95*, Wellington, N.Z.: Industrial Relations Centre, Victoria University.
- Hilmer, F et al. (1993) *Working Relations: A Fresh Start for Australian Enterprises*, Melbourne: The Business Library with BCA.
- International Labor Office (ILO) (1994) 295th Report by the Committee on Freedom of Association to the 261st Session of the Governing Body of the ILO. Case No.1698
- 'Learning to Talk at Telstra' (1995) *Inside Enterprise Bargaining*, Issue No.39, September: 3-4, 6.
- Isaac, J. et al. (1993) *A Survey of Small Business and Industrial Relations* Canberra: Department of Industrial Relations.
- James, S. 'The Intellectual Muscle Behind CRA's Management Style' (1995) *Business Review Weekly*, 9th October.
- Kohler, A. *Sydney Morning Herald*, 18th November 1995.
- McAndrew, I. (1993) 'The Process of Developing Employment Contracts: A Management Perspective' in R. Harbridge (ed.) *Employment Contracts: New Zealand Experiences*, Wellington, N.Z.: Victoria University Press.
- McAndrew, I. and Ballard, M. (1995) 'Negotiation and Dictation in Employment Contract Formation in N.Z.', *New Zealand Journal of Industrial Relations*, 20(2), August.
- Maloney, T. (1994) 'Estimating the Effects of the Employment Contracts Act on Employment and Wages in New Zealand', *Australian Bulletin of Labour*, 20(4), December.
- Mark, G. (1992) Address to N.Z. Employers' Federation Convention, 13th May 1992. Unpublished.

- Niland, J. (1989-1990) *Transforming Industrial Relations in New South Wales: A Green Paper*, Sydney: NSW Government Printing Office.
- Ogden, M. (1993) *Towards Best Practice Unionism: The Future of Unions in Australia*, Sydney: Pluto Press.
- Parcels, J. (1993) 'The Challenge of Human Resource Management for Industrial Relations Research and Practice', *International Journal of Human Resource Management*, 4(3), September.
- Roche, W.K. and Turner, T. (1994) 'HR Policy Effects on Trade Union Recognition in Ireland', *International Journal of Human Resources*, 5(3), September.
- 'Saw Doctors Gain 25% Pay Increase Plus Profits' (1995) *Workplace Focus*, Issue No.10, April/May: 5.
- Sisson, K. (1993) 'In Search of HRM', *British Journal of Industrial Relations*, 31(2), June.
- Small Business Index: A Special Report on Industrial Relations and the New National Training Wage* (1994) Sydney: Yellow Pages Australia.
- '1300 Sign Hamersley Agreement' (1994) *Workplace Focus*, Issue No.5 March/April: 3
- Webb, S. and Webb, B. (1897) *Industrial Democracy*, London: The Author.
- Weipa Industrial Dispute* (1995) Bulletin issued by Comalco to staff on 13th November 1995
- Whatman, R. Armitage, C. and Dunbar, R. (1994) 'Labour Market Adjustment Under the Employment Contracts Act', *New Zealand Journal of Industrial Relations*, 19(1), April.

ACIRRT

The Australian Centre for Industrial Relations Research and Teaching (ACIRRT) at the University of Sydney was established as a Key Centre of Teaching and Research in 1989 through a grant from the Commonwealth Department of Employment, Education and Training. The Centre is closely linked with the University's Department of Industrial Relations, which has a long and distinguished history of teaching and research in this area.

ACIRRT's main brief is to improve the quality of industrial relations teaching and research in Australia. This goal will be pursued through a range of activities including a national review of industrial relations teaching, conferences and seminars, research projects conducted by members of ACIRRT and scholars from other institutions, secondments of staff, and publications.

The present Working Paper Series is designed to disseminate ideas and research-in-progress which are still in preliminary form.