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Articles: Anna Chapman, Centre for Employment and Labour Relations Law, Melbourne Law School, Vic, 3010, law-ajll@unimelb.edu.au;

Reports: Joo-Cheong Tham, Centre for Employment and Labour Relations Law, Melbourne Law School, Vic, 3010, j.tham@unimelb.edu.au; or Emily Long, emjlong@gmail.com;

Legislative Developments: Carolyn Sutherland, Faculty of Business and Economics, Monash University, PO Box 197, Caulfield East, Vic, 3145, Carolyn.Sutherland@buseco.monash.edu.au;

Recent Cases: Amanda Coulthard, Faculty of Law, Bond University, University Drive, Robina QLD 4229, acoultha@bond.edu.au; or Joel Fetter, joel.fetter@gmail.com

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Book Reviews: Jill Murray, School of Law, La Trobe University, Bundoora, Vic, 3086, jill.murray@latrobe.edu.au.



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Articles

Employee Participation in Employee Share Ownership Plans: The Law, Company Objectives and Employee Motives

Michelle Brown, Rowan Minson,† Ann O'Connell‡ and Ian Ramsay§*

Although Employee Share Ownership Plans (ESOPs) are widely used in Australian companies, little is known about why employees participate in these plans. Yet understanding employee motivations for share ownership has significant implications for corporate governance, human resource practice and public policy. We first review the history of ESOP regulation in Australia in order to identify Federal Government policy rationales for ESOPs. We then identify employee motives for participating in employee share plans. Two hypotheses, using data from both employee shareholders and non shareholders in Australia are investigated: that employees participate because they are motivated by financial considerations or they participate because they believe share ownership is a way of increasing their involvement in decision-making at work. We then compare employee motivations for participating in ESOPs with the policy rationales advanced by the government for its support of ESOPs. We find, based on this comparison, that there is a mismatch between the employee motivations and the government's policy rationales and we identify the implications of this finding for public policy.

1 Introduction

Despite considerable public policy interest in the area,¹ non-executive employee share ownership in Australia has, until recently, been largely uncharted by researchers. Indeed, in 2000 the House of Representatives Standing Committee on Employment, Education and Workplace Relations' inquiry into employee share ownership found that, putting executive

* Associate Professor (Human Resource Management), Faculty of Business and Economics, University of Melbourne.

† Research Assistant, Employee Share Ownership Project, Melbourne Law School, University of Melbourne.

‡ Associate Professor, Melbourne Law School, University of Melbourne.

§ Harold Ford Professor of Commercial Law and Director of the Centre for Corporate Law and Securities Regulation, Melbourne Law School, University of Melbourne. The authors thank Ingrid Landau and Malcolm Anderson for their valuable assistance in the preparation of this article. The authors also thank two anonymous referees for their comments.

¹ For an overview of such interest: see J Lenne, R Mitchell and I Ramsay, 'Employee Share Ownership Schemes in Australia: A Survey of Key Issues and Themes' (2006) 14 *International Jnl of Employment Studies* 1.

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remuneration plans to one side,² ‘very little of a substantive nature is known about employee share plans in Australia at all’.³

We have three objectives for this article. First, we examine the regulation of Employee Share Ownership Plans (ESOPs) in Australia for the period 1974–2011. The incidence of ESOPs in Australian companies has been determined in part by the laws relating to the establishment and operation of such plans. We chart the changes to the laws, particularly the taxation laws, regulating ESOPs. We also identify the policy rationales advanced by the government for its support of ESOPs.

Our second objective is to examine the reasons why employees participate in ESOPs. We test two contrasting motivations for ESOP participation — a financial motivation and a control motivation — using survey data collected from employees (both shareholders and non-shareholders) at two major Australian companies on their reasons for taking up, or not taking up, shares in their company. Where shares or options are provided to employees as a ‘gift’, we would expect the take up rate on share plans to be typically high as there is no cost to the employee. Our focus is on contributory plans where employees need to make a financial contribution to acquire shares in their employing company. Employees must make a conscious decision to participate and therefore this represents a suitable opportunity to test the employee motivations for share ownership in the Australian context.

Our third objective is to compare the employee motivations for participating in ESOPs with the policy rationales advanced by the government for its support of ESOPs. The government has in the past set specific participation targets⁴ and today continues to promote employee share ownership.⁵ We examine whether the government rationales for ESOPs and the policy settings employed to promote share ownership are consistent with employee motives for share ownership. If there is not an alignment, this implies that government policies aimed at encouraging employee share ownership may not enjoy strong support from employees and companies may not derive the potential benefits of ESOPs.

Understanding the motivations for employee share ownership has significant implications for corporate governance, human resource practice and public policy.⁶ A greater understanding of why employees participate in ESOPs will, for example, shed light on how employee participation in ESOPs may be increased. This will assist companies who have an ESOP or who wish to implement one. A better appreciation of the issue will also permit assessment of the extent to which employee share ownership is capable of

2 House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours: Inquiry into Employee Share Ownership in Australian Enterprises*, Commonwealth Parliament, Canberra, 2000, pp 10–12.

3 *Ibid*, pp 41–2. See also pp xxvi, 15–16, 26, 29, 285, 290–1.

4 For example, in February 2004, the then Minister for Employment and Workplace Relations Kevin Andrews announced a target of doubling ESOP participation in workplaces from 5.5% of employees to 11% by 2009; Lenne, Mitchell and Ramsay, above n 1, at 2.

5 See, eg, Explanatory Memorandum, Tax Laws Amendment (2009 Budget Measures No 2) Bill 2009 (Cth), Parliament of Australia, 2009, [1.25]–[1.26], which identifies the government’s support for employee share ownership.

6 For a more detailed discussion: see M Brown et al, ‘Why Do Employees Participate in Employee Share Plans? A Conceptual Framework’ (2008) 18 *Labour & Industry* 45.

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fulfilling the objectives most commonly cited by those who favour it.⁷ Furthermore, such an appreciation will help determine the desirability and shape of regulatory reform.

The structure of the article is as follows. Part 2 summarises recent research on the incidence of employee share ownership in Australia and the objectives of companies in establishing ESOPs. Part 3 then provides an overview of the regulation of employee share ownership in Australia with a particular focus on recent reform to the taxation incentives provided for participation in ESOPs. Part 4 explains the background and methodology of the study. Parts 5 and 6 set out, respectively, the key characteristics of our sample and our results. In particular, we examine in Part 6 the general attitudes of employees towards ESOPs, employee share ownership patterns, and whether employees have a financial or a control orientation to employee share ownership. Drawing upon the results in Part 6, in Part 7 we compare the attitudes of employees to share ownership with that of the government and explore the implications of this comparison. Part 8 concludes by noting how our research can assist companies design ESOPs that will appeal to employees. We also observe that there is a mismatch between the policy rationales of the government for its support of employee share ownership and the motivations of employees for participating in ESOPs.

2 Employee Share Plans in Australia

2.1 Incidence of ESOPs

The evidence suggests that ESOPs operate in a sizeable number of workplaces in Australia.⁸ A study commissioned by the Commonwealth Department of Employment and Workplace Relations in 2004 found that around 10% of Australian businesses had some form of employee share ownership.⁹ Four percent of businesses surveyed had a 'broad-based' employee share plan, defined in the study as one open to at least 75% of employees. Data from the Australian Bureau of Statistics indicate that increasing numbers of employees are participating in employee share plans: while in 1979, around 1.3% of employees received shares as a form of employment benefit, this had risen to 5.9% of employees by 2004.¹⁰

Further insight into the extent and nature of broad-based employee share ownership in Australia, particularly in larger companies, can be gained from a recent study conducted into employee share plan practice in companies

⁷ These objectives are discussed in Part 2.2 below.

⁸ For a more detailed review of data on the incidence and nature of employee share plans in Australia, see I Landau et al, 'Employee Share Ownership in Australia: Theory, Evidence, Current Practice and Regulation' (2007) 25 *UCLA Pacific Basin LJ* 25; Senate Economics References Committee, *Employee Share Schemes*, Commonwealth Parliament, Canberra, August 2009, [4.1]–[4.13].

⁹ TNS Social Research, 'Employee Share Ownership in Australia: Aligning Interests — Executive Summary', Department of Employment and Workplace Relations, 2004, p 4.

¹⁰ Australian Bureau of Statistics, *Spotlight: Employee Share Schemes*, Australian Labour Market Statistics Cat No 6105.0, ABS, July 2005.

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listed on the Australian Securities Exchange.¹¹ This study found that 57% of respondent companies operated at least one broad-based employee share plan. Significantly more companies reported having a broad-based plan than a narrow-based plan: that is a plan only open to executives. The study also found that broad-based employee share ownership is a recent phenomenon, with over three quarters of those companies with a plan having adopted it since 2000. The most common type of broad-based plan offered was the plan structured to take advantage of the \$1000 tax exemption available through (former) Div 13A of the Income Tax Assessment Act 1936 (Cth).¹² The most common type of equity offered under broad-based employee share plans was options (around 49% of plans), followed closely by shares (around 47% of plans).

2.2 Organisational objectives for establishing ESOPs

There is evidence on the objectives of companies in establishing ESOPs. As part of the study conducted into employee share plan practice in companies listed on the Australian Securities Exchange,¹³ the authors asked respondents who did have an ESOP to select the extent to which they agreed or disagreed that the plan was implemented to achieve certain objectives.¹⁴ Respondents could select from 14 objectives. Ninety seven per cent of respondents either agreed or strongly agreed that the company sought to show its employees that they were valued by the company. Other common objectives were: sharing financial success with employees (95.5%); aligning employee interests with shareholders interests (94.9%); retaining employees (92%); and attracting employees (81.8%). The seventh most popular objective was encouraging increased productivity (76%). The four least common objectives for having the employee share plan were: utilising the tax concession advantage (32.6%); facilitating additional savings by employees for retirement (31.1%); raising capital (6.7%); and inhibiting takeovers (2.2%).

3 Employee Share Plan Regulation: 1974–2011

Employee share plans first became the subject of federal legislation in 1974.¹⁵ The main regulation of employee share plans has always been through taxation law and therefore this is the focus of this section of the article.¹⁶ However, it should be noted that regulation of employee share plans is also found in corporate law.¹⁷ Here, a range of provisions directed principally at

11 I Landau et al, 'Broad-Based Employee Share Ownership in Australian Listed Companies: An Empirical Analysis' (2009) 37 *ABLR* 412.

12 See Part 3 below for further discussion of the taxation aspects of ESOPs.

13 Landau et al, above n 11.

14 Respondents could identify more than one objective and therefore the percentages in this paragraph add to more than 100%.

15 House of Representatives Standing Committee on Employment, Education and Workplace Relations, above n 2, p 9.

16 For a more detailed discussion of the history of taxation laws relevant to employee share plans: see A O'Connell, 'Employee Share Ownership Plans in Australia: The Taxation Law Framework', Research Report, Employee Share Ownership Project, Melbourne Law School, March 2007.

17 For a detailed discussion of the corporate law framework underpinning employee share

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protecting investors in relation to public share offerings also apply to the issuing of securities to employees under ESOPs. The Australian Securities and Investments Commission (ASIC) has issued a Regulatory Guide and Class Order, the effects of which are to provide to companies some relief from a raft of fundraising, licensing and hawking provisions in the Corporations Act 2001 (Cth). This relief is offered, according to ASIC, in recognition of the fact that the primary objective of employee share plans is to foster the ongoing and mutually interdependent relationship between employer and employee, rather than fundraising by companies.¹⁸ Class Order relief is subject to a number of conditions, the most important being that there be a 5% cap on the number of shares that can be issued under an employee share plan, that the recipients be full-time or part-time employees, and that there is a history of disclosure to a well regulated market — in other words, the relief is only available to listed companies.¹⁹ Further regulatory principles for listed companies can be found in the ASX Listing Rules and the Employee Share Scheme Guidelines (issued by the Investment and Fiscal Services Association in 2007 and endorsed by the Australian Institute of Company Directors, the Australian Shareholders Association and the Australian Employee Ownership Association).

As noted above, the main regulation of ESOPs is through taxation law and the general rule governing the taxation treatment of employee shares is that the issuing of shares or rights to an employee ‘in respect of their employment’ is treated as a substitute for cash income for services. Tax is imposed, at marginal income tax rates, at the time the share or right is acquired. The amount to be included in the employee’s assessable employment income is the difference between the market value of the share or right and any consideration provided: that is, the amount of the discount provided to the employee or service provider.

Prior to the introduction of Div 13A of the Income Tax Assessment Act 1936 (Cth) in 1995 the position had been that no tax was imposed until an option was exercised or any restrictions on shares were lifted. Division 13A shifted the tax point to acquisition but permitted taxpayers to defer tax liability in certain circumstances for up to 10 years or to claim an exemption for the first \$500 (later increased to \$1000) worth of discount. Australian law has, since 1995, provided two alternative concessions from the general rule to promote employee share ownership. While these two concessions continue today, they were significantly reformed in 2009. The pre and post-reform regulatory regimes are outlined briefly below.

3.1 The pre-2009 regime

Prior to the 2009 reforms, employees who received shares or options under an employee share plan could elect either to: (i) pay income tax upfront and receive a \$1000 tax exemption (the ‘exemption concession’); or (ii) defer paying income tax on the discount for up to 10 years (the ‘deferral

plans in Australia: see I Landau and I Ramsay, ‘Employee Share Ownership Plans in Australia: The Corporate Law Framework’, Research Report, Employee Share Ownership Project, Melbourne Law School, March 2007.

18 Australian Securities and Investments Commission (ASIC), ‘Employee Share Schemes’, Regulatory Guide No 49, ASIC, February 2004, [49.3]–[49.5].

19 ASIC, ‘Employee Share Schemes’, Class Order No CO 03/184, ASIC, April 2003.

concession').²⁰ In order to be eligible for either of the two concessions, the shares or rights issued under the employee share plan had to satisfy a number of conditions. These included that the share or right was to be in the company which was the employer of the taxpayer (or in the holding company of the employer company); the equity offered was ordinary shares, or rights to ordinary shares; and the employee not have control of more than 5% of the company or be in a position to cast, or control the casting of, more than 5% of the maximum number of votes that might be cast at a general meeting. Finally, in the case of shares (but not options), at least 75% of 'permanent employees' (defined as employees employed full or part time with 36 months prior service) were entitled to participate in the plan or another employee share plan. In order to be eligible for the exemption concession it was also necessary to satisfy three additional conditions: the shares or rights could not be subject to forfeiture; there was a minimum holding period of 3 years, and a requirement that the plan and any related plan for the provision of finance be operated on a non-discriminatory basis. The deferral concession was available if there were restrictions preventing the employee from disposing of the shares or rights, or conditions that could result in forfeiture, and the employee did not elect to be taxed up-front. In such cases, tax would be imposed (i) when the restrictions ended; (ii) on disposal; (iii) when employment ended; or (iv) after 10 years, whichever occurred first. In fact, many employees chose to pay tax up-front and then to obtain the benefit of the capital gains tax 50% discount on disposal of the shares or rights.²¹ This concession was much more attractive to senior executives than the \$1000 exemption. The concessions allowed a company to operate plans that were open only to executives (narrow-based plans) either by having two plans — a broad-based plan and a (more generous) narrow-based plan for shares, or a narrow-based plan that only offered options because, as noted above, shares were subject to more onerous requirements.

3.2 The 2009 reforms

The Commonwealth Treasurer announced significant changes to the regulation of employee share plans in the 2009–2010 federal budget.²² The first major change was to the exemption concession. The government announced that this concession would be limited to 'low and middle-income earners', defined as those with an adjusted taxable income of \$60,000 per annum or less. Second, the government announced that the deferral concession would be abolished completely. These measures were to take effect from 12 May 2009. The ability to defer tax (and potentially to evade tax liability) motivated the proposed changes.²³

The changes were strongly opposed by a range of stakeholders, including

20 Income Tax Assessment Act 1936 (Cth) Pt 3 Div 13A, later repealed by Tax Laws Amendment (2009 Budget Measures No 2) Act 2009 (Cth) Sch 1 Item 18.

21 Income Tax Assessment Act 1997 (Cth) Div 115.

22 Commonwealth of Australia, Budget Paper No 1 — Budget Strategy and Outlook 2009–10, Commonwealth of Australia, Canberra, 2009, p 141. See also the Hon Wayne Swan MP, 'Better Targeting the Employee Share Scheme Tax Concessions', Media Release No 063, 12 May 2009.

23 Swan, *ibid.*

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tax professionals and employer and employee peak organisations.²⁴ A number of major companies suspended their employee share plans in response to the budget announcement.²⁵ The government conceded that the proposed changes may have had unintended consequences and undertook a series of consultative measures.²⁶ Around the same time, the Senate referred an inquiry into employee share plans (including the government's proposed changes) to the Economics References Committee.²⁷ The government subsequently introduced amended legislation to the Parliament in October 2009.²⁸

The government's original proposals for reform were modified significantly in response to stakeholder concerns. Under the amended legislation, which received Royal Assent in late 2009, the exemption concession (renamed the 'reduction concession') is now only available to individuals with an adjusted taxable income of \$180,000 per annum or less.²⁹ The conditions required to access this concession are very similar to those under former Div 13A. The deferral concession remains, but is much more limited. The ability to defer tax on receipt of shares or rights is no longer a matter of election for the employee. Rather, equity received through employee share plans is taxed upfront unless certain conditions are met. Deferral is only available where, under the conditions of the plan, there is a real risk that the shares or rights will be lost or forfeited or where equity is provided through an approved salary sacrifice employee share plan (up to \$5000 worth of shares).³⁰ If deferral is available, tax is payable (i) when there is no real risk of losing or forfeiting the share or right; (ii) when any restrictions that prevent disposal are lifted; (iii) when employment ceases; or (iv) after 7 years, whichever occurs first.³¹

As part of its 2009 reforms to the taxation aspects of ESOPs, the

24 See, eg, Editorial, 'Labor's Share Schemes Blunder', *Australian Financial Review* (Sydney), 19 May 2009; S Lannin, ABC Radio National, 'Employee Share Scheme Changes "Bad Business"', *The PM Program*, 19 May 2009; N Berkovic, 'Union Rage Over Shares Scheme Tax Plan', *The Australian* (Sydney), 20 May 2009; The Treasury, Australian Government, *Reform of the Taxation of Employee Share Scheme: Consultation Paper — June 2009* (Commonwealth of Australia, 2009); and submissions in response, at <<http://www.treasury.gov.au/contentitem.asp?NavId=066&ContentID=1573>> (accessed 12 February 2012).

25 Editorial, *ibid*; N Berkovic, 'Share Scheme Draws Demand for Clarity', *The Australian* (Sydney), 26 May 2009.

26 This consultation process consisted of a consultation paper produced by Treasury, above n 24; a public consultation period on a draft Exposure Bill; and a Board of Taxation consultation on: (i) technical issues relating to the Exposure Bill (due one month after its release); and (ii) the market value of employee share plan equity and whether employees of start-up, research and development and speculative-type companies should be subject to separate arrangements.

27 The Committee was directed to inquire into the operation of such plans in Australia, including: structure and operation of plans; benefits; taxation issues relating to compliance of employers and employees participating in employee share plans; the recent proposed changes to the treatment of plans (including the Assistant Treasurer's policy statement); rules governing plans in other countries; and any other related matters: Senate Economics References Committee, above n 8.

28 The Tax Laws Amendment (2009 Budget Measures No 2) Act 2009 (Cth) received Royal Assent on 14 December 2009.

29 Income Tax Assessment Act 1997 (Cth) s 83A–35.

30 Income Tax Assessment Act 1997 (Cth) ss 83A–105(3)–(4).

31 Income Tax Assessment Act 1997 (Cth) ss 83A–115, 83A–120.

government identified the alignment of employer and employee interests and the promotion of workplace productivity as the basis of its support for ESOPs:

In recognition of the economic benefits derived from employee share scheme arrangements, the rules provide for tax concessions for employees participating in employee share schemes.

Tax support is provided on the grounds that aligning the interests of employees and employers encourages positive working relationships, boosts productivity through greater employee involvement in the business, reduces staff turnover and encourages good corporate governance.³²

It can be argued that the support the government has provided for the development of ESOPs through taxation incentives is very modest. The exemption concession was last increased (from \$500 to \$1000) in 1997. The reluctance of successive governments to increase the value of the concession beyond this amount has been the subject of persistent criticism and in 2009 the Senate Economics References Committee observed that a number of submissions received as part of its inquiry into the government's proposed changes to the regulation of ESOPs had suggested increasing the concession to 'somewhere in the range of \$1500 to \$5000'.³³ In addition, a survey of companies asking, among other things, for views on regulatory reform of ESOPs, found that 77% of respondents supported an increase in the \$1000 concession, which was the area of ESOP regulation most in need of reform according to the respondents.³⁴ Given that this is the concession most commonly accessed in broad-based schemes, it is important to note that the only change has been to make access to the concession more difficult. In summary, although the government has indicated its desire to encourage employee share ownership, the recent reforms provide no additional incentives and in fact make access to the concession more difficult.

An important issue arises from this discussion of the policy rationales identified by the government for its support of ESOPs and the way this support is demonstrated through limited taxation incentives. The issue is the extent to which the policy rationales match what employees perceive as the reasons why they participate in ESOPs. If there is a mismatch then this will limit the achievement of the government's objectives. We therefore now turn to examine the views of employees on ESOPs to understand what motivates employees to invest in these plans.

4 Methodology

4.1 The survey and sample

We sought the views of employees (both shareholders and non-shareholders) through a survey conducted at two major Australian companies with operating ESOPs. The survey asked a broad range of questions which we developed from a review of the literature and some exploratory interviews with human resource managers and union officials.

32 Explanatory Memorandum, Tax Laws Amendment (2009 Budget Measures No 2) Bill 2009 (Cth), Parliament of Australia, 2009, [1.25]–[1.26].

33 Senate Economics References Committee, above n 8, [6.10].

34 Landau et al, above n 11, at 432.

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The employee survey was distributed to 2000 employees of two subsidiaries of one of Australia's largest publicly listed retail companies and employers — 500 randomly selected employees who were shareholders at each company and 500 randomly selected employees who were not shareholders at each company — representing 4.2% of their combined workforce of 48,069.

The employees were entitled to participate in the parent company's Exempt Salary Sacrifice Share Plan (ESSSP) and Deferred Salary Sacrifice Share Plan (DSSSP). These plans were offered to all permanent — that is, full-time and part-time, but not casual or fixed term — employees, with no minimum 'in service period' requirement. Under the tax-exempt plan, eligible employees could sacrifice either \$1000 or \$4500 of salary in exchange for ordinary shares in the parent company, with the allocation price calculated in accordance with the weekly Volume Weighted Average Price. Under the tax-deferred plan, eligible employees could sacrifice a minimum of \$1500 of salary.

The two subsidiaries were chosen as subjects of this study as the parent company's plans required a financial contribution from employees. The employees surveyed were offered the opportunity of participating in only two particular employee share plans and plan design would seem to have a significant effect on the participation decision.³⁵ Existing research indicates, first, that the incidence of broad-based ESOPs is far higher in larger companies than smaller companies³⁶ and, furthermore, in publicly listed companies than in unlisted companies;³⁷ second, that ESOPs are particularly common in the retail sector;³⁸ and third, that the types of plan offered by the two subsidiaries were fairly characteristic of the plans offered by publicly listed companies in general.³⁹ Thus, our results may be more generalisable than our sampling method would suggest.⁴⁰

35 Brown et al, above n 6, at 59–60.

36 I Landau et al, 'An Overview of Existing Data on Employee Share Ownership in Australia', Working Paper, Employee Share Ownership Project, Melbourne Law School, 2007, p 5. Cf Landau et al, above n 11.

37 A O'Connell, 'Employee Share Ownership in Unlisted Entities: Objectives, Current Practices and Regulatory Reform', Working Paper, Employee Share Ownership Project, Melbourne Law School, 2008, pp 9–10. See also Landau et al, above n 11; Landau et al, above n 36, p 5.

38 Lenne, Mitchell and Ramsay, above n 1, at 12, citing data from the 1995 Australian Workplace Industrial Relations Survey. But see Landau et al, above n 36, p 4, citing research undertaken on behalf of the Department of Workplace Relations' Employee Share Ownership Development Unit in 2004.

39 For example, Landau et al, above n 11, found that significant proportions of broad-based ESOPs offered by companies listed on the Australian Securities Exchange involve, as here, the restriction of eligibility to permanent full time and part time employees (62.9%), the offer of shares (46.7%), the provision of securities at market value (68%), no contribution from the employer to the value of the securities (47.7%), no restrictions (such as limited voting rights) on entitlements (80.8%), no restrictions on the disposal of employee securities (51.7%), no minimum holding period (51.7%), no maximum holding period (71.2%), no minimum period of employment requirement (42%) and no link with performance hurdles (57.4%). Furthermore, the authors found that 26.6% of plans which require an employee contribution involve a salary-sacrificing arrangement.

40 M Walter, 'Surveys and Sampling', in M Walter (Ed), *Social Research Methods: An Australian Perspective*, Oxford University Press, South Melbourne, 2006, p 198.

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4.2 Survey instrument, administration, data collection and response rate

The employee survey was an anonymous, self-administered, structured questionnaire, with a combination of closed questions with five-point likert-scales. Two different survey instruments were used, one for employee shareholders and another for employee non-shareholders. Both surveys contained the same 21 questions (with a total of 121 items), however, the former involved an additional nine questions (with a total of 30 additional items).

The employee survey was posted to recipients' home addresses with a covering letter from the parent company and the research team. A second copy of the survey was sent approximately 2 weeks later, followed by a 'reminder' letter a week after that. In total, 553 employees completed and returned the survey, giving a final response rate of 28.6% once the 64 undeliverable surveys are accounted for. This level of response is common in surveys of this type in this field.⁴¹

5 Sample Characteristics

5.1 Extent of employee share ownership

Our sample contained 354 persons who were participants in their respective employer's ESOP (shareholders) (64%) and 199 non-participants (non-shareholders) (36%).

5.2 Demographic characteristics

Our sample, like the study population, was dominated by women: 82.3% of our respondents were women and 16.7% of respondents were male. The study population was also noticeably skewed towards women (72.4%). Most respondents were middle-aged, with 68.1% being 40 years or over and the average and median ages being 44.7 and 46.0 respectively. High school was the highest education qualification attained by the vast majority of respondents (70.3%). Only 26.7% of respondents had attained a qualification above high school level, with less than one in 10 (9.5%) holding undergraduate or postgraduate degrees. Almost three-quarters of respondents reported gross annual income below \$40,000, with the average being \$34,406. Only 12.1% of respondents earned over \$60,000 per annum, and only 3.0% over \$100,000 per annum.

Almost 50% of respondents had worked for their employer for 11 or more years, with the average length of service being 13.1 years. Further, 56.3% of respondents classified themselves as sales workers, 17.0% as clerical or administrative workers, 3.7% as machinery operators and 2.2% as technicians

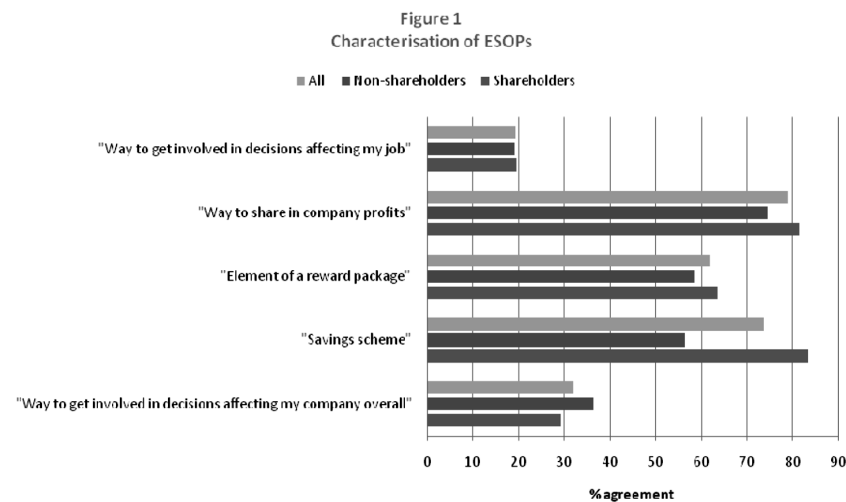
⁴¹ See, eg, A Pendleton, 'Employee Participation in Employee Share Ownership: An Evaluation of the Factors Associated with Participation and Contributions in Save as You Earn Plans' (2010) 21 *British Jnl of Management* 555 at 559; A Pendleton, 'Sellers or Keepers? Stock Retentions in Stock Option Plans' (2005) 44 *Human Resource Management* 319 at 324, who achieved a response rate of 24% in each survey.

or trades workers. The remaining fifth were managers (14.2%) or professionals (6.6%). Forty two and a half percent of respondents worked full-time — considerably more than the figure of 15.8% for the study population — while 57.5% were on part-time contracts. Overall, the average number of hours worked per week was 32.0, with just under half (49.7%) of all respondents working 31 hours or more per week.

6 Results

6.1 General attitudes towards ESOPs

The survey asked respondents a number of questions to measure their attitudes towards employee share ownership in general (Figure 1). In this section of the article we set out the combined results for both shareholders and non-shareholders before investigating the differences in the responses of these two groups in Parts 6.2 and 6.3 below.

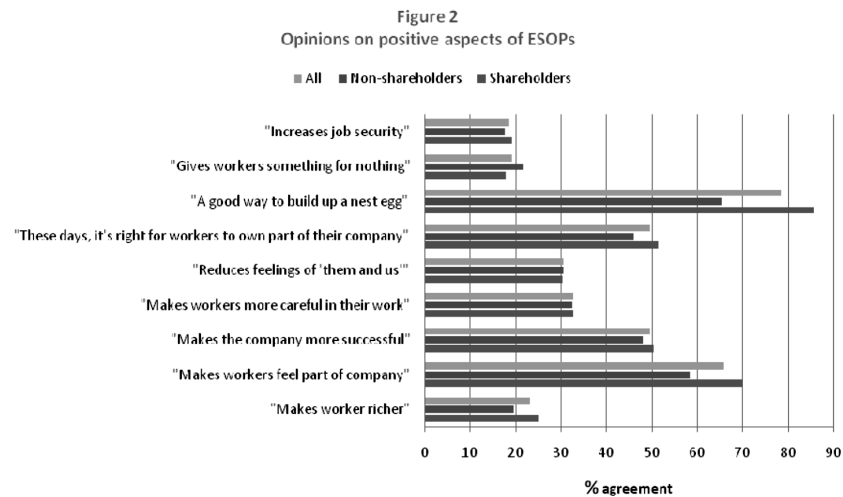


Overall, respondents most commonly characterised employee share ownership as 'a way to share in company profits' (78.9%), followed by 'a savings plan' (73.7%) and 'an element of a reward package' (61.7%) (Figure 1). Less than one third of respondents saw employee share ownership as 'a way to get involved in decisions affecting [their] company overall' (31.8%) or 'a way to get involved in decisions affecting my job' (19.3%).⁴² Using items developed by Dewe, Dunn and Richardson to measure the level of agreement with commonly cited advantages of employee share ownership,⁴³ respondents most frequently took the view that employee share ownership 'is a good way to build up a nest egg' (78.3%), followed by 'makes

42 This set of questions was adopted from the International Survey on Employee Share Ownership and Work Values, conducted by the Research Centre in Management (Centre de Recherche en Gestion des Organisations) at the University of Montpellier II.

43 P Dewe, S Dunn and R Richardson, 'Employee Share Option Schemes: Why Workers Are Attracted to Them' (1988) 26 *British Jnl of Industrial Relations* 1 at 10–11.

workers feel “part of the company” (65.8%) and ‘makes the company more successful’ (49.5%) (Figure 2). Just under half of all respondents felt that ‘these days, it’s right for workers to own part of their company’ (49.5%), while approximately 3 in 10 felt that employee share ownership reduces feelings of ‘them and us’ (30.4%) and makes workers more careful in their work (32.6%). Only 18.6% of respondents considered that employee share ownership increased job security. Running the questions together as a scale ($\alpha=0.8194$), respondents generally agreed with the positive statements about ESOPs ($\bar{X}=3.19$). Of all demographic variables, age was the only one which had a significant relationship with this scale, with older respondents tending to be more positive about employee share ownership (Sig T=0.0036).⁴⁴



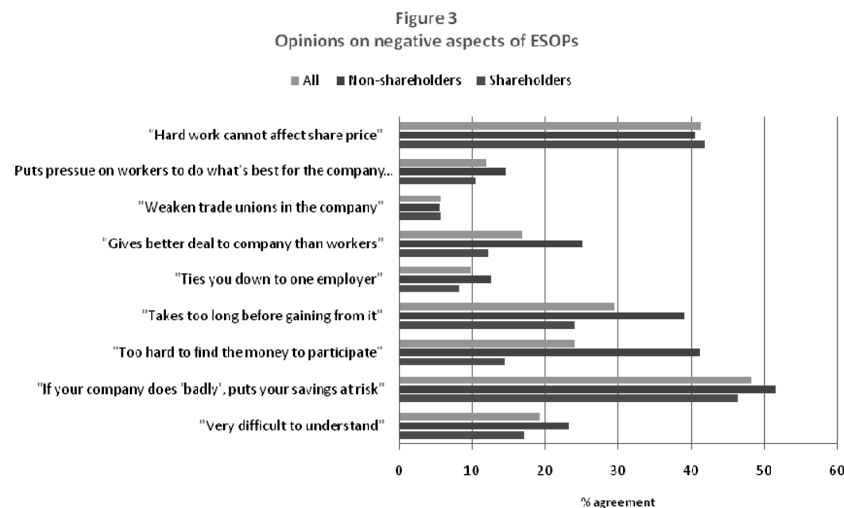
It can be observed that there is some degree of alignment between the views of employees regarding ESOPs and the objectives of companies in establishing ESOPs. As we have seen, financial motives featured most prominently in the responses of employees regarding ESOPs. We saw in Part 2.2 above that the second most popular reason for companies establishing ESOPs was sharing financial success with employees. However, the most popular reason given for companies establishing ESOPs was showing employees that the company values them and the third most popular reason was aligning the interests of employees and shareholders. In other words, a focus on the quality of their relationship with employees featured prominently as a rationale for why companies establish ESOPs. This rationale also featured in the responses of employees, but not to the same extent. As we have seen, about 66% of employees stated that an advantage of employee share ownership is making employees feel part of the company and almost 50% of

⁴⁴ Here, we ran an ordinary least squares regression with the ‘opinions on advantages of employee share ownership’ scale as the dependent variable and part-time status, age, education level, gender, length of service, trade union membership, income and occupational group as independent variables. Note that a ‘Sig T’ value of less than or equal to 0.05 is considered statistically significant.

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employees stated that employee share ownership makes the company more successful.

We also sought to identify what employees perceived to be the negative aspects of ESOPs. In relation to commonly perceived disadvantages of employee share ownership,⁴⁵ respondents most frequently agreed with the statement 'if your company does badly, [ESOPs] put your savings at risk' (48.2%), followed by 'hard work cannot affect share price' (41.3%), 'it takes too long before gaining from [participation]' (29.4%) and 'it's too hard to find the money to participate' (24.0%) (Figure 3). Only a minority felt that ESOPs 'are very difficult to understand' (19.3%), 'give a better deal to the company than the workers' (16.8%), 'tie you down to one employer' (9.7%) and 'weaken trade unions in the company' (5.6%). Overall, treating the questions as a scale ($\alpha=0.7889$), respondents generally did not agree with the propositions on the negative aspects of ESOPs ($\chi^2=2.80$).⁴⁶ This was particularly the case for those with a high income (Sig T=0.0193) and those in a managerial or professional position (Sig T=0.0072).⁴⁷



6.2 Employee share ownership patterns

As noted in Part 5.1 above, 64% of respondents were employee shareholders, while 36% were not. In this section, we look more closely at the share

⁴⁵ Dewe, Dunn and Richardson, above n 43, at 11–12.

⁴⁶ In line with the structure of most of the questions in the survey instruments, responses were largely coded as follows: 'strongly disagree' (1); 'disagree' (2); 'neutral' (3); 'agree' (4); and 'strongly agree' (5). Therefore, a mean score greater than 3 indicates a generally positive response, while a mean score less than 3 (as here) indicates a generally negative response.

⁴⁷ In a similar fashion to n 44 above, here we ran an ordinary least squares regression with the 'disadvantages of employee share ownership' scale as the dependent variable and part time status, age, education level, gender, length of service, trade union membership, income and occupational group as independent variables.

ownership patterns of the employee shareholders.⁴⁸ For almost 60% of shareholders, shares in their employer were the only shares they held. Those who owned shares in companies other than their employer tended to be older (Sig T=0.0001) and to work part-time (Sig T=0.0115).⁴⁹ The average number of shares held by employees in their employer companies was approximately 247, with just over three-quarters of respondents owning less than 500 shares. The number of shares held tended to increase with age (Sig T=0.0104), income (Sig T=0.0183) and length of service (Sig T=0.0001); however, ownership of non-employer shareholdings had the most significant effect on this variable.⁵⁰ Almost 95% of respondents considered the number of shares they held to be 'a very small number' or 'not very many'.

More than three quarters of shareholders (78.0%) reported that they 'usually' participate in employee share offerings when made, more than half (52.4%) that they invest in shares of their company 'whenever possible' and some 44.5% that they prefer to reinvest, rather than keep, dividend income. Moreover, a large majority (70.0%) indicated that they would 'definitely participate' in their company's next ESOP. Treating the four items as a scale measuring ongoing and intended future ESOP participation ($\alpha=0.7509$), such participation was strongly related to having a positive view of employee share ownership (Sig T=0.0000) and low intention to turnover (Sig T=0.0126).⁵¹

The financial performance of shares could impact on the willingness of employees to participate in a contributory share scheme. Approximately four in 10 (40.4%) respondents felt that their shares had dropped in value, 14.5% considered that their shares had remained stable, while three in 10 (30.4%) considered their shares to have increased in value. The remaining 14.8% of respondents did not keep track of the value of their shares. The great majority of respondents had either held their shares for less than 2 years (75.6%) or more than 10 years (14.8%), with few (9.5%) in between. While respondents had not held their shares for very long they did intend to hold on to them: nearly all respondents (92.6%) intended to keep their shares for 'a substantial period of time' or 'indefinitely', while less than 1% of respondents intended

48 Except where otherwise noted, the questions discussed in this section were adopted from the International Survey on Employee Share Ownership and Work Values, above n 42.

49 This was the result of an ordinary least squares regression with ownership of other shares acting as the dependent variable and gender, age, education level, income, trade union membership, length of service, occupational group and part-time status as the independent variables.

50 Here we ran two ordinary least squares regressions with the number of shares held as the dependent variable in both. In the first regression, the independent variables were gender, age, education level, income, trade union membership, length of service, occupational group and part-time status. In the second regression, we added ownership of non-employer shares as a further independent variable and it proved to be the only significant variable (Sig T=0.0000), suggesting that the number of shares held and ownership of other shares are highly correlated. This was confirmed by a logistic regression which showed a significant positive relationship (Sig T=0.0000) between ownership of other shares (the dependent variable) and the number of shares held (the independent variable).

51 Here we ran two ordinary least squares regressions with the 'ongoing and intended future participation' scale as the dependent variable and the 'opinions on advantages of employee share ownership' scale and the 'turnover intention' scale as independent variables respectively. The results remained the same when various demographic variables were added as additional independent variables.

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to sell their shares after satisfying the minimum holding period. Furthermore, only 2.6% of shareholders agreed with the statement 'I usually sell my company's shares as soon as I can'.⁵²

Financial investments of any variety carry risks as well as benefits so we measured the extent to which respondents felt they understood the ESOP in their company. While only 12.2% of respondents felt that they did not understand 'anything' about their company's ESOP, the level of understanding among shareholders was not particularly high. More than half (51.8%) did not understand how voting rights work, 43.4% reported not fully understanding the documents they received about their shares and fewer than three in ten (29.0%) felt that the information they received about their voting rights was 'clear and easy to understand'.

We asked respondents for their views on aspects of employee share ownership. Overall, shareholders ranked 'getting the maximum financial payoff' as the most important aspect of employee share ownership (68.0%), followed by fair treatment (66.8%), a sense of community ('that we're all in this together') (58.2%), employee influence over the overall management of the company (42.3%), and individual influence over decisions affecting daily work (38.2%).⁵³

One factor identified in earlier research as a potential driver of ESOP participation is ESOP satisfaction. Using a scale developed by Rosen, Klein and Young⁵⁴ to test for satisfaction with ESOP participation ($\alpha=0.8648$), we found that, overall, shareholders were more satisfied than not with their ESOP ($\chi^2=3.36$). Significantly, more than 8 in 10 (80.4%) respondents indicated that they were 'proud' to own shares in their company and more than half (51.7%) that it was 'very important' to them that their company had an ESOP. Only 4.5% of shareholders 'didn't care' about their company's ESOP.

6.3 Financial and control orientations to employee share ownership

There has been a long-running debate amongst scholars, both at the normative and empirical levels, as to whether employee shareholders bring a financial or a control orientation to ownership.⁵⁵ On the one hand, in line with the theory that employee share ownership promotes industrial democracy,⁵⁶ some authors argue that employee-owners primarily view their shareholding as a

52 This set of questions was adopted from M Poole and G Jenkins, *The Impact of Economic Democracy: Profit-Sharing and Employee-Shareholding Schemes*, Routledge, London, 1990, p 127.

53 These questions were adopted from the National Centre for Employee Ownership, 'List of Survey Items for ESOP Companies', NCEO, 2007.

54 C Rosen, K Klein and K Young, *Employee Ownership in America: The Equity Solution*, Lexington Books, Lexington, Massachusetts, 1986, pp 67-78.

55 Brown et al, above n 6, at 49-51.

56 See, eg, P Derrick and J F Phipps (Eds), *Co-Ownership, Co-Operation and Control: An Industrial Objective*, Longmans, London, 1969; J Vanek (Ed), *Self-Management: Economic Liberation of Man*, Penguin Books, Baltimore, 1975; G Winther and R Marens, 'Participative Democracy May Go a Long Way: Comparative Growth Performance and Employee Ownership Firms in New York and Washington State' (1997) 18 *Economic and Industrial Democracy* 393 at 394.

means by which to increase control over company decision-making. On the other hand, some authors argue that employees primarily seek financial gain from participation in an ESOP.

Kruse, writing against the prevailing view in 1981, discussed the possibility that employee shareholders may, like most ordinary non-employee shareholders, define ownership purely in terms of rights to the profits generated by the investment capital.⁵⁷ Several years later, investigating the effects of share ownership on employees with varying degrees of control within employee-owned firms, French noted that three-quarters of the 566 employees surveyed viewed their shareholding as an investment, rather than a chance to become an owner.⁵⁸ French argued that most literature on employee share ownership tended to proceed from the assumption that, when they become shareholders, employees expect greater control over decision-making, overlooking the possibility that they in fact expect profits.⁵⁹ In doing so, he cited a number of studies that cast doubt on such an assumption⁶⁰ and also a number of studies that explicitly supported the latter view, including research by Hammer and Stern who concluded from their study of a furniture factory purchased by the employees to prevent its closure that, contrary to their predictions, employee share ownership did not imply any desire for changes in the distribution of control and that '[r]ather than having any "collective consciousness" of ownership, many employee-owners saw themselves as traditional financial investors'.⁶¹

Klein developed three theoretical models to explain the conditions necessary for employee ownership to have a positive influence on employee attitudes: first, the 'intrinsic satisfaction model', according to which the simple fact of ownership increases employee satisfaction with the company; second, the 'instrumental satisfaction model', according to which employee ownership increases satisfaction by increasing employee influence in company decision-making; and third, the 'extrinsic satisfaction model', which holds that employee ownership increases organisational commitment only where such ownership is financially rewarding.⁶² Klein noted the 'surprising' lack of attention given in the literature to this last hypothesis⁶³ and, testing her models against a survey of 2804 ESOP participants at 37 companies with operating

⁵⁷ D Kruse, *The Effects of Worker Ownership upon Participation Desire: An ESOP Case Study*, BA Thesis, Harvard University, 1981, as cited in J L French, 'Employee Perspectives on Stock Ownership: Financial Investment or Mechanism of Control?' (1987) 12 *Academy of Management Review* 427 at 429.

⁵⁸ French, *ibid.*

⁵⁹ *Ibid.*, at 428–9.

⁶⁰ For example, French referenced R Long, 'Desires for and Patterns of Worker Participation in Decision Making After Conversion to Employee Ownership' (1979) 22 *Academy of Management Jnl* 611, whose truck firm studies found no significant difference between the desire to participate in decision-making on the part of worker-owners and workers without shares: *ibid.*, at 428.

⁶¹ T Hammer and R Stern, 'Employee Ownership: Implications for the Organizational Distribution of Power' (1980) 23 *Academy of Management Jnl* 78 at 96.

⁶² K Klein, 'Employee Stock Ownership and Employee Attitudes: A Test of Three Models' (1987) 72 *Jnl of Applied Psychology* 319 at 320–1.

⁶³ *Ibid.*, at 320.

ESOPs, found support for both the extrinsic and instrumental models.⁶⁴

We extend this debate by examining whether employee orientations towards ownership affect the decision to participate in an ESOP. Research into this latter question is limited; however, two early studies merit noting. First, in 1981, Greenberg found as part of his interview and survey research at 14 worker-owned and managed enterprises in the United States that, 'almost without exception', people joined the cooperatives for financial rather than 'political' reasons, such as the desire to participate in the processes of industrial self-government.⁶⁵ Second, from their analysis of participation rates in Save-As-You-Earn (SAYE) share option plans in two UK companies, Baddon et al found that over 90% of participants surveyed rated the potential financial rewards as 'very' or 'quite' important in their motives for participation in the SAYE plan; and over 80% rated the fact that there was no risk involved and that it was an 'easy way of saving' as 'very' or 'quite' important.⁶⁶ The authors concluded by observing that the financial aspects of share ownership appear to dominate the motives for participation in SAYE plans.⁶⁷

More recently, Pendleton has drawn upon a data source of 2,638 employees in three UK companies with well-established SAYE plans to analyse the demographic and attitudinal factors which influence the decision of employees to participate in ESOPs.⁶⁸ Pendleton sought to assess the orientation of employees towards the share plan through constructing two variables: one single item five-point scale asked employees how far 'share schemes give employees more of a say in how the company is run' and a similar scale asked respondents to indicate the extent to which they saw the share plan as delivering financial benefits to workers.⁶⁹ He found that a control orientation had a 'tiny' effect on the decision to participate, but that financial orientation was 'positive and significant'.⁷⁰ He also found that employee attitudes towards the plan itself were much more significant in influencing the decision-making

64 Ibid, at 327. See also K Klein and R Hall, 'Correlates of Employee Satisfaction with Stock Ownership: Who Likes an ESOP Most?' (1988) 73 *Jnl of Applied Psychology* 630 at 637, where the authors, now focusing at the individual rather than the company level of analysis, again found support for both the extrinsic and instrumental models; D Hallock, R Salazar and S Venneman, 'Demographic and Attitudinal Correlates of Employee Satisfaction with an ESOP' (2004) 15 *British Jnl of Management* 321 at 330, who found from their survey of employees at a medium-sized, privately-held trucking firm with an ESOP that 'an employee's perceived influence on decision-making was a significant correlate of ESOP satisfaction but not as significant as was stock performance'. Cf A Pendleton, N Wilson and M Wright, 'The Perception and Effects of Share Ownership: Empirical Evidence from Employee Buy-Outs' (1998) 36 *British Jnl of Industrial Relations* 99 at 116, whose results from a survey of employees at four employee-owned UK bus companies lend support for the intrinsic and instrumental satisfaction models, not the extrinsic model.

65 E Greenberg, 'Industrial Self-Management and Political Attitudes' (1981) 75 *American Political Science Review* 29 at 33-4.

66 L Baddon et al, *People's Capitalism? A Critical Analysis of Profit-Sharing and Employee Share Ownership*, Routledge, London, 1989, pp 253, 255.

67 Ibid, p 255.

68 A Pendleton, 'Employee Participation in Employee Share Ownership: An Evaluation of the Factors Associated with Participation and Contributions in Save As You Earn Plans' (2010) 21 *British Jnl of Management* 555.

69 Ibid, at 561.

70 Ibid, at 565.

process than attitudes towards the company, concluding that participation is 'driven primarily by instrumental concerns centred on financial returns'.⁷¹ On balance, existing studies suggest that employees approach participation in an ESOP with a financial orientation⁷² so we developed the following two hypotheses:

Hypothesis 1: Employees who adopt a financial orientation towards employee share ownership are more likely to participate in an ESOP than those who do not adopt a financial orientation.

Hypothesis 2: Employees who adopt a control orientation towards employee share ownership are less likely to participate in an ESOP than those who do not adopt a control orientation.

In testing these hypotheses, share ownership was the dependent variable, while financial orientation and control orientation acted as the independent variable(s) as appropriate. In this sense, our approach was similar to Pendleton's;⁷³ however, instead of using single-item scales to measure the independent variables, we used multi-item scales in order to increase reliability. For financial orientation, we asked respondents to indicate the extent to which they agreed that employee share ownership is 'a savings plan', 'an element of my rewards package' and 'a way to share in my company's profits', respectively. For control orientation, we asked respondents to indicate their level of agreement with the statements 'employee share ownership is a way to get involved in decisions affecting my company overall' and 'employee share ownership is a way to get involved in the decisions affecting my job'.

At first glance, the overall pattern of responses for shareholders and non-shareholders to these questions was not radically different. Indeed, shareholders and non-shareholders alike tended to consider employee share ownership in financial, rather than control, terms. As Figure 1 demonstrates, for both shareholders and non-shareholders, the most common characterisations of employee share ownership were financial, while the views that employee share ownership is a way of increasing involvement in decisions affecting the company overall and decisions affecting individuals' jobs were similarly rare amongst both groups.

However, further analysis provides strong support for our first hypothesis. As set out in Table 1, shareholders were significantly more likely than non-shareholders to consider employee share ownership 'a savings plan' and 'a way to share in my company's profits'. When the items measuring financial orientation were treated as a scale ($\alpha=0.67$), the mean score for shareholders was significantly higher than for non-shareholders. Therefore, in our sample, financial orientation acts as a good predictor of ESOP participation.

⁷¹ Ibid, at 567.

⁷² Brown et al, above n 6, at 49.

⁷³ Pendleton, above n 68, at 560-1.

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Table 1
Financial Orientation

Item	Shareholders		Non-shareholders	
	\bar{x}	σ	\bar{x}	σ
'A savings plan'	4.01	0.75	3.50***	0.85
'An element of a reward package'	3.60	0.87	3.48	0.87
'A way to share in my company's profits'	3.94	0.74	3.77**	0.79
Financial orientation scale ($\alpha=0.67$)	3.85	0.59	3.59	0.67

* $p < 0.10$; ** $p < 0.05$; *** $p < 0.01$, where p signifies significant difference in the means of shareholders and non-shareholders

Supplementary support for Hypothesis 1 is provided by some of the other items in our survey. For example, in relation to the commonly cited 'positives' of employee share ownership,⁷⁴ shareholders were significantly more likely than non-shareholders to consider employee share ownership 'a good way to build up a nest egg' ($p=0.0000$). Furthermore, there were significant differences in the way shareholders and non-shareholders responded to the supposed financial 'negatives' of employee share ownership — namely, that 'you have to wait too long before you can make money' from ESOP participation or that 'it's too difficult to find the money to participate'. Consistently with our hypothesis, shareholders were considerably less likely to agree with either statement.

Table 2
Control Orientation

Item	Shareholders		Non-shareholders	
	\bar{x}	σ	\bar{x}	σ
'A way to get involved in decisions affecting my company overall'	2.99	0.94	3.03	1.02
'A way to get involved in decisions affecting my job'	2.73	0.98	2.72	0.99
Control orientation scale ($\alpha=0.75$)	2.86	0.59	2.87	0.89

* $p < 0.10$; ** $p < 0.05$; *** $p < 0.01$, where p signifies significant difference in the means of shareholders and non-shareholders

The data, however, did not support our second hypothesis. As Table 2 shows, there were no significant differences between shareholder and non-shareholder responses to the control orientation questions or the control orientation scale ($\alpha=0.75$), meaning that those with a control orientation were

74 See, eg, Dewe, Dunn and Richardson, above n 43.

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no more or less likely than others to participate in the ESOP.⁷⁵

7 A Comparison of Employee and Government Attitudes to ESOPs

There is a large body of literature which has proposed rationales for employee share ownership. Some of these rationales include improving workplace productivity (as a result of employees feeling that they have a direct interest in the performance of the company and/or through lowering monitoring costs by aligning employee interests with those of the company); promoting workplace cooperation and harmony through reducing the 'them' and 'us' mentality between employers and employees; enhancing industrial democracy through bringing employees into corporate governance; increasing employees' understanding of how the economy is run; providing employers and employees with greater flexibility in determining the nature and mix of remuneration packages; contributing to national savings through providing employees with an additional avenue for savings and investment; promoting innovation, particularly in small and medium unlisted companies and sunrise industries; and facilitating succession planning in small businesses through enabling employee buyouts.⁷⁶

The current Federal Government supports ESOPs as they are seen to have the capacity to align employer and employee interests thereby promoting workplace productivity.⁷⁷ The government believes the taxation incentives it provides stimulate participation in ESOPs resulting in benefits for companies and the economy.⁷⁸ However, these rationales are not those most favoured by employees when they are asked for their opinions on employee share ownership. Our research indicates that employees have a financial orientation to ESOPs. They most commonly view ESOPs as a way to share in company profits, a savings plan, an element of a reward package, and 'a good way to build up a nest egg'. Our hypothesis that employees who adopt a financial orientation to employee share ownership are more likely to participate in an ESOP received strong support from our statistical analysis. Alignment of employer and employee interests did feature in the responses of employees. For example, 66% of employees stated that an advantage of employee share ownership is that it makes employees feel part of the company and almost 50% stated that it makes the company more successful. However, these rationales featured much less prominently in employee responses than financial considerations.

When we compare the attitudes of employees and the government to ESOPs, it is noticeable that the financial orientation motivations for ESOP participation are not identified by the government. There is no mention of ESOPs being a useful or desirable savings plan for employees, or a way to reward employees, or a way to share in company profits — all matters that are

⁷⁵ We also tested our hypotheses using regression analysis which generated the same results. The results are available from the authors.

⁷⁶ For further discussion of the possible rationales for employee share ownership, see Landau et al, above n 8.

⁷⁷ See n 32 above and accompanying text.

⁷⁸ Ibid.

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important to employees. Instead, the government rationales are alignment of the interests of employees and employers, the encouragement of positive working relationships, boosting productivity through greater employee involvement in the business and reduction of employee turnover.⁷⁹ It might be possible to argue that the taxation concessions are a means of reducing the costs to employees of participating in an ESOP and that therefore to some extent the government supports financial orientation motivations for ESOP participation. However, the rationales articulated by the government do not acknowledge financial orientation motives. In addition, even if it is thought that the taxation concessions do support employee financial orientation motivations, the recent government changes undercut this support. The changes restrict the taxation concessions available to those who participate in ESOPs. Also, the government's decision to keep the modest taxation exemption concession at \$1000 since 1997, despite calls for an increase,⁸⁰ means that the value of the concession has decreased over time.

Another indication of the mismatch between government rationales for its support for ESOPs and employee attitudes to ESOPs arises from the statement by the government that greater involvement by employees in the business is a reason for its support of ESOPs. Our research shows that the control orientation towards ESOPs (that share ownership is viewed as a way of increasing employee involvement in decision-making at work) is less important to employees than a financial orientation.

The implications of this finding of a mismatch between the policy rationales identified by the government for its support of ESOPs and our research identifying the motivations of employees for participating in ESOPs are important. The findings suggest that the government policy of supporting employee share ownership has not been based on a sound understanding of what motivates employees to participate in such plans. In addition, the recent government decisions (restricting the taxation incentives available to those who participate in ESOPs and keeping the modest \$1000 taxation exemption concession at the same level since 1997) are likely to have the effect of making employee participation in ESOPs less appealing given that these decisions impact upon the financial value of ESOPs to employees.

8 Conclusion

Broad based employee share plans are found in many Australian companies. The taxation laws applying to ESOPs, which are the main way in which ESOPs are regulated, provide financial incentives to employees who participate in ESOPs. However, these financial incentives have been reduced as a result of policy decisions by the government. It would seem that, in part, this is because the government views ESOPs not as a way for employees to benefit financially but as a way to align the interests of employees and employers and increase productivity through greater involvement in the business. However, these are not the reasons that motivate employees to participate in ESOPs. There are two schools of thought on employee motives for share ownership: on the one hand, a financial orientation and, on the other

⁷⁹ Ibid.

⁸⁰ See Part 3.2 above.

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hand, a control orientation. The data in our study suggest that employees most commonly characterise employee share ownership as a way to share in company profits but they also view ESOPs as a savings plan and an element of a reward package. We found support for the hypothesis that employees who adopt a financial orientation towards employee share ownership are more likely to participate in an ESOP than those who do not. Employees were much less likely to view ESOPs as a way to become involved in decisions that affect the company or the employee's job. The results of our research can assist companies in designing ESOPs that appeal to employees and the results indicate the desirability of companies understanding employee motivations prior to designing and implementing ESOPs. The results also suggest that the government pay close attention to the financial implications for employees of policy initiatives intended to increase the level of employee participation in ESOPs.



Enforcing Upstream: Australian Health and Safety Inspectors and Upstream Duty Holders

Elizabeth Bluff* Richard Johnstone† Maria McNamara‡
and Michael Quinlan§

The 'new style' occupational health and safety legislation implemented in Australia from the late 1970s changed the character of OHS legal obligations, establishing general duties supported by process, performance and, more rarely, specification standards,¹ and extending obligations to those who propagate risks as designers, manufacturers, importers or suppliers — the 'upstream duty holders'. This article examines how OHS agencies inspect and enforce OHS legislation upstream, drawing on empirical research in four Australian states and relevant case law. We argue that upstream duty holders are an increasing area of attention for OHS inspectorates but these inspectorates have not yet risen to the challenge of harnessing these parties to help stem, at the source, the flow of risks into workplaces.

Introduction

Until 30 years ago Australian occupational health and safety (OHS) legislation focused almost exclusively on the obligations of employers and occupiers of industrial premises, construction sites and shops to protect workers employed or engaged at those workplaces.² There were also some requirements relating to plant design, manufacture and supply in specific legislation for boilers and pressure vessels, lifts and cranes, scaffolding and machinery supplied to particular industries.³ Since that time, the application and scope of the

* Dr Elizabeth Bluff, BSc (Hons), MAppSc (OHS), PhD Research Fellow, National Research Centre for OHS Regulation, School of Regulation, Justice and Diplomacy, College of Asia and the Pacific, The Australian National University.

† Professor Richard Johnstone, BBusSci(Hons), LLB (Hons), PhD Griffith Law School, Griffith University, Queensland; National Research Centre for OHS Regulation, The Australian National University; Work and Health Research Team, The University of Sydney.

‡ Dr Maria McNamara, BA(AppPsych), MA(Social and Organisational Psychology), PhD Work and Health Research Team and Department of Ageing, Work and Health, The University of Sydney.

§ Professor Michael Quinlan, BEc, PhD, School of Organisation and Management, University of New South Wales; Work and Health Research Team, The University of Sydney; Business School, University of Middlesex.

1 L Bluff and N Gunningham, 'Principle, Process, Performance or What? New Approaches to OHS Standards Setting', in L Bluff, N Gunningham and R Johnstone (Eds), *OHS Regulation for a Changing World of Work*, The Federation Press, Sydney, 2004, pp 17–27.

2 For discussion of the relevant legislation, its application, obligations and provisions relating to particular hazards and preventive measures, see N Gunningham, *Safeguarding the Worker: Job Hazards and the Role of the Law*, The Law Book Company, Sydney, 1984, Ch 7.

3 For example, the Lifts and Cranes Act 1967 (Vic), Boilers and Pressure Vessels Act 1970 (Vic) and the Scaffolding Act 1971 (Vic) prescribed minimum standards for these items of

Australian OHS statutes has broadened to cover all workplaces and to encompass obligations for a much wider range of persons, such as individuals or officers of corporate entities.⁴ Among other duty holders, the OHS statutes now typically impose obligations on designers, manufacturers, suppliers and importers of plant, and manufacturers, suppliers and importers of substances. In some jurisdictions designers and/or constructors of buildings or structures also have duties.⁵

Collectively, these duty holders are sometimes referred to as 'upstream duty holders' because of the potential for their acts or omissions to give rise to risks that flow through to employers, workers or members of the public who encounter their plant, substances, buildings or structures in workplaces downstream. That this impact may be substantial is illustrated by the multiple fatalities and serious injuries involving poorly designed and constructed tractors and all terrain vehicles prone to rolling over, the supply of asbestos containing products without adequate warnings of the fatal health risks, or more generally the high proportion of fatalities and compensable injuries in Australia that are attributable to poor design and manufacture of workplace equipment.⁶

In Australia, for constitutional reasons, the regulation of OHS has predominantly been a matter for state and territory governments rather than the Commonwealth, although the latter has taken a more prominent role in the last 5 years, culminating in efforts to 'harmonise' OHS legislation.⁷ At the time of this research, the upstream duties differed between the nine general OHS statutes but in broad terms they require duty holders to ensure, so far as is 'reasonably practicable' (or equivalent expressions),⁸ that the plant, substance, building or structure is safe and without risks to health (or that risks

plant, and the Labour and Industry Act 1958 (Vic) required that machinery must be guarded before sale. For further summaries of legislation relating to specific types of plant see Gunningham, above n 2, pp 195–7, 375–91; Worksafe Australia, *Economic Impact Analysis on the National Standard for Plant*, Canberra, AGPS, 1996, pp 21–33.

4 Recently some OHS statutes have also imposed duties on officers of unincorporated associations.

5 For a summary of the relevant duties at the time of this research, see R Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials*, 2nd ed, Lawbook Co, Sydney, 2004, pp 270–2, 275–80. See also L Bluff, 'Regulating the safe design of plant' (2004) 20(3) *Jnl of Occupational Health and Safety — Australia and New Zealand* 229; B Creighton and P Rozen, *Occupational Health & Safety Law in Victoria*, The Federation Press, Sydney, 2007, pp 115–27.

6 See, eg, C Ramazzini, 'Asbestos is Still With Us: Repeat Call for a Universal Ban' (2010) 52(5) *Jnl of Occupational and Environmental Medicine* 469; T Driscoll, J Harrison, C Bradley and R Newson, 'The Role of Design Issues in Work-Related Injuries in Australia 1997–2002' [2008] 39(2) *Jnl of Safety Research* 209; Office of the Australian Safety and Compensation Council, *Design Issues in Work-Related Serious Injuries*, Australian Government, Canberra, 2005, pp 6–11.

7 R Johnstone, 'Harmonising Occupational Health and Safety Regulation in Australia: The First Report of the National OHS Review' [2008] *Jnl of Applied Law and Policy* 35. See also the national Model Work Health and Safety Bill 2011, which can be found at <http://www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/598/Model_Work_Health_And_Safety_Bill_23_June_2011.pdf> (accessed 21 March 2011).

8 The case law relating to the statutory duties and the 'reasonably practicable' requirement has been comprehensively reviewed elsewhere. See, eg, E Bluff and R Johnstone, 'The

are minimised, or persons are not exposed to risks). Designers, manufacturers, importers and suppliers of plant, and manufacturers, importers and suppliers of substances are also required to ensure some form of testing or examination of the plant or substance, and to provide OHS information.

The potential for parties outside the immediate employer/worker relationship to impact on OHS is also growing with the complexity of modern production and service delivery systems, such as the use of elaborate supply chains and leasing arrangements. Important here are the duties imposed on employers, self-employed persons, persons in control of workplaces and/or persons conducting a business or undertaking, to others who are not that person's direct employees.⁹ These 'duties to others' can cover acts and omissions committed upstream and, in this sense, they may also be considered to be upstream duties. Again, the duties vary between jurisdictions but in broad terms they require the duty holders to ensure, so far as is reasonably practicable,¹⁰ that other persons are not exposed to risks arising from the conduct of the business or undertaking (or that others are not adversely affected). Crucially, the duties to others potentially extend legal obligations to persons who design, produce, import or supply business and work systems, equipment or materials that fall outside the scope of the other upstream duties which relate specifically to 'plant', 'substances', 'buildings' or 'structures' as defined in OHS legislation.

In the last 30 years then, the Australian OHS statutes have progressively, and to different extents, reflected the principle that all persons whose activities may create a risk at work should bear legal responsibility for minimising that risk. There is, however, little empirical research examining whether or how OHS regulators support compliance by upstream duty holders, or inspect and enforce breaches of OHS legislation involving acts or omissions by parties upstream. These are the issues examined in this article. In the next section we outline the methodology for the empirical study on which this article is based. We then examine the inspectorates' compliance support, inspection and enforcement with upstream duty holders, and argue that despite increased activity there are weaknesses in the inspectorates' strategy and practice with this important group of duty holders.

Methodology for the Research

Between 2003 and 2007 an Australian Research Council funded Discovery Project was conducted to investigate the Australian OHS inspectorates' educative, inspection and enforcement activities under the new style OHS legislation. The inspectorates' responses to the upstream duties were examined

Relationship Between "Reasonably Practicable" and Risk Management Regulation' (2005) 18 *AJLL* 197 at 201–21. See also Johnstone, above n 5, pp 207–11.

9 Johnstone, above n 5, pp 250–3; R Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12(2)*AJLL* 73; and R Johnstone, 'Regulating Occupational Health and Safety in a Changing Labour Market' in C Arup, P Gahan, J Howe, R Johnstone, R Mitchell and A O'Donnell (Eds), *Labour Law and Labour Market Regulation*, The Federation Press, Sydney, 2006, pp 617–36.

10 Or equivalent expressions as for the jurisdiction. See Bluff and Johnstone, above n 8, at 201–21.

as part of this larger study. The research focused on four of the nine general¹¹ OHS inspectorates (Victoria, Queensland, Tasmania and Western Australia), these jurisdictions being representative of larger and smaller inspectorates, geographical area and population size.

A broad definition of the upstream duty holders was adopted to take in parties *outside the workplace* or parties *outside the employer/worker relationship* whose activities might impact upon the OHS of third parties downstream. This included the traditional upstream duty holders, as discussed above: designers, manufacturers, suppliers, and importers of plant; manufacturers, suppliers and importers of substances; and designers and/or constructors of buildings or structures. It also included some non-traditional upstream duty holders: employers, self-employed persons and persons conducting a business or undertaking, in relation to the systems, equipment and materials that they design, produce, import or supply, which might impact upon the physical and psychosocial health and safety of persons other than their own workforces.¹²

The issues examined in the research were the nature and extent of OHS agencies' efforts to educate upstream duty holders about how to comply with their legal obligations (providing 'compliance support'), and their inspection and enforcement with upstream duty holders. Also explored were inspectors' perceptions of the adequacy of existing regulatory requirements and aspects requiring improvement.

The research investigated these issues through a combination of data sources and research methods. The OHS agencies' publications, documentation and statistical data were analysed, as well as reported cases and agencies' summaries of OHS prosecutions. For this particular study, in-depth, semi-structured interviews were conducted with 94 current inspectors: 27 from Queensland; 16 from Tasmania; 26 from Victoria; and 25 from Western Australia.¹³ We also interviewed a senior agency manager in each of these states. The original empirical research project from which this study is developed did not include New South Wales or South Australia. Interviews were supplemented with two rounds of participant observation of inspectors' activities. In 2004 a researcher spent a day as an observer with each of 42 of the inspectors interviewed, accompanying them on at least one visit to a workplace where the inspector recorded the nature of the inspection, issues raised and actions taken. The workplace visits were a normal part of the inspectors' tasks and were not influenced by the presence of the researcher. Where possible a researcher then accompanied the same inspector again in

11 That is, inspectorates other than the industry focused inspectorates for the mining, petroleum or maritime industries.

12 The upstream duty holder component of the research did not include employers in relation to the OHS of their own employees, or the duties of those involved in labour hire or leased labour. For discussion of the latter, see R Johnstone and M Quinlan, 'The OHS Regulatory Challenges of Agency Labour: Evidence From Australia' (2006) 28(3) *Employee Relations* 273; R Johnstone, C Mayhew and M Quinlan, 'Outsourcing Risk? The Regulation of OHS Where Contractors Are Employed' (2001) 22(2-3) *Comparative Labor Law and Policy Jnl* 351; M Quinlan, R Johnstone and M McNamara, 'Australian Health and Safety Inspectors' Perceptions and Actions in Relation to Changed Work Arrangements' (2009) 51(4) *JIR* 557.

13 Interviews were typically of 40 minutes duration and all were recorded and transcribed verbatim, and then entered into and analysed using the NVivo software program.

2006 on a visit to a similar type of workplace. Where an inspector was no longer available to participate, an additional inspector was recruited for the second round. As a result, a total of 57 inspectors (rather than 42) were accompanied by a researcher over the two rounds of observation. When undertaking the second round of visits, inspectors were interviewed again to determine whether their experiences or perceptions had changed and to explore relevant issues identified in the visits. Table 1 presents a breakdown of the workplace visits by industry sector.

Table 1: Accompanied Workplace Visits, by Industry Sector*

Industry	Number	Percentage
Construction	25	20.8
Government and human services	24	20
Retail, wholesale & hospitality	23	19.2
Manufacturing	22	18.3
Transport & storage	14	11.7
Primary industry & forestry	12	10
Total	120	100

* Includes multiple visits in one day.

As Table 1 shows, workplace visits covered a range of industry sectors (matched as far as possible to similar types of workplaces in each round), and they involved diverse types of workplaces. They included visits to construction sites, factories, hospitals, shops, warehouses, schools, childcare centres, farms, forestry co-operatives and prisons. Visits also included workplaces of different sizes (small and large), and both unionised and non-unionised sites. Over 40% of visits were in regional locations (outside a capital city).

The data gathered from interviews and workplace visits provided a 'snapshot' of the inspectorates' activities and approaches to inspection and enforcement at the time of the study. We sought to follow through each of the upstream issues identified in our workplace visits in our analysis of agencies' publications, documentation, statistical data and prosecution summaries, but this proved impossible. Apart from information about prosecutions, the agency data did not identify firms that were the subject of enforcement action and none of the 'upstream' issues identified in our workplace visits resulted in a prosecution.

Compliance Support and Upstream Duty Holders

While some of the upstream duties have been in the Australian OHS statutes for 30 years or more, it has only been in the last decade that OHS agencies have supported implementation of these duties, largely through provision of information and guidance material. For example, OHS regulators have issued guidance material relating to the design of retail work stations, waste collection vehicles, forklift trucks, and workplace buildings and structures.¹⁴

¹⁴ WorkSafe Victoria, *Non-Hazardous Waste and Recyclable Materials*, Victorian WorkCover

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Regulators have also issued 'alerts' following a fatality or other serious incidents to warn relevant duty holders, including upstream parties, of specific risks and advise on measures required to minimise them. For example, WorkSafe Victoria issued an alert warning suppliers and operators of the risk of telescopic forklifts (telehandlers) that were not designed to lift freely suspended loads.

Guidance material and alerts often include valuable information on the principles and processes for duty holders to address OHS matters. Substantive initiatives have also been taken by the national OHS agency,¹⁵ which has issued guidelines on safe design principles and collaborated with some tertiary education providers to produce a safe design manual intended for use in engineering studies.¹⁶ Despite this progress, the treatment of upstream duty holders in compliance support initiatives remains piecemeal and principally relies upon duty holders seeking out and taking up such guidance, rather than the inspectorates implementing and/or supporting initiatives to build OHS capacity among upstream duty holders, across the board.

Inspection and Enforcement with Upstream Duty Holders

Australian OHS inspectors have broad powers to enter and inspect workplaces and investigate OHS matters.¹⁷ Each of the OHS statutes empowers inspectors to issue improvement and prohibition notices requiring duty holders to remedy breaches of OHS legislation.¹⁸ At the time of data collection for this research, the inspectorates in three of the study states (Queensland, Tasmania and Victoria) were also empowered to accept written, enforceable undertakings from duty holders in relation to OHS matters,¹⁹ and inspectors in two of the jurisdictions studied (Queensland and Tasmania) were able to issue

Authority, Melbourne, 2003; WorkSafe Victoria, *Guidance Note, Forklifts — Instability and Excessive Speed*, Victorian WorkCover Authority, Melbourne, 2003; WorkSafe Victoria, *Information for People Who Commission the Design of Buildings and Structures to be Used as Workplaces*, Victorian WorkCover Authority, Melbourne, 2007; WorkSafe WA, *Industry Guidance Document: Checkout Workstations in Retail — Safe Design and Work Practices*, Department of Consumer and Employment Protection, Perth, 2005; WorkSafe WA, *Safe Design of Buildings and Structures — Code*, Commission for Occupational Health and Safety, 2008.

15 Now Safe Work Australia but formerly the Australian Safety and Compensation Council (ASCC). The latter's predecessor was the National Occupational Health and Safety Commission (NOHSC).

16 Australian Safety and Compensation Council, *Guidance on the Principles of Safe Design for Work*, Australian Government, Canberra, 2006; Australian Safety and Compensation Council, *Safe Design for Engineering Students. An Educational Resource for Undergraduate Engineering Students*, Australian Government, Canberra, 2006.

17 Johnstone, above n 5, pp 373–91.

18 Ibid, pp 403–10.

19 Ibid, pp 419–20; R Johnstone and M King, 'A Responsive Sanction to Promote Systematic Compliance?: Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *AJLL* 280.

infringement notices (also known as penalty notices or on-the-spot fines).²⁰ All of the OHS inspectorates could initiate legal proceedings for alleged breaches of their OHS statutes.

In this section we argue that the OHS inspectorates studied exercised their inspection and enforcement powers with upstream duty holders in only a limited way, and did not generally secure more far-reaching improvements in OHS performance by these duty holders. While individual inspectors took an interest in upstream duty holders and considered their contribution to workplace risks, they did not necessarily pursue issues upstream or, if they did, treated them as a lower order consideration. If inspectors did address them, they often determined non-compliance in a specific context and required retrofitting of control measures or remedial measures, or provision of OHS information, rather than seeking to ensure the inherent safety of plant, substances, structures or other workplace items for the benefit of persons who would encounter them in other contexts.

Inspectors' dealings with upstream duties in workplace visits

In the study of four OHS inspectorates, researchers observed that inspectors identified upstream issues in 52 (43.3%) of accompanied workplace visits. Most commonly, inspectors identified upstream duty holders as sharing in responsibility for an OHS problem, such as the safety of cranes, pressure vessels or other items of plant at the workplace. As shown in Table 2, issues involving upstream duty holders were less likely to be identified than were the more traditional focus of inspectoral activity, the employers' duties. The one exception to this pattern were issues to do with manual handling: despite the markedly greater attention given to manual handling by OHS inspectorates in recent years, collectively upstream issues were more commonly identified than employer obligations relating to this area.

²⁰ E Bluff and R Johnstone, 'Infringement Notices: Stimulus for Prevention or Trivialising Offences?' (2003) 19(4) *Jnl of Occupational Health and Safety — Australia and New Zealand* 337.

Table 2: Duties and Types of Issues Identified by Inspectors During Workplace Visits

Duty and Type of Issue	Number	As percentage of visits (n=120)
Employer duty and plant	79	65.8
Employer duty and manual handling	44	36.7
Employer duty and substances	59	49.2
Employer duty and work arrangements	60	50.0
Employer duty and OHSM*	61	50.8
Employer duty and other issue (includes 37 fall from height)	89	74.2
Upstream duty holders	52	43.3

*OHSM matters include OHS management components such as risk management and incident reporting systems.

Inspectors' recognition of upstream issues was higher than might be expected in view of the relatively recent and limited policy focus of OHS agencies on upstream duty holders. Nonetheless, due to the multiplicity of issues considered by inspectors during workplace visits, when they identified non-compliance by upstream duty holders it was usually a *lower order consideration* rather than the primary focus of the visit. Workplace visits in which upstream issues constituted a significant part of the visit were exceptional.

Inspectors who dealt with upstream issues gave priority, while they were on site, to securing preventive action at the workplace. They typically explained to managers or workers the obligations of the relevant upstream duty holders while also indicating measures that workplace parties should take to mitigate the risk. For example, an inspector who identified unguarded dough mixers at a cake manufacturing site advised the employer that the supplier firm had failed to comply with its duty but told the employer that he needed to fit guards to the mixers. In part, inspectors' limited attention to upstream duty holders during workplace visits was due to the fact that these parties were seldom on site. In these instances the inspector could at most, while on site, determine the relevant upstream duty holder(s), which might require consideration of multiple contributing parties. The inspector would then investigate, track down and determine the feasibility of pursuing the OHS issue with the upstream duty holder(s) which the inspector might not consider warranted, especially if the duty holder's operations were outside the state.

Whether inspectors addressed issues of upstream duty holder non-compliance while they were on site or followed them up at a later date, their interventions tended to be *limited to a specific context*, rather than negotiating solutions with wider benefits for those who would encounter particular plant, substances, building or structure designs, or other items in other workplaces. For example, one inspector spent considerable time negotiating a solution for the safe movement of shopping trolleys with upstream duty holders at a particular supermarket but did not seek the implementation of that solution in other settings. A rare example of

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negotiating a solution for wider application was provided by an inspector who had negotiated guarding for a type of forestry equipment in response to a series of incidents involving the plant. The inspector stated:

we had a number of incidents . . . where we had operators injured in the cabins of the excavators that had chainsaws or drop saws fitted to the log grabs. The chains were breaking and parts of the chains were entering the cabin and hitting the operators . . . So we met with the managers of [the overseas manufacturer] and let them know that their guarding wasn't up to standard and . . . recommended the fitting [named two types of guarding] . . . They carried out extensive tests . . . and subsequently all their machines have [the suggested guarding].

In the 52 visits in which inspectors identified upstream issues, there were 57 upstream parties involved (some issues involved multiple upstream duty holders). As shown in Table 3 below, inspectors most commonly identified suppliers of plant or substances as contributing to breaches of OHS legislation, and less commonly invoked the duties of designers, manufacturers/constructors of plant or workplaces, manufacturers of substances, or the duty to others in relation to these upstream functions. While poor design was a common source of inspectors' concerns, they tended to identify suppliers as the responsible duty holder, reflecting the fact that suppliers were often the most proximate upstream duty holder, and thus the easiest for the inspector to contact and deal with.

Because of the inspectors' focus on suppliers, their interventions typically led to the *retrofitting* of control measures, *'patch up' measures* to remedy problems or *provision of OHS information* by suppliers. They rarely sought to secure inherently safe design or development of alternative products, which would have had wider and more lasting benefits for OHS.

Table 3: Type of Upstream Duty Holders Implicated

Duty Holder	2004	2006	Total*/Percentage
Designer of plant or workplaces	5	4	9 (15.8%)
Manufacturer of plant or substances	5	3	8 (14.0%)
Supplier of plant or substances (including hire)	16	15	31 (54.4%)
Other upstream duty holders (eg employer duty to others)	4	5	9 (15.8%)
Total	30	27	57 (100%)

*Note: Numbers exceed totals in Table 3, as some visits identified issues with multiple upstream duty-holders

Data reporting on the number of improvement, infringement or prohibition notices issued by Australian OHS inspectors against upstream duty holders are very difficult to find. In the 52 visits in which inspectors identified upstream issues, two involved forklifts which did not comply with regulatory requirements, and resulted in an inspector issuing an improvement notice against the supplier of the forklift. In one instance, when a worker was injured after a forklift hit a bump at speed, a WA OHS inspector issued an improvement notice against the supplier of the forklift for supplying the

forklift without load compliant plates or an operating manual. In the second case, a Tasmanian inspector conducted a blitz on forklifts, and found that a forklift at a service station had inadequate hazard lights. The inspector was informed that the forklift had been supplied without hazard lights, and that the agent for the supplier was located across the road from the service station. The inspector issued improvement notices against both the service station and the supplier.

In another instance a WA OHS inspector found that a grass slasher was inadequately guarded and that the slasher had been supplied without guards. The inspector issued a prohibition notice to the employer to prevent the use of the unguarded slasher and an improvement notice requiring the employer to conduct risk assessments on all plant. The employer was also prosecuted. The inspector considered that he was unable to issue a notice against the supplier because the slasher had been supplied 8 years earlier, and the inspector considered that 'the statute of limitations' precluded the issuing of a notice. With respect, this stated reason is erroneous, as limitation periods only restrict prosecution proceedings, and have no effect on statutory notices.

A senior manager in the Queensland OHS regulator noted in an interview that this regulator did not, at the time, have a clear strategy to further investigations of potential upstream issues that arose from workplace inspections, or to develop inspection programs focusing on upstream duty holders. We had similar responses from senior managers in Victoria, Tasmania and Western Australia. In a different study involving empirical research conducted between 2001 and 2003,²¹ Bluff demonstrated that the Victorian and SA OHS regulators' inspection and enforcement with plant designers and manufacturers was strategically weak. She pointed to the lack of a specific, coordinated strategy or program of action to focus inspectorate attention and effort on these upstream duty holders — coupled with the considerable discretion²² given to inspectors to choose whether and how to interact with particular duty holders, the regulators' other priorities and targets, and the dominant paradigm of employer-worker enforcement — as key weaknesses.

The present research reinforces the conclusion that enforcement policy and practice in relation to upstream duty holders is weak. Although individual inspectors might recognise that the acts and omissions of these duty holders contribute to workplace OHS problems, the inspectorates have not adopted a strategic approach to securing more far-reaching improvements in OHS performance through upstream duty holders. The inspectorates have only implemented more coordinated initiatives in campaigns targeting specific risks, as we discuss below.

Campaigns involving upstream duty holders

When the inspectorates identify an OHS problem applicable to a range of businesses or industry sectors, they sometimes conduct campaigns to focus

21 E Bluff, *Occupational Health and Safety in the Design and Manufacture of Workplace Plant*, PhD Thesis, Griffith University, Brisbane, 2010, Ch 4.

22 For discussion of the exercise of discretion by law enforcement officers see J Black, 'Managing Discretion', paper presented to the *Australian Law Reform Commission Conference: Penalties, Principles and Practice in Government Regulation*, Sydney, Australia, 2001.

inspection and enforcement on securing measures to address the problem. These campaigns typically incorporate targeted publicity, provision of information, workplace visits, the issuing of notices and other enforcement actions. Some of the regulators' campaigns have targeted upstream duty holders, including several coordinated nationally through the Heads of Workplace Safety Authorities.²³

For example, in 2005–2006, six state OHS regulators conducted a joint national campaign targeting certain items of farm machinery — tractors and their attachments, grain augers and all terrain vehicles. The regulators held information seminars to advise duty holders about their obligations and to alert them to a forthcoming program of inspections. Around 100 inspectors then audited compliance by 500 suppliers, 114 manufacturers, 47 designers and 16 importers of these types of plant and equipment.²⁴ Several of the observed workplace visits in the current study were to upstream duty holders as part of this national campaign.

An earlier example of a state wide campaign was the Victorian OHS regulator's program to address fatalities and serious injuries involving forklifts. The regulator commissioned research which revealed that problems previously attributed to unsafe driving by operators were actually caused by the unsafe design of forklifts.²⁵ On the basis of this research, the Victorian regulator produced guidance material to advise both suppliers and employers about the (reasonably) practicable action they should take to minimise risks and comply with their upstream duties in s 24 of the Occupational Health and Safety Act 1985 (Vic) (OHSA 1985 (Vic)).²⁶ The regulator used the guidance material to provide advice in consultative forums with suppliers, and to support negotiations with the Industrial Truck Association²⁷ and supplier firms for a code of conduct committing suppliers to incorporate safety features in the forklifts they supplied.²⁸

Although limited in number, the OHS regulators' campaign style interventions have certain advantages. Regulators interact with a cross-section of duty holders systematically, thereby reinforcing their regulatory messages through communication between duty holders, and reducing the potential for resistance to compliance by consistent treatment of suppliers who were

23 The Heads of Workplace Safety Authorities is a group comprising the general managers (or their representatives) of the peak bodies responsible for the regulation and administration of OHS in Australia and New Zealand. The group mounts national and trans-Tasman campaigns across all jurisdictions.

24 See Heads of Workplace Safety Authorities, *Post Implementation Report. Agricultural Plant Designers, Manufacturers, Suppliers, Importers Program*, Heads of Workplace Safety Authorities, Sydney, 2007.

25 J Lambert and Associates, *Forklift Stability and Other Technical Safety Issues*, Accident Research Centre Monash University, Melbourne, 2003, pp 3–21; WorkSafe Victoria, *Guidance Note, Forklifts — Instability and Excessive Speed*, Victorian WorkCover Authority, Melbourne, 2003, pp 2–4. See also T Larsson et al, 'Industrial Forklift Trucks — Dynamic Stability and the Design of Safe Logistics' (2003) 7(1) *Safety Science Monitor* 1.

26 WorkSafe Victoria, above n 25, p 4; *WorkSafe Victoria, Forklift Safety — Reducing the Risk*, Victorian WorkCover Authority, 2003, pp 6–8.

27 The industry association representing the interests of forklift truck manufacturers and suppliers.

28 W Skinner and A Stewart, *Evaluation of the Forklift Instability and Traffic Management Project #979*, July 2005–June 2006, Victorian WorkCover Authority, 2006, p 17.

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competitors in the same markets. These campaigns are coordinated and more strategic initiatives, although their focus is limited to targeted risks.

Prosecution of Upstream Duty Holders

Our analysis of OHS prosecutions involving non-compliance by upstream duty holders provides further evidence of weaknesses in the OHS inspectorates' enforcement strategy in relation to upstream duty holders. This indicates again that the agencies hardly ever pursue upstream duty holders and, if they do, they tend not to be proactive and focus on the inherent and ongoing safety of plant, substances, structures or other workplace items. Rather they are reactive and focus on non-compliance in a specific context and failures to provide particular control or remedial measures, or adequate OHS information or testing. There have been a small number of prosecutions invoking the traditional upstream duties relating to plant design, manufacture, import or supply, substance manufacture, import or supply, and design or construction of buildings or structures, most notably where duty holders' acts or omissions have contributed to deaths or serious injuries at work. There is a larger number of prosecutions invoking the duty to others but these typically concern 'one off' breaches relating to particular risks in a specific context. They do not break new ground in demonstrating the potential for the duty to others to extend to upstream issues.

Since the enactment of OHSA 1985 (Vic), and its replacement by the Occupational Health and Safety Act 2004 (Vic) (OHSA 2004 (Vic)), there have only been a few prosecutions of plant designers or manufacturers: the cases of *Hydrapac*,²⁹ *Outdoor Initiatives*,³⁰ *Tornado Pumps and Sprayers*³¹ and *Jalor Tools*.³² None of these cases established important precedents for the inherent safety of plant. The four prosecutions were reactive and event-focused,³³ each following a fatality or serious injury involving the designer's or manufacturer's plant. They dealt with the events leading to the incident, basic safeguarding issues, or information provision. In each case sentencing was unremarkable and fines were rather low — although the courts had increased penalties from the lowest fine of \$7500 to the highest fine of \$40,000 in the *Jalor Tools* case. There have also been a small number of prosecutions of suppliers or importers of plant.³⁴ These cases were also

29 *Victorian WorkCover Authority v Hydrapac Pty Ltd* (unreported, Magistrates Court of Victoria, McDonald M, 25 October 2001).

30 *Victorian WorkCover Authority v Westrup (t/as Outdoor Initiatives)* (unreported, Magistrates Court of Victoria, Crisp M, 20 February 2006).

31 *Victorian WorkCover Authority v Tornado Pumps and Sprayers Pty Ltd* (unreported, Magistrates Court of Victoria, Wright M, 5 May 2006).

32 *Victorian WorkCover Authority v Jalor Pty Ltd* (unreported, County Court of Victoria, Coish J, 25 January 2010).

33 For further discussion of the reactive, event focus of OHS prosecutions in Australia, see R Johnstone, *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*, Federation Press, Sydney, 2003, Chs 3–5.

34 *Inspector Arnott v Wreckair Pty Ltd* (unreported, Dandenong Magistrates' Court (Vic), 30 October 1991); *Victorian WorkCover Authority v Anton's Mouldings Pty Ltd* (unreported, Dandenong Magistrates' Court (Vic), Harding M, 5 June 2001); *Victorian WorkCover Authority v Melbourne Cranes Imports Pty Ltd* (unreported, Melbourne Magistrates' Court

event-focused and dealt with basic safeguarding or information provision matters. They are not significant for the safe design and manufacture of plant, or the ongoing self-regulation by firms of OHS in their upstream functions. We are not aware of any Victorian prosecutions of manufacturers, suppliers or importers of substances.

A key reason for the small number of prosecutions of upstream duty holders in Victoria was the regulator's reluctance to prosecute upstream duty holders if any element of a case could be perceived to involve 'improper use'. This reluctance followed the unsuccessful prosecution of Chem-Mak Australia in 1999.³⁵ This case concerned ss 24(1)(a) and (4) of OHSA 1985 (Vic), which required persons who designed, manufactured, imported or supplied plant to ensure, so far as practicable, that plant was safe and without risks to health *when properly used*.³⁶ The duty also stated that plant was not to be regarded as properly used where it was used without regard to *any relevant information or advice* available relating to its use.³⁷ Chem-Mak, the supplier of a textile brushing machine was prosecuted after an employee of another firm, Diamondquest, had his hand and arm crushed in the unguarded rollers of the machine. The Taiwanese manufacturer had provided advice to management and operators of Diamondquest, including a warning to keep hands away from rollers and to turn the machine off before straightening fabric.

The prosecution in *Chem-Mak Australia* referred the court to an unreported decision of the President of the NSW Industrial Relations Commission in *Callaghan v Thiess Contractors Pty Ltd*,³⁸ which stated that, since the same requirement in the former NSW OHS statute³⁹ was to make plant safe, the section could not be construed to mean that if machinery is unsafe, liability can be avoided by providing advice or instruction. However, O'Shea J accepted the defence submission that the plant was not properly used and that the instruction provided by the Taiwanese manufacturer constituted relevant information and advice under OHSA 1985 (Vic) s 24(4), even though the injured employee did not receive this instruction. In view of this ruling, the

(Vic), Crowe M, 12 September 2001); *Victorian WorkCover Authority v Marco Packing Machine Supplies Pty Ltd* (unreported, Ballarat Magistrates' Court (Vic), Bolster M, 25 November 2002); *Victorian WorkCover Authority v East End Hire Pty Ltd* (unreported, Melbourne Magistrates' Court (Vic), Hannan M, 24 June 2003); *Victorian WorkCover Authority v Mastaquip Pty Ltd* (unreported, Melbourne Magistrates' Court (Vic), Hannan M, 16 April 2003). For later supplier cases, after the period of data generation for this research, see *Victorian WorkCover Authority v Press Shop Automation Pty Ltd* (unreported, Melbourne Magistrates' Court (Vic), Walter M, 10 March 2005); *Victorian WorkCover Authority v Androniko (t/as High Five Jumping Castles)* (unreported, Melbourne Magistrates' Court (Vic), Popovic M, 14 December 2006); *Victorian WorkCover Authority v Panzera (t/as High Five Jumping Castles)* (unreported, Melbourne Magistrates' Court (Vic), Popovic M, 14 December 2006); *Victorian WorkCover Authority v Extec Sales and Distribution Australia Pty Ltd* (unreported, County Court of Victoria, Coish J, 19 June 2009).

35 *Victorian WorkCover Authority v Chem-Mak Pty Ltd* (unreported, County Court of Victoria, O'Shea J, 10 September 1999).

36 OHSA 1985 (Vic) s 24(1)(a).

37 OHSA 1985 (Vic) s 24(4).

38 Unreported, Industrial Court (NSW), Fisher P, 20 December 1990.

39 OHSA 1983 (NSW) ss 18(2), (9).

prosecution did not lead any evidence and O'Shea J ordered a not guilty verdict.

The Victorian regulator had not challenged the interpretation of the duty in s 24 of OHSA 1985 (Vic), unlike the NSW regulator, which successfully challenged the equivalent requirement in the former NSW OHS statute,⁴⁰ in the *Arbor Products* case.⁴¹ In *Arbor Products*, the manufacturer and supplier of a wood chipping machine was found to have breached s 18(2)(a) of Occupational Health and Safety Act 1983 (NSW) (OHSA 1983 (NSW)), for failing to ensure the plant was safe and without risks to health when properly used. *Arbor Products* had provided an operating manual and training to some of the customer's employees, at the time of supply. An employee sustained traumatic amputation to both arms when he was drawn into the chute of the machine and his arms came into contact with the cutting blades. The employee had not received training and did not have access to the manual.

The key finding of the Industrial Relations Commission of New South Wales (IRC) in Full Session (on appeal) was that the statutory duty requires that plant supplied is safe, in the sense that its safety is ensured.⁴² The wood chipping machine was inherently unsafe, as the chute for feeding material was too short and permitted contact with rotating blades.⁴³ The IRC also found that the qualification 'when properly used' was intended to limit liability where the plant was safe but became unsafe because of misuse, but not to limit liability where the defendant had not made the machine safe, but had only provided an instruction manual, advice or training in the proper use of the plant at work.⁴⁴ The Full Bench concluded that if information or training were an acceptable alternative, 'it would be open to manufacture and supply plant for use at work that was not safe and posed risks to health',⁴⁵ and that the duty in s 18(2)(a) could not be intended to have been circumscribed in this way.⁴⁶ *Arbor Products* was fined \$30,000.

Other NSW cases have subsequently confirmed the principle established in *Arbor Products* that plant must be designed and manufactured to be safe, and that provision of information or training are not a substitute for this. In particular, in the NSW case of *National Hire*⁴⁷ the appellant sought to have the decision in *Arbor Products* reconsidered. The Full Bench of the Industrial Relations Commission of New South Wales refused leave to re-argue *Arbor Products*, concluding that '[t]he decision in *Arbor [Products]*, in our view, is correct and is not one of manifest or demonstrable error that requires reconsideration'.⁴⁸

40 OHSA 1983 (NSW) ss 18(2), (9).

41 *WorkCover Authority of New South Wales (Inspector Mulder) v Arbor Products International (Aust) Pty Ltd* (2001) 105 IR 81; [2001] NSWIRComm 50.

42 *Ibid*, at [43].

43 *Ibid*, at [44].

44 *Ibid*, at [43].

45 *Ibid*, at [43].

46 *Ibid*, at [43].

47 *National Hire Pty Ltd v Howard* [2003] NSWIRComm 144 (9 May 2003).

48 *Ibid*, at [10]. For further NSW cases confirming the approach taken in *Arbor Products*, see *Inspector Wilkie v Batequip Pty Ltd (formerly Bateman Equipment Pty Ltd) (t/as Ditch Witch Australia)* [2003] NSWIRComm 111 (14 April 2003); *Inspector Batty v Vehicle Inspection Systems Pty Ltd* [2004] NSWIRComm 19 (27 February 2004); *Inspector Wilkie v Kennards*

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The principle of ensuring that plant is inherently safe was also endorsed in the WA *Viticulture Technologies*⁴⁹ case. This was a prosecution of a supplier of grape harvesters for breach of the general duty in ss 23(1)(a) and 23(5) of the Occupational Safety and Health Act 1984 (WA), which, like the equivalent provisions in the Victorian and NSW statutes, only required the upstream duty holders to ensure the safety of plant for persons who 'properly use' the plant. The prosecution of Viticulture Technologies followed an incident in which a worker fell from the top of a grape harvesting machine while he was attempting to clear a blockage and sustained serious spinal injuries in the fall. Stipendiary Magistrate Malone concluded that the defendant had failed to design the grape harvester so as not to expose employees to the risk of falling; that it was foreseeable that employees would go to the top of the machine to clear blockages; and that this exposed them to a risk of falling.⁵⁰ With regard to the issue of proper use, Malone SM referred to the *Arbor Products* case, indicating that, while not binding, the case was 'of persuasive value'⁵¹ and 'sets the appropriate boundaries'.⁵² He concluded that accessing the harvester to clear blockages, and for maintaining and cleaning the harvester, was within the scope of proper use and that it was practicable for the harvester to be fitted with safety platforms.⁵³ Viticulture Industries was fined \$20,000.

The WA OHS regulator has also prosecuted other plant suppliers in the cases of *Ground Support Systems*⁵⁴ and *Nomel Holdings*,⁵⁵ and suppliers of substances in the case of *Headfirst International*.⁵⁶ Like the Victorian prosecutions of suppliers these cases are unremarkable in dealing with basic safeguarding or information provision issues, and imposed small penalties in the range \$2000 to \$20,000. They are not significant for the design or development of inherently safe plant or substances, or self-regulation of OHS by duty holders.

The upstream obligations in Queensland were also qualified, at the time of this research, by the expression 'when used properly'.⁵⁷ We have only been able to find seven prosecutions of upstream obligation holders in Queensland, each resulting in small penalties without conviction or an adjournment without

Hire Pty Ltd [2004] NSWIRComm 167 (10 June 2004); *Inspector Ruth Buggy v Kentan Pty Ltd* [2005] NSWIRComm 152 (12 May 2005); *Inspector Ruth Buggy v Lyco Industries Pty Ltd* [2005] NSWIRComm 423 (24 November 2005); *Lyco Industries Pty Ltd v Inspector Ruth Buggy (WorkCover Authority of New South Wales)* [2006] NSWIRComm 396 (13 December 2006). For a rare, and more recent, prosecution of a designer of plant see *Inspector Ching v Simpson Design Associates Pty Ltd* [2009] NSWIRComm 213 (15 December 2009).

49 *Shepherd v Viticulture Technologies (Aust) Pty Ltd* (unreported, Albany Court of Petty Sessions (WA), Malone SM, charge no 1941/01, 15 May 2003).

50 *Ibid.*, at [47]–[50], [53]–[54].

51 *Ibid.*, at [40].

52 *Ibid.*, at [54].

53 *Ibid.*

54 *Ground Support Systems Pty Ltd* (unreported, Perth Court of Petty Sessions (WA), 20 January 1998).

55 *Nomel Holdings Pty Ltd* (unreported, Perth Court of Petty Sessions (WA), 8 November 1999).

56 *Headfirst International Pty Ltd* (unreported, Narrogin Court of Petty Sessions (WA), 15 October 2003).

57 See Workplace Health and Safety Act 1995 ss 32–34A.

conviction.⁵⁸ Three of these prosecutions were brought against designers of plant (formwork, a guillotine and a mincing machine) and resulted in, respectively, fines of \$16,750 and \$20,000 without conviction and an adjournment without conviction with a good behaviour bond.⁵⁹ Two of the prosecutions were against erectors and installers of scaffolding,⁶⁰ resulting in a \$2500 without conviction and a good behaviour bond. One prosecution was against a manufacturer of plant⁶¹ (a fine of \$22,500 without conviction) and another was against a supplier of a substance⁶² (cleaning products) and resulted in a fine of \$5000 without conviction.

The problem of the expression 'when properly used' may have been resolved in OHS Act 2004 (Vic), which uses the alternative expression 'when used for a purpose for which it was designed or manufactured', and *does not include* any statement to the effect that the plant, substance, building or structure is not to be regarded as properly used where it was used without regard to any relevant information or advice available relating to its use.⁶³ The Victorian approach is also adopted in the national Model Work Health and Safety Bill 2011 (Cth), the basis for harmonising the Australian OHS statutes in all jurisdictions from 2012.⁶⁴

In addition to prosecutions of the traditional upstream duty holders for plant, substances, buildings or structures, there have also been a number of prosecutions around Australia under the duties to others. Many of these concern basic safety issues on construction sites where the acts or omissions of multiple parties may contribute to risks. Examples are prosecutions for breaches concerning unguarded stairwells, unsafe scaffolding or unsafe access/egress to and from different areas of the site. These prosecutions relate to particular risks in a local context rather than wider concerns about designing, constructing, supplying inherently safe workplace structures or plants, and in many respects reflect the inspectorates' long standing focus on the obligations of employers and occupiers of construction sites and other premises to protect workers employed or engaged at those workplaces. The duties to others have rarely been the basis for legal proceedings against technical specialists such as engineers for their contribution to workplace risks (and not in the jurisdictions studied).

For example, in the case of *Inspector Michael Dall v William Caesar Porta (t/as Western Pacific Engineers)*,⁶⁵ a case involving s 9 of the Occupational Health and Safety Act 2000 (NSW), a consultant engineer for demolition work

⁵⁸ We thank Graham Lee for providing information about these prosecutions.

⁵⁹ *Boral Formwork and Scaffolding Pty Ltd* (unreported, 1 March 2004); *Simville Pty Ltd* (unreported, 28 September 2005); and *Rodney Charles Sammon* (unreported, 5 December 2005).

⁶⁰ *Brisbane Scaffold Hire Pty Ltd* (unreported, 2001, specific date unknown) and *Ray Anthony White* (unreported, 14 January 2006).

⁶¹ *Air Design Pty Ltd* (unreported, 16 December 2010).

⁶² *Belgold Queensland Pty Ltd* (4 September 1998).

⁶³ See Occupational Health and Safety Act 2004 (Vic) ss 27–30.

⁶⁴ The Model Work Health and Safety Bill 2011 (Cth) ss 22, 23 makes it clear that designers and manufacturers must address risks to persons who store, inspect, operate, clean, maintain, or carry out any reasonably foreseeable activity relating to decommissioning, dismantling or disposal of plant, or are exposed to plant in the vicinity of a workplace.

⁶⁵ [2006] NSWIRComm 214.

was prosecuted under the duty of self-employed persons in relation to persons who are not employees. In *Workcover Authority of NSW (Inspector Keenan) v Leighton Contractors Pty Ltd and Lindores Crane & Rigging (Aust) Pty Ltd*,⁶⁶ Leighton Contractors and Lindores Crane & Rigging were convicted of offences under the employer's duties to employees and to others (ss 15 and 16 of the OHS Act 1983 (NSW)) for failing to safely commission a tower crane at a construction site resulting in the death of two workers. Another well known example was the series of prosecutions arising from the collapse of a 26m high and 95m wide \$9.5 million hangar in May 2003 at the Royal Australian Air Force (RAAF) base at Fairbairn in the Australian Capital Territory, as a result of which 12 workers were seriously injured. WorkSafe ACT issued charges for offences under the Occupational Health and Safety Act 1989 (ACT) to four companies and six individuals, including company directors and engineers. Most of the charges were issued for contraventions of the duty of a person in control of a workplace to take reasonable steps to ensure that it is safe and without risks to health (s 29). While charges against the project manager, Construction Control, were dropped after the Magistrates' Court found there was insufficient evidence for conviction, the company responsible for designing and constructing the hangar, Strarch International Pty Ltd (in liquidation), was successfully prosecuted under the employer's general duty provision, for deviating from the original proven method to erect the hangar roof, and for failing to undertake new engineering calculations to ensure that the new method was safe. The company was fined \$97,750, and in separate proceedings two directors were convicted and fined \$18,000 each for breaching s 29.

In summary, OHS inspectorates have made some progress in recognising that multiple duty holders, including those upstream, may contribute to particular instances of non-compliance. However prosecutions such as *Arbor Products*,⁶⁷ which highlight upstream duty holders' role in ensuring the inherent safety of their products at the source, are few and far between.

The Challenge of Jurisdiction in Enforcing Upstream

So far in this article we have argued that while OHS inspectors in the agencies studied may recognise upstream issues and take some action to address them, and the agencies have conducted some campaigns targeting particular upstream duty holders and initiated some legal proceedings, the treatment of upstream duty holders in the inspectorates' compliance support, inspection and enforcement activities is generally under-developed, ad hoc in character and lacking in strategy. Our overarching argument is that the nature and extent of compliance support, inspection and enforcement with upstream duty holders is unlikely to shift further without the inspectorates developing and implementing a specific, coordinated strategy or program of action to focus regulatory attention and effort on securing more far reaching improvements in OHS performance by upstream duty holders. We also acknowledge that inspectors interested in inspecting and enforcing upstream confront particular difficulties. They typically face the need to secure preventive action in a

66 [2004] NSWIRComm 31.

67 (2001) 105 IR 81; [2001] NSWIRComm 50 at [43].

particular workplace while upstream duty holders are often off site and might be located in another jurisdiction (elsewhere in Australia or overseas).

We do not, however, accept the point made by many inspectors in this research that the issue of jurisdiction will inevitably limit inspectors to enforcing OHS legal obligations with the most proximate duty holders. The essence of these inspectors' concern was that they did not have jurisdiction in relation to offences committed wholly or partly outside their respective states. This issue was examined in Bluff's research.⁶⁸ Bluff argues that territorial jurisdiction is clearly established where an alleged offender commits all the elements of an offence within a state but it may also be established for offences committed wholly or partly outside the state.

The first avenue for establishing territorial jurisdiction is if there is an express provision in a relevant statute to establish such a nexus. Such a provision exists in New South Wales where s 10C of the Crimes Act 1900 (NSW) provides that an offence is committed if all elements necessary to constitute the offence exist and the offence is committed wholly or partly in the state, or if wholly outside the state, that the offence *has an effect* in the state. An earlier version of this provision was considered in the appeal case of *Lyco Industries*.⁶⁹ In the Industrial Relations Commission of New South Wales, Walton and Backman JJ found that there were two elements of the offence under s 18(1) of the OHSA 1983 (NSW) which had a nexus with New South Wales.⁷⁰ The Victorian based manufacturer-supplier, Lyco, had supplied a post driving machine for use by persons at work, and Lyco had failed to ensure that the machine was safe and without risks to health when properly used.

A relevant statutory provision exists in Tasmania where the Criminal Law (Territorial Application) Act 1995 (Tas) s 4 establishes that a crime against the law of the state is committed if all elements necessary to constitute the crime exist and a territorial nexus exists between the state and at least one element of the crime. Similarly, in Western Australia the Criminal Code Act Compilation Act 1913 (WA) s 12 establishes that an offence under that Code or any other law of Western Australia is committed if all elements necessary to constitute the offence exist and at least one of the acts, omissions, events, circumstances or states of affairs that make up those elements occurs in Western Australia. Section 12(2) of the Criminal Code 1899 (Qld) provides that where acts or omissions occur which would constitute an offence if they all occurred in Queensland and where any of these acts or omissions occur in Queensland, the person who does the acts or makes the omissions is guilty of an offence of the same kind and is liable to the same punishment as if all of the acts or omissions had occurred in Queensland.⁷¹

In South Australia, the Criminal Law Consolidation Act 1935 (SA) was amended in November 2002 to establish that a territorial nexus sufficient to justify the assertion of jurisdiction in SA courts exists if a relevant act

68 Bluff, above n 21, Ch 4.

69 *Lyco Industries Pty Ltd v Inspector Ruth Buggy* [2006] NSWIRComm 396 (13 December 2006) at 396.

70 *Ibid*, at [23].

71 See also Criminal Code 1899 (Qld) ss 12(3) and (4).

occurred wholly or partly in the state, or the alleged offence caused harm or a threat of harm in the state.⁷²

There is no relevant statutory provision in Victoria to establish precisely what territorial nexus would suffice.⁷³ In the absence of such a provision it is likely that a *real connection* between a crime and the state would be sufficient grounds for enforcement with parties outside the state. In the 1997 High Court case of *Lipohar v R*,⁷⁴ which dealt with a common law offence of conspiracy to defraud, Gleeson CJ determined that there was a real connection between the conspiracy, committed in Victoria, and the state of South Australia, where the intended victim was located.⁷⁵ Gaudron, Gummow and Hayne JJ also considered that the requirement of nexus should be liberally applied, and that a real connection with the jurisdiction would suffice.⁷⁶

The Victorian Supreme Court case of *Director of Public Prosecutions (Vic) v Sutcliffe*⁷⁷ in 2001 provides a useful discussion of the issue of territorial nexus in relation to criminal legislation.⁷⁸ Gillard J observed that historically there was a presumption against criminal legislation having an extra-territorial operation but the presumption against extra-territorial effect can be rebutted.⁷⁹ Gillard J also stated that, in determining whether the presumption is rebutted in particular circumstances, it is relevant to consider the nature, scope, subject matter and object of the legislation and whether the legislation would be robbed of much of its purpose by being confined to acts committed within the state.⁸⁰

Undoubtedly, complex cross-border and international supply chains pose particular challenges for OHS inspectorates enforcing upstream but the location of an upstream party in another jurisdiction is not automatically a barrier to enforcement as perceived by inspectors. The reasoning of the courts in the High Court case of *Lipohar* and the Victorian case of *Sutcliffe* suggests that the OHS inspectorates in this research might, like the NSW regulator, test whether a territorial nexus can be established for OHS offences committed wholly or partly outside of their respective states.

We concur with Bluff's⁸¹ earlier research in arguing that the jurisdictional impediments to enforcement with upstream duty holders perceived by OHS inspectors, which extend both to issuing improvement and prohibition notices, and initiating legal proceedings, could be resolved if the inspectorates develop

72 Criminal Law Consolidation Act 1935 (SA) ss 5E–5I.

73 The Crimes Act 1958 (Vic) includes such provisions for offences relating to piracy, theft, contamination of goods and some other offences but not for harm against a person.

74 (1999) 200 CLR 485; 168 ALR 8; [1999] HCA 65; BC9908013.

75 Ibid, at [38].

76 Ibid, at [123]. See also the comments of Callinan J at [269], where his Honour agreed that an offence should be regarded as having been committed against the law of a state if the offence, wherever committed, has a real link with that jurisdiction.

77 [2001] VSC 43; BC200100570 (1 March 2001). This case concerned a stalking offence where the perpetrator acted within Victoria, and the subject of the stalking case was in Canada. The case was prosecuted under the Crimes Act 1958 (Vic). See also *Sutcliffe v DPP* (Vic) [2003] VSCA 34; BC200301881 (7 April 2003) in which leave to appeal was declined without ruling on the issue.

78 Such as OHSA 1985 (Vic) or OHSWA 1986 (SA).

79 *Director of Public Prosecutions (Vic) v Sutcliffe* [2001] VSC 43; BC200100570 at [59], [67].

80 Ibid, at [68], [72].

81 Bluff, above n 21, Ch 4.

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experience, policy, practice and legal precedents to support inspection and enforcement of OHS legal obligations upstream, through a coordinated strategy or program of action. A greater emphasis on interaction with upstream duty holders proactively would also enable inspectorates to focus on safe design; that is, action to ensure that business and work systems, buildings and structures, substances and materials, plant and other items are inherently safe, at the source.

Conclusion

A complex array of parties can influence the design, production and supply of workplaces, and the plant, substances, systems and other items used at work, in ways that affect OHS. Globalised supply chains, remote sourcing and outsourcing have added to the complexity of managing OHS, and inspecting and enforcing OHS legislation. Although some upstream duties were introduced into the Australian OHS statutes 30 or more years ago and OHS inspectorates are mindful of these obligations, the agencies we studied lacked coordinated and ongoing strategies or programs to support upstream duty holders to learn how to comply with their OHS legal obligations, and to focus their inspection and enforcement effort on securing compliance and safety at the source.

In the absence of such a strategic approach, upstream duty holders were a recognised but lower order consideration for inspectors, whose interventions tended to be aimed at localised adjustments involving retrofitting of control measures, 'patch up' measures to remedy problems or provision of OHS information, rather than securing inherently safe design solutions or the development of alternative products which would have more wide ranging and enduring benefits for OHS. We conclude that inspection and enforcement with upstream duty holders has been strategically weak in the recent past, but that harmonisation of the upstream duties through the implementation of uniform OHS laws in all jurisdictions in Australia,⁸² and supporting nationally harmonised inspection and enforcement policy, provides the opportunity for OHS inspectorates to rethink and reform their strategy and practice.

⁸² Johnstone, above n 7.



Oxymoronic or Employer Logic? Preferred Hours under the Fair Work Act

*Craig Cameron**

Preferred hours clauses have featured in enterprise agreements covering retail, agricultural, fast food, hospitality and aged care workplaces. The employee elects to work different or additional hours to their ordinary work pattern, hours which would otherwise attract overtime or penalty rates, but is paid at the ordinary rate of pay. This article examines, through the lenses of flexibility and the safety net, preferred hours under the new Fair Work regime. It then makes recommendations designed to clarify the limited circumstances in which an individual flexibility arrangement can incorporate a preferred hours clause.

Introduction

Commissioner Cambridge in *Margin Brothers Pty Ltd (t/as Campbell IGA Friendly Grocer)* observed that:

the concept of 'preferred' hours represents the antithesis of industrial regulation. It seems to me to be oxymoronic to create prescriptions for governing the arrangements for work and then permit individuals to agree to disregard those prescriptions.¹

The concept is that the employee elects to work different or additional hours — hours which would ordinarily trigger penalty and overtime payments — but is paid at a lower rate under an enterprise agreement because the employee volunteers or prefers to work those hours. 'Preferred hours' is a controversial concept because it brings into direct conflict two objectives of the Fair Work Act 2009 (Cth) (FW Act); flexibility and the safety net of employment conditions. The union position is that preferred hours clauses undermine the 38 hour working week and employees who work beyond the 38 hour week should be compensated with overtime payments. Employer organisations support the preferred hours clause in cases where the employee volunteers to work overtime in the interests of flexibility and for personal and financial reasons.² Despite recent judicial scrutiny in the area of enterprise bargaining, the impact of preferred hours clauses under the FW Act remains a complex issue.

This article examines, through the lenses of flexibility and the safety net,

* Lecturer, Griffith Business School, Griffith University. I would like to thank the anonymous referees for providing their insightful comments. Any errors are my own.

1 [2010] FWA 2105 at [28].

2 E Hannan, 'Workers Can't Sell Off Overtime Rights, Tribunal Rules', *The Australian* (Sydney), 16 April 2010, at <<http://www.theaustralian.com.au/business/workers-cant-sell-off-overtime-rights-tribunal-rules/story-e6frg8zx-1225854291706>> (accessed 15 February 2012); B Schneiders, 'Union Appeal on Overtime', *The Age* (Melbourne), 31 March 2010, available at <<http://www.theage.com.au/national/union-appeal-on-overtime-20100330-rbii.html>> (accessed 15 February 2012).

preferred hours under the new Fair Work regime.³ It commences with a definition of the term 'preferred hours clause', an assessment of the various types of such clauses in enterprise agreements, and an introduction to the statutory objectives underpinning industrial instruments that may incorporate these arrangements. Following a brief review of applications for approval of enterprise agreements before Fair Work Australia (FWA), three 'preferred hours' cases are examined, including the seminal Full Bench decision of *Bupa Care Services*.⁴ These cases reveal the employer logic for and the judicial approach to assessing preferred hours clauses under the following approval requirements: the Better Off Overall Test (BOOT), the No-Disadvantage Test (NDT) and the Public Interest Test. The author argues that the *Bupa* decision effectively clarified the method by which preferred hours clauses are assessed. As a consequence, the 'public interest' represents a test of last resort for approving a preferred hours arrangement in an enterprise agreement. The article then explores the likely impact of the preferred hours concept on employment contracts, individual flexibility arrangements (IFAs) and the National Employment Standards (NES), particularly maximum weekly working hours and the request for flexible working arrangements. While the inclusion of preferred hours clauses in enterprise agreements is oxymoronic in the terms suggested by Commissioner Cambridge, the concept is not necessarily the antithesis of the FW Act. The article concludes with proposed amendments to the regulatory framework governing IFAs which are designed to balance the statutory objectives of flexibility and the safety net.

Preferred Hours: Definition, Types and Statutory Context

Preferred hours, also known as 'voluntary additional hours' and 'voluntary hours', has no universal definition. The Australian Chamber of Commerce and Industry (ACCI) is critical of affixing the label 'preferred hours' to each type of clause because it implies that all clauses operate in the same manner or have the same effect and suggests that clauses need to be assessed on a case by case basis.⁵ Nevertheless, two general types of clauses can be discerned. Under the first type ('different hours'), the employee elects to work different hours to his or her usual work pattern (ie, as set out in a roster or contract). These different hours, such as ordinary hours worked on a Saturday, Sunday or at night during the week or hours worked outside the spread of ordinary hours, would typically attract penalty or overtime rates. Under the second type ('additional hours'), the employee elects to work hours in excess of their maximum ordinary hours prescribed in the enterprise agreement, hours which would ordinarily attract overtime rates. The common feature of both types of clauses

3 For an examination of safety net provisions through the lens of flexibility refer J Murray and R Owens, 'The Safety Net: Labour Standards in the New Era' in A Forsyth and A Stewart (Eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, Sydney, 2009, p 40.

4 *Bupa Care Services, ANF and ASU Enterprise Agreement 2009* (2010) 196 IR 1; [2010] FWAFB 2762 (15 April 2010) (*Bupa*).

5 *Ibid*, at [4]; Transcript of Proceedings, *Bupa Care Services Pty Ltd* (Fair Work Australia Full Bench, C2010/2624, SDP Acton, DP Sams and Williams C, 17 March 2010) at [406].

is that the employee is paid at a lower rate than what would otherwise be paid under the enterprise agreement because he or she volunteers or prefers to work the additional or different hours. The two types are collectively termed 'preferred hours' in this article unless the context indicates otherwise. The author suggests this is a sensible approach given that many preferred hours clauses in enterprise agreements incorporate both types.

Although individual preferred hours clauses can operate in a different manner, there are three recurring themes. First, employers seek to justify the inclusion of preferred hours clauses in the agreement. Preferred hours represent an opportunity to earn 'extra income',⁶ to achieve 'flexible and efficient work practices'⁷ and to meet personal circumstances, such as family and/or carer's responsibilities and the employee's financial situation.⁸ Second, the pay rate for working preferred hours is typically the ordinary rate of pay.⁹ Third, many enterprise agreements require the employee to complete a written application or declaration, located at the back of the enterprise agreement, as evidence of the agreement to work preferred hours.¹⁰ These applications can be so detailed as to require the employee to nominate preferred hours, days and times. For example, one enterprise agreement, which appears to be based on a template prepared by the National Retailers Association (NRA), enables an employee to nominate public holidays, Saturday and Sunday as their preferred hours by placing their signature against those items in the application.¹¹ Employees usually have the freedom to withdraw from the agreement at any time¹² or by giving notice.¹³

The sections which follow examine preferred hours clauses in light of the statutory objectives underpinning industrial instruments that may incorporate such arrangements. Identifying the relevant objectives is therefore necessary. The general object of the FW Act is to provide a 'balanced framework for cooperative and productive workplace relations'.¹⁴ Enterprise agreements, awards and the NES are industrial instruments used to achieve productivity and fairness within this balanced framework.¹⁵ Balance operates on a number of levels including between the interests of unions and business, between

6 *International Workforce Pty Ltd; re International Workforce Pty Ltd Enterprise Agreement 2009* [2010] FWAA 4003 (26 May 2010) at cl 9.7.

7 *Ranann Pty Ltd re Security Enterprise Agreement 2009* [2010] FWAA 1582 (5 March 2010) (Attachment B).

8 *Rooty Hill RSL Club Ltd; re Rooty Hill RSL Club Enterprise Agreement 2009* [2010] FWAA 3421 (29 April 2010) at [2].

9 For an exception, see *Woolworths Ltd; re Woolworths National Supermarket Agreement 2009* [2010] FWAA 3820 (20 May 2010) at cl 2.6.1.

10 *Sylvan Lodge Trust; re Statewide Monitoring Services Enterprise Agreement* [2010] FWAA 2243 (22 March 2010) at cl 4.11, Attachment B.

11 *P & A Securities Pty Ltd as Trustee for D'Agostino Family Trust; re P & A Securities Pty Ltd as Trustee for D'Agostino Family Trust Enterprise Agreement* [2010] FWAA 3639 (6 May 2010) at Sch 1.

12 *Chamber of Commerce and Industry Queensland; re Adventure and Recreation Activities Employees' Enterprise Agreement 2009* [2010] FWAA 1898 (5 March 2010) at cl 4.6.1(d).

13 *Anable Pty Ltd as Trustee for Nable Family Trust; re Bambu Cafe Enterprise Agreement* [2010] FWAA 3407 (29 April 2010) at cl 4.3.4.

14 FW Act s 3.

15 FW Act ss 3(f), 171(a) (enterprise agreements), s 134(1) (awards and NES).

work and family and between fairness and flexibility.¹⁶ In the particular context of industrial instruments, this balanced framework requires inter alia: a guaranteed safety net of employment conditions; a safety net that is not undermined by statutory individual employment agreements; and flexibility in working arrangements so that employees can balance their work and family responsibilities.¹⁷ Flexibility and the safety net are two key components of a balanced regulatory framework governing industrial instruments. It is not suggested that these are the only components but they do provide a satisfactory basis to examine preferred hours clauses.

Flexibility as a value is difficult to define and is often misconceived as being 'inescapably positive'.¹⁸ The FW Act offers procedural flexibility with respect to employment conditions. Stewart defines procedural flexibility as the 'adoption of regulatory mechanisms which facilitate ongoing change'.¹⁹ IFAs, through varying the application of modern awards and enterprise agreements, the NES, by enabling changes to working hours and arrangements and enterprise agreements, by changing underlying award conditions, facilitate procedural flexibility. Preferred hours arrangements reveal the negative side of flexibility through its direct conflict with the safety net. While preferred hours clauses in an industrial instrument offer flexibility in working arrangements, it is also an arrangement between an individual employee and their employer which displaces two safety net provisions: overtime and penalty rates. It represents a mechanism that employers may wish to exploit for the purpose of reducing labour costs. A key issue addressed in this article is how preferred hours clauses, when examined through the lenses of flexibility and the safety net, can be part of a balanced regulatory framework.

Preferred Hours: Approval Tests

Introduction

The benchmark and authorities responsible for assessing collective arrangements have been the subjects of regulatory change and academic scrutiny since the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices).²⁰ FWA is now responsible for approving enterprise agreements. As part of the approval process, FWA must assess the agreements against the employees' safety net of terms and conditions, which includes the NES²¹ and any applicable award. The relevant assessment mechanism depends on the time the enterprise agreement was made. The NDT applied to

16 A Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *AJLL* 3 at 45–6.

17 FW Act s 3(c)–(e).

18 A Stewart, 'Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation' (1992) 5 *AJLL* 101 at 102.

19 *Ibid.*, at 103 (emphasis altered).

20 C Sutherland, 'Making the "BOOT" Fit: Reforms to Agreement-Making from Work Choices to Fair Work' in A Forsyth and A Stewart (Eds), *Fair Work: The New Workplace Laws and Their Work Choices Legacy*, Federation Press, Sydney, 2009, p 111.

21 FW Act s 186(2)(c).

all agreements made between 1 July 2009 and 31 December 2009.²² This was known as the 'bridging period', that is the period between the repeal of Work Choices and the operative date for the remaining elements of the FW Act (minimum wages, NES and modern awards). Under the NDT, FWA must be satisfied that the 'agreement does not, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees who are covered by the agreement under any reference instrument relating to one or more of the employees'.²³ While very few (if any) cases will now be assessed using the NDT as a result of the transition to the FW Act, much of the jurisprudence on preferred hours addresses the NDT and hence an understanding of the test is important. For agreements made on or after 1 January 2010, the FW Act prescribes the BOOT.²⁴ Under the BOOT, FWA must be satisfied that each employee 'would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee'.²⁵ The global nature of both assessment mechanisms facilitates flexibility by enabling agreements to replace award entitlements with monetary benefits (eg, above award wage rates). Nevertheless the NDT and BOOT regulates this flexibility by using the safety net as the relevant comparator for assessing agreements.

FWA can still approve an enterprise agreement even it does or may fail the BOOT or NDT. A written undertaking by the employer to FWA, which subsequently forms part of the agreement, is designed to alleviate FWA concerns about the agreement not meeting the relevant test. FWA can only accept the undertaking if it is not likely to cause financial detriment to the employees concerned or result in substantial changes to the agreement.²⁶ Alternatively, FWA may approve an agreement that does fail the NDT or BOOT 'if FWA is satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest' (public interest test).²⁷ A similar exception existed prior to Work Choices.²⁸ Agreements accepted under the public interest test have a maximum nominal term of 2 years, which differs from the 4 year period for agreements that pass the BOOT or NDT.²⁹

Preferred hours clauses: approach of FWA

FWA has adopted various, and at times, conflicting, approaches to preferred hours clauses in enterprise agreements. Some enterprise agreements have passed the NDT without any undertakings.³⁰ For example, the *Milbag Pty Ltd Enterprise Agreement*, which covers two Eagle Boys Pizza outlets, was

22 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) Sch 7, Pt 2, Item 2(1).

23 Ibid, Item 4(1).

24 FW Act s 186(2)(d).

25 Ibid, s 193(1).

26 Ibid, ss 190(2) and 190(3).

27 Ibid, s 189(2).

28 Workplace Relations Act 1996 (Cth) s 170LT(3)(b).

29 FW Act s 186(5).

30 *International Workforce Pty Ltd* [2010] FWAA 4003.

accepted by FWA in March 2010.³¹ Nevertheless, identical or very similar preferred hours clauses intended to cover fast food industry employees were rejected by FWA in May 2010.³² Other enterprise agreements were approved on the undertaking that the preferred hours clause would not operate during the life of the agreement,³³ the offending clause would be deleted from the agreement³⁴ or the preferred hours would be paid at a higher rate of pay.³⁵ FWA has also rejected a number of agreements, primarily involving the retail industry, because the preferred hours clause either displaces the employee's entitlement to higher rates under the award³⁶ and/or the agreement does not provide other more beneficial entitlements so that the employee is not, on balance, disadvantaged.³⁷

Preferred hours clauses drew particular legal and media attention in *Fanoka Pty Ltd t/as Fairview Orchards re Fanoka Pty Ltd Agreement 2009*.³⁸ *Fanoka* involved 102 single enterprise agreements covering employees in the agricultural industry that contained a similar preferred hours clause. In approving the agreements (subject to undertakings in respect of matters other than preferred hours), Senior Deputy President Richards held that the preferred hours clause represented a benefit to employees and thereby passed the NDT because: employees could volunteer to work hours and earn more than they would otherwise have earned; earning additional income would offset periods when their work hours decreased; it reduced transaction costs (eg, tax free threshold and withholding tax) associated with a transient workforce moving to new employers to seek more hours; and it facilitated greater flexibility in hours of work.³⁹

Three significant cases have emerged from the 'state of flux'⁴⁰ created by FWA's early approach to preferred hours arrangements. *Bupa*⁴¹ was the first FWA Full Bench decision that considered preferred hours clauses in enterprise agreements. *Samphie Pty Ltd t/as Black Crow Organics re Black Crow Organics Enterprise Agreement 2009*⁴² was the first FWA decision that applied the public interest test to approve an agreement containing a preferred hours clause. Finally, the decision of *Top End Consulting Pty Ltd re Top End*

31 *Milbag Pty Ltd; re Milbag Pty Ltd Enterprise Agreement* [2010] FWAA 1834 (4 March 2010).

32 *P & A Securities Pty Ltd* [2010] FWAA 3639.

33 *Sylvan Lodge Trust* [2010] FWAA 2243 at [3]–[5]; *Anable Pty Ltd* [2010] FWAA 3407 at [3]–[6].

34 *Undertaking of Hudaks Bakery Pty Ltd* (15 April 2010) at [5], attached to *Hudaks Bakery Pty Ltd; re HB Enterprise Agreement 2009* [2010] FWAA 3512 (3 May 2010).

35 *Chamber of Commerce and Industry Queensland* [2010] FWAA 1898 at [4]–[5].

36 *Bendy Q Pty Ltd* [2009] FWA 1869 (22 December 2009).

37 *DJ Swag Pty Ltd* [2010] FWA 4968 (6 July 2010) at [8].

38 [2010] FWAA 2139 (16 March 2010) (*Fanoka*).

39 *Ibid*, at [33].

40 Transcript of Proceedings, *Application by Chateau Elan Hospitality as Trustee for the Chateau Elan Management Unit Trust* (Fair Work Australia, AG2010/66, Sams DP, 25 February 2010) at [110]. See also *Chateau Elan Hospitality as trustee for the Chateau Elan Management Unit Trust re Vintage Complex Enterprise Agreement 2009* [2010] FWAA 1942 (15 March 2010).

41 (2010) 196 IR 1; [2010] FWAFB 2762.

42 [2010] FWAA 5060 (8 July 2010) (*Black Crow Organics*).

*Consulting Enterprise Agreement 2010*⁴³ is significant because it was the first reported decision in which FWA applied the BOOT to a preferred hours clause and it also provided FWA with an opportunity to consider all the approval tests in light of *Bupa* and *Black Crow Organics*. These decisions are discussed in the sections that follow.

Preferred Hours: Key Cases

Bupa

The enterprise agreement in *Bupa* involved employees in the aged care sector. The preferred hours clause, being an 'additional hours' type arrangement, was subject to a trial and review period of 6 months after which time any unresolved issues could be referred to FWA according to the dispute resolution procedure in the agreement. During submissions, the employer and union logic for the preferred hours clause were revealed. According to the employer, such a clause would reduce the employer's reliance on labour hire staff and give preference to existing staff for additional shifts. The benefit was characterised in terms of labour cost savings but also a patient benefit through maintaining consistency in the delivery of aged care services.⁴⁴

Commissioner Smith at first instance rejected the agreement on the basis it failed the NDT. The preferred hours clause was a cost saving to the employer, not a benefit. The alleged benefit, being that an employee would receive additional work that they may not otherwise have been given, was characterised by Commissioner Smith as a 'gift of employment' at a 'discounted rate from the safety net'.⁴⁵ His Honour noted that 'it would be difficult to suggest that an employee would see the benefit in being paid less than that which would otherwise apply'.⁴⁶

The employer lodged an appeal on the grounds that Commissioner Smith erred in applying the NDT and for not providing the employer with a reasonable opportunity to give an undertaking to address Commissioner Smith's concerns that the agreement did not pass the NDT. On appeal, the Full Bench of FWA cited with approval the decision of *Re MSA Security Officers Certified Agreement 2003*⁴⁷ which rejected a clause enabling an employee to work overtime at ordinary rates by agreement with the employer. A majority of the Full Bench in that case held that the comparison under the NDT was between the terms and conditions of employment in the agreement and the relevant award. The operational possibility of the employer to provide an employee with additional work hours was irrelevant because the applicable award made no distinction between voluntary working hours and hours directed by the employer.⁴⁸ As in the *Security Officers* case, FWA was required to make a textual comparison between the enterprise agreement and the

43 [2010] FWA 6442 (24 August 2010) (*Top End Consulting*).

44 See Transcript of Proceedings, *Bupa* (Fair Work Australia Full Bench, C2010/2624, SDP Acton, DP Sams and Williams C, 17 March 2010) at [405].

45 *Bupa Care Services Pty Ltd* [2010] FWA 16 (5 January 2010) at [17] per Smith C.

46 *Ibid.*

47 (Unreported, AIRCFB, PR937654, Watson SDP, Blain DP, Lewin C, 15 September 2003).

48 *Ibid.*, at [79]–[81].

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relevant award and assess, on a global basis, whether the agreement resulted in a reduction in employment terms and conditions. In particular:

the 'no-disadvantage test' does not involve an analysis of matters other than the terms and conditions of the enterprise agreement against those in any relevant reference instrument. The effect the terms and conditions may have on the actions of an employer or employee is not relevant to the 'no-disadvantage test'.⁴⁹

The agreement failed the NDT because the preferred hours clause represented at least one term or condition of employment that was less beneficial than the awards that applied to the employees.⁵⁰ Despite this, the Full Bench held that Commissioner Smith did make an appealable error by not giving the employer an opportunity to provide a written undertaking to alleviate concerns about the agreement.⁵¹ The appeal was upheld, the decision of Commissioner Smith quashed and the application for approval of the agreement referred to Senior Deputy President Acton. The enterprise agreement was subsequently approved subject to an undertaking that the preferred hours clause would not be referred to, relied on or applied during the operation of the agreement.⁵²

Black Crow Organics

In *Black Crow* the employer was the operator of a potato farm with a peak season of May to late November each year. Three main reasons for approval of the enterprise agreement containing an 'additional hours' type arrangement were proffered by the employer. First, *Bupa* was not authority for the proposition that all agreements with preferred hours clauses would fail the NDT. Second, a number of similar agreements had been approved by the Australian Industrial Relations Commission (AIRC) and FWA, including those in *Fanoka*. Third, if the agreement failed the NDT, the agreement should be approved under the public interest test. Costs dominated the employer logic for the preferred hours clause. It was submitted that the employer would otherwise have to increase its casual workforce to cover the additional hours because it could not afford to pay penalty rates to regular seasonal employees. This would be to the detriment of those regular seasonal employees seeking to work as many hours as possible during peak season to maximise their income, would increase administrative costs and raise workplace health and safety issues for the employer.⁵³

Commissioner Asbury agreed that the effect of *Bupa* was not that all preferred hours clauses in enterprise agreements would fail the NDT.⁵⁴ However, *Bupa* did not change the global approach taken to applying the NDT, namely, the identification and balancing of more beneficial and less

49 *Bupa* (2010) 196 IR 1; [2010] FWAFB 2762 at [25].

50 *Ibid*, at [36].

51 *Ibid*, at [54].

52 *Undertaking of Bupa Care Services Pty Ltd* (23 March 2010), attached to *Bupa Care Services Pty Ltd; re Bupa Care Services, ANF and HSU Enterprise Agreement 2009* [2010] FWAA 3238 (22 April 2010).

53 *Black Crow Organics Enterprise Agreement 2009* [2010] FWAA 5060 at [11].

54 *Ibid*, at [20].

beneficial provisions compared to the reference instrument (ie, the award).⁵⁵ Commissioner Asbury concluded that the preferred hours clause had the identical effect to that in *Bupa* and, despite the seasonal nature of the agricultural industry and fluctuating work hours, this was not a basis for distinguishing *Bupa*. On a global approach, the agreement failed the NDT because the preferred hours clause, being less beneficial than the relevant award which applied to the employees, was not offset by more beneficial provisions.⁵⁶

The enterprise agreement was however accepted under the public interest test. There were two exceptional circumstances. First, the employer was in a seasonal industry which had a detrimental effect on regular casual employees who had to accumulate sufficient savings during peak season to offset their lack of earnings outside peak season. Without a preferred hours clause, the employees would be unable to maximise their income during peak season. Second, similar agreements were generally approved under the FW Act prior to *Bupa* and at the time the enterprise agreement was made, the Workplace Authority had referred to a preferred hours clause as an example of meeting the NDT in its policy.⁵⁷ The approval of the preferred hours clause was subject to an undertaking that it would only operate during the peak season each year (1 May to 30 November).

Top End Consulting

The employer was a labour hire company providing services to the agricultural, retail and hospitality industries located in the Kimberley region of Western Australia and the Northern Territory. The employer logic for including both 'different hours' and 'additional hours' arrangements in the proposed enterprise agreement was that it enabled employees to maximise their income during peak periods by working hours which would not otherwise be available to them because of the employer's liability to pay overtime and penalty rates.⁵⁸ Deputy President Bartel differentiated the BOOT and NDT, finding that the BOOT required a higher standard because employees must be 'positively better off'.⁵⁹ Although the BOOT was a different test, Deputy President Bartel acknowledged that a textual comparison between the agreement and the reference instrument remained the proper approach to approving the enterprise agreement:

There is nothing in s 193 to suggest that the Better Off Overall Test is to be assessed by matters extraneous to the terms and conditions of the relevant instruments. The test still requires that the status of the employees as better off overall, or otherwise, is to be assessed on the basis of the application of each instrument to the employee and not the intentions of the parties as to working arrangements which may flow from those terms.⁶⁰

Deputy President Bartel cited with approval *Bupa* and distinguished

⁵⁵ *Black Crow Organics* [2010] FWAA 5060 at [21].

⁵⁶ *Ibid.*, at [23].

⁵⁷ *Ibid.*, at [26].

⁵⁸ *Top End Consulting* [2010] FWA 6442 at [11] and [17].

⁵⁹ *Ibid.*, at [22].

⁶⁰ *Ibid.*, at [27].

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Fanoka on the ground that a different approach to the assessment of the NDT was adopted.⁶¹ On a global assessment, the agreement did not pass the BOOT because the more beneficial provisions of the agreement did not outweigh the preferred hours clause.⁶²

In the alternative, the employer submitted that the agreement should be approved under the public interest test. Her Honour held that the nature of a labour hire business — supplying labour which enables a client employer to handle peaks in activity and its short term and highly casualised workforce — was not an exceptional circumstance. *Black Crow Organics* was also distinguished on the basis that the employees covered by that agreement were regular casuals, who were dependent on additional income in peak periods to cover for periods where work was limited, whereas the Top End Consulting employees were a transient population, moving to other locations when the work ceased.⁶³ Nevertheless, there were exceptional circumstances, being ‘the convergence of the profile of the employees, the provision of labour to seasonal industries (as opposed to the provision of labour to cover the regular peaks and troughs of activity that occurs in many businesses) and the employer’s business operating predominantly within the tropical areas’.⁶⁴

The preferred hours clause was not contrary to the public interest in respect of seasonal industries. Her Honour was prepared to approve the agreement on an undertaking which restricted the operation of the preferred hours clause to seasonal industries.

Preferred Hours: Case Discussion

NDT and BOOT

The cases reveal that the dominant employer logic for preferred hours clauses is labour costs or is driven by labour costs. For example, an ‘additional hours’ type of clause is justified to give the employee an opportunity to work additional hours that would otherwise have been allocated to new, casual or labour hire staff. The employer logic here is cost-driven — the hours would not be available because of the increased labour costs (eg, overtime rates) associated with offering those hours to the employee. FWA though has made it clear that labour costs and the opportunity to work different or additional hours for financial or family reasons are irrelevant when applying the NDT and BOOT.

FWA’s position is entirely appropriate, given that the flexibility in labour allocation offered by a preferred hours clause is susceptible to exploitation by the employer. For instance the employer’s first preference in allocating labour that would otherwise be paid at overtime or penalty rates is likely to be the employees who have nominated preferred hours, their second preference casuals and perhaps labour hire staff and their third preference permanent staff who have not nominated preferred hours. Herd behavior, also known as the ‘bandwagon effect’ and ‘informational cascades’, may ensue. Herd behaviour

61 Ibid, at [24]–[25].

62 Ibid, at [35].

63 Ibid, at [42].

64 Ibid, at [43].

occurs when an individual decides to follow the behaviour of a preceding group of individuals, regardless of his or her own information.⁶⁵ While the individual's decision-making process may be rational, herd behaviour can lead to undesirable outcomes.⁶⁶ For example, Employee A (a permanent employee) enters an 'additional hours' type arrangement. Employee B (a permanent employee) needs to work overtime hours to meet financial commitments. The employer is more likely to offer Employee A (a first preference employee) overtime hours than Employee B (a third preference employee). Equipped with this information, Employee B decides to follow Employee A and enter a preferred hours arrangement. As the herd of first preference employees grows, it provides a stronger signal to third preference employees such as Employee C and D to nominate preferred hours because it becomes increasingly unlikely that the employer will offer third preference employees overtime hours. While the decision-making process is rational, the 'herd' of employees is worse off because the additional hours are paid at ordinary rates. The preferred hours arrangement has the effect of undermining the employees' safety net entitlement to overtime payments. Fortunately, labour law regulates the potential exploitation of flexibility and protects safety net entitlements by recognising preferred hours clauses as a detriment under the NDT or BOOT.

There was some debate prior to the FW Act about the operation of the BOOT compared to the NDT.⁶⁷ The decision in *Top End Consulting* suggests that FWA will apply the BOOT in the same manner as the NDT. Further, the BOOT does set a higher standard for approving agreements than the NDT, but the difference is not significant. *Bupa* reveals a two step process in assessing agreements. The first step is to identify the benefits and detriments of the agreement vis-a-vis the relevant award, which can only be achieved by comparing the terms of the agreement and award. This textual comparison is consistent with the intention of the legislature when formulating the BOOT.⁶⁸ Matters such as flexibility, transaction costs, earning additional income, family responsibilities or the opportunity to work additional or different hours cannot be a benefit for the purpose of the BOOT because they represent the potential effects of the preferred hours clause on the employee. The term of the agreement is the preferred hours clause and it represents a detriment vis-a-vis the award because the additional or different hours are paid at a lower rate than the award rate. The second step of the BOOT is to assess, on a global basis, whether the benefits identified outweigh the detriments in respect of each employee or, where appropriate, each class of employees.⁶⁹ The employee will not be better off unless the detriment of the preferred hours clause is outweighed by corresponding benefits in the agreement. The agreements

65 S Bikhchandani, D Hirschleifer and I Welch, 'A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades' (1992) 100 *Jnl of the Political Economy* 992 at 994-5; A V Banerjee, 'A Simple Model of Herd Behaviour' (1992) 107 *The Quarterly Jnl of Economics* 797 at 798.

66 *Ibid.*

67 M Pittard and R Naughton, *Australian Labour Law: Text, Cases and Commentary*, 5th ed, LexisNexis Butterworths, Sydney, 2010, pp 739-42; R Bargary cited in 'BOOT Tougher than the NDT, Says AIG; ACTU Disagrees', *Workplace Express*, 28 November 2008.

68 Explanatory Memorandum, Fair Work Bill 2008 (Cth), Parliament of Australia, 2008, rr 159 and 160.

69 FW Act s 193(7).

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reviewed by the author do not provide such benefits.

Public interest test

The public interest test represents the employer's only fallback position should the enterprise agreement fail the BOOT or NDT. This was demonstrated in both *Top End Consulting* and *Black Crow Organics*. FWA was satisfied that approval of both agreements was not contrary to the public interest because of the exceptional circumstances associated with a seasonal industry. FWA did not however identify the 'public interest' considerations relevant to the enterprise agreements being assessed, which is part of a common trend in agreement approval decisions studied by the author. Both cases raise two important questions: Are there other exceptional circumstances that would enable an enterprise agreement to satisfy the public interest test? What could represent the 'public interest' with respect to the approval of enterprise agreements?

The case law makes clear that exceptional circumstances are not limited to seasonal industries. The employer's financial position (in administration and receivership) was an exceptional circumstance in *ABC Learning Centres and LHMU Enterprise Agreement 2009*.⁷⁰ Overseas competition, as opposed to labour cost competitiveness within an Australian industry,⁷¹ can be exceptional circumstances. For example in *Metro Velda Pty Ltd Peterborough Enterprise Agreement 2009*,⁷² an exceptional circumstance was fierce competition in the Australian horsemeat industry from South America. Despite concerns about the agreement not meeting the award safety net, FWA agreed that approving the agreement would ensure continuing employment through the ongoing processing and export of horse meat to Europe.⁷³ Exceptional circumstances have also included the funding constraints of not-for-profit organisations⁷⁴ and the remote location of the workplace.⁷⁵ An enterprise agreement incorporating a preferred hours arrangement could be approved in any of these circumstances.

The 'public interest' has been a feature of Australian labour law, most notably in test cases brought before the industrial tribunal.⁷⁶ It is considered in a variety of contexts under the FW Act including the termination of enterprise agreements.⁷⁷ The leading case concerning the public interest test in the approval and termination of agreements is *Kellogg Brown & Root v Esso Australia Pty Ltd re Bass Strait (Esso) Onshore/Offshore Facilities Certified*

70 [2010] FWAA 1687 (*ABC Learning Centres*).

71 *Douglas Labour Services Pty Ltd* [2010] FWA 555 (10 February 2010).

72 [2010] FWAA 2622 (1 April 2010) (*Metro Velda*).

73 *Ibid*, at [10].

74 *Community Living & Respite Services Inc; re Community Living & Respite Services Inc Enterprise Agreement* [2010] FWAA 2290 (19 March 2010).

75 *Milingimbi & Outstations Progress Resource Association; re Milingimbi & Outstations Progress Resource Association Enterprise Agreement* [2011] FWAA 1431 (22 February 2010).

76 R Owens and J Riley, *The Law of Work*, Oxford University Press, Melbourne, 2007, pp 90–3.

77 FW Act s 226.

Agreement 2000.⁷⁸ The Full Bench observed that '[t]he notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards'.⁷⁹

The Full Bench also acknowledged that ascertaining the public interest may involve the balancing of competing public interests.⁸⁰ Applying *Kellogg Brown* the 'public interest' would, in the context of agreement approvals, include maintaining the safety net of employment conditions, being a 'proper industrial standard'. Approving an enterprise agreement that does not satisfy the BOOT or NDT is clearly not in the public interest because it undermines the safety net. However the failure to approve such an agreement may lead to negative public outcomes associated with unemployment (*Metro Velda*), underemployment (*Black Crow Organics*) or the shutdown of all or part of an employer's business (*ABC Learning Centres*). The final outcome is also recognised by the FW Act which provides an example of an agreement that may pass the public interest test: 'the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer'.⁸¹

On the author's interpretation, 'exceptional circumstances' trigger competing public interest considerations to the safety net which satisfies the public interest test. A logical reason for this interpretation is that without a competing public interest consideration, the agreement is clearly contrary to the public interest. For example, the *Black Crow Organics* enterprise agreement undercut the safety net, but the exceptional circumstances associated with fluctuating hours in a seasonal industry triggered another public interest consideration — underemployment. Protecting the safety net of employment conditions no longer represented the sole 'public interest' consideration because of the exceptional circumstances. In light of a competing public interest consideration, approving the agreement would 'not be contrary to the public interest', which Deputy President Bartel noted in *Top End Consulting* is a lower test than 'in the public interest'.⁸² The validity of the author's interpretation is open for debate. Nevertheless it may explain why industrial tribunals have placed greater emphasis on ascertaining the 'exceptional circumstances' rather than ascertaining where the 'public interest' lies. It is also an interpretation consistent with a balanced regulatory framework. The public interest test affords FWA with the flexibility to override the safety net protection of the NDT and BOOT, but only in exceptional circumstances which trigger other public interest considerations.

Preferred Hours: Impact on Industrial Instruments

FWA's position on preferred hours clauses is clear — an enterprise agreement will not be approved unless: there is a corresponding benefit(s) elsewhere in

78 Unreported, AIRCFB, Guidice P, Ross VP and Gay C, PR955357, 31 January 2005 (*Kellogg Brown*).

79 Ibid, at [23].

80 Ibid, at [26].

81 FW Act s 189(3).

82 *Top End Consulting Pty Ltd* [2010] FWA 6442 at [46].

the agreement that outweighs the detriment of the preferred hours clause; or approval of the agreement would not be contrary to the public interest perhaps because exceptional circumstances exist. But are there other legal outlets for the preferred hours arrangement to subsist in the employment relationship? This section addresses the potential impact of the preferred hours concept on the contract of employment, the NES and individual flexibility arrangements.

Employment contract

The common law contract of employment can incorporate a preferred hours clause, but its operation is still subject to any award or enterprise agreement that applies to the employee. For employees not covered by either of these industrial instruments or an award employee with a guarantee of annual earnings,⁸³ the preferred hours clause is free from the award safety net of employment conditions. While the NES provide a legislated safety net for the vast majority of private sector employees in Australia known as 'national system employees',⁸⁴ it does not include overtime or penalty rates for working additional or different hours. Alternatively, an employer in a workplace covered by industrial instruments may attempt to circumvent their operation by signing employees up to individual employment contracts containing a preferred hours clause which include wage payments above industrial instrument pay rates. Nevertheless the employer remains at risk of breaching the relevant industrial instrument unless the higher payment can be used to offset and does offset the loss of penalty and overtime rates. An analysis of the employer's capacity to offset is beyond the scope of this article but has been discussed elsewhere.⁸⁵

National employment standards

The NES expands on the legislated safety net first introduced under Work Choices. Many of the additional conditions, including notice of termination and redundancy pay, are re-packaged versions of AIRC test cases or Work Choices provisions.⁸⁶ Nevertheless the NES is significant because it represents a legislated safety net for all national system employees, it cannot be excluded by an enterprise agreement or award,⁸⁷ and together with awards, the NES restores the protective function of the safety net that was compromised under Work Choices.⁸⁸ It is also significant that the FW Act attempts to complement the legislated safety net with flexibility. As Murray and Owens note, the NES should not be seen as monolithic and uniform but are imbued with a particular principle of flexibility.⁸⁹ This flexibility is revealed in the maximum hours of work standard and right to request flexible working arrangements.

83 FW Act Pt 2-9 Div 3.

84 Ibid, ss 13 and 30C.

85 A Stewart, *Stewart's Guide to Employment Law*, 2nd ed, Federation Press, Sydney, 2009, pp 186-7.

86 M Pittard, 'Reflections on the Commission's Legacy in Legislated Standards' (2011) 53 *JIR* 698; Murray and Owens, above n 3, p 49.

87 FW Act s 55.

88 Pittard and Naughton, above n 67, Ch 10; Owens and Riley, above n 76, pp 337-41.

89 Murray and Owens, above n 3, p 54.

The first employment condition in the NES is that an employer must not request a full time employee to work more than 38 hours per week unless the additional hours are reasonable.⁹⁰ While the preferred hours clause is not in breach of the NES because the employee and not the employer is requesting additional hours, it could be seen as undermining the concept of a 38 hour week.⁹¹ The additional hours that employees prefer to work are treated as ordinary hours for all intents and purposes because they are paid at the ordinary rate. This contradicts a fundamental principle in labour law that award-based employees receive overtime pay for overtime hours. The preferred hours clause may be contrary to the spirit of the NES, but it is not a breach of the NES.

An alternative method by which an 'additional hours' type arrangement can be incorporated into an enterprise agreement is by averaging weekly hours. The NES states that an enterprise agreement or award can provide for the averaging of hours of work so that the employee works on average a 38 hour week over a specified period.⁹² The more prevalent industries seeking approval of agreements with preferred hours clauses are retail, fast food, agriculture, aged care and hospitality. From a review of their respective awards, only the retail industry permits an averaging of ordinary hours beyond a 4 week period, and only by agreement between the employer and employee.⁹³ In applying the BOOT, any enterprise agreement with an averaging of ordinary hours beyond 4 weeks when an award prescribes a 4 week maximum would, on a textual comparison, constitute a detriment to the employee. For example, an employee works 40, 36, 34, 42, 34 and 42 hours over a 6 week period. If the proposed enterprise agreement enabled the employer to average ordinary hours over a 6 week period, the employee suffers a detriment because they would be entitled to overtime payments in week six under the award. Unless the relevant award provides for a long term averaging of hours, the ability of employers to use averaging of hours as an 'additional hours' type of arrangement is limited to short term fluctuations in labour requirements. The averaging hours mechanism cannot work as a de facto 'additional hours' clause where the employees are already working their maximum ordinary hours each week nor does it release the employer from paying penalty rates for ordinary hours worked.

The NES also provides that an employee may make a request to their employer for a change in their working arrangements to assist the employee to care for a child in their capacity as a parent or care giver.⁹⁴ A request can only be refused by the employer on reasonable business grounds.⁹⁵ This request for flexible working arrangements appears to allow a 'different hours' type of arrangement by another name, but significant restrictions exist in its operation. The employee must be a long term casual employee or have at least 12 months continuous service with the employer and the child must be under

90 FW Act s 62(1).

91 *Bupa Care Services Pty Ltd* [2010] FWA 16 at [14]–[16].

92 FW Act s 63(1).

93 *General Retail Industry Award 2010* (1 January 2010) cl 28.1.

94 FW Act s 65.

95 *Ibid*, s 65(5).

school age or under 18 with a disability.⁹⁶ Further, the request for flexible working arrangements cannot vary the application of an industrial instrument to provide for ordinary rates of pay. For example, the employer is liable to pay penalty rates if as a consequence of the request the employee's changed hours are subject to penalty rates under the applicable industrial instrument. Conceivably this liability may be used by the employer as a 'reasonable business ground' to refuse the request. The FW Act does not define 'reasonable business grounds' but the Explanatory Memorandum suggests it includes the financial impact on the employer's business.⁹⁷ Given these circumstances, the employee may seek or the employer may encourage an IFA.

Individual flexibility arrangements

The FW Act incorporates a different measure of individual flexibility in awards and enterprise agreements than has previously existed in Australian labour law. The Workplace Relations Act 1996 (Cth) introduced statutory individual agreements in 1996 known as Australian Workplace Agreements (AWAs). This legislation also marked the beginning of an award simplification process. As part of this process, the AIRC was required to ensure that awards, where appropriate, contained 'facilitative provisions'.⁹⁸ Employees, individually or collectively, could agree with their employer about how particular award matters would operate in the workplace.⁹⁹ Work Choices then restricted facilitative provisions to individual agreement.¹⁰⁰ The FW Act subsequently abolished AWAs on the basis that statutory individual employment agreements 'can never be part of a fair workplace relations system'.¹⁰¹ Nevertheless the FW Act authorises individual agreements known as IFAs.

All enterprise agreements and awards must include a flexibility term that enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement or award in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer.¹⁰² The flexibility term must set out the terms of the industrial instrument the effect of which can be varied by the IFA.¹⁰³ A model flexibility term is taken to form part of an enterprise agreement if none exists in the enterprise agreement.¹⁰⁴ Both the model flexibility term for enterprise agreements and the model flexibility term devised by the AIRC for inclusion in awards enable the IFA to vary the effect of arrangements in the industrial instrument about when work is performed, overtime rates and penalty rates. The subsequent IFA, which has effect as a term of the industrial instrument, must result in the employee being better off

⁹⁶ Ibid, ss 65(1) and (2).

⁹⁷ Explanatory Memorandum, Fair Work Bill 2008 (Cth), above n 68, at [267].

⁹⁸ Workplace Relations Act 1996 (Cth) ss 143(1B) and (1C).

⁹⁹ Owens and Riley, above n 76, pp 340-1.

¹⁰⁰ Workplace Relations Act 1996 (Cth) s 521.

¹⁰¹ FW Act, s 3(c).

¹⁰² Ibid, s 144 (awards); s 202 (enterprise agreements).

¹⁰³ Ibid, s 144(4)(a) (awards); s 203(2)(a) (enterprise agreements).

¹⁰⁴ Ibid, s 202(4).

overall than if there was no IFA.¹⁰⁵ Unlike an enterprise agreement, the IFA is not lodged with and assessed by FWA. The employer is responsible for ensuring that the employee is better off overall under the IFA.¹⁰⁶

IFAs bring the statutory objectives of flexibility and the safety net into direct conflict. The primary concern is that the flexibility in IFAs can be exploited in much the same way as AWAs during the Work Choices regime to vary and displace the award safety net through individual bargaining.¹⁰⁷ Preferred hours clauses in an IFA do just that, displacing overtime payments and/or penalty rates. The apparent lack of FWA scrutiny of IFAs not only magnifies these concerns,¹⁰⁸ but makes it difficult for FWA to resolve the issue as to whether an IFA can incorporate a preferred hours clause. No judicial authority will be forthcoming until FWA adjudicates a dispute about the IFA pursuant to the dispute settlement procedures in an industrial instrument¹⁰⁹ or an employee claims that the IFA containing the preferred hours clause was not properly made. A failure to meet the requirements of an IFA, including the BOOT, constitutes a breach of the industrial instrument which made provision for the IFA.¹¹⁰

The ACCI revealed the source of the present confusion, namely, the operation of the BOOT to IFAs, during the *Bupa* proceedings. It submitted that the decision at first instance undermined the employer's ability to use preferred hours clauses in an IFA, contrary to the examples of preferred hours arrangements in IFAs given in the Explanatory Memorandum to the Fair Work Bill and the Fair Work Ombudsman's (FWO) Best Practice Guide.¹¹¹ The ACCI's concerns are valid. The Commonwealth Government intended that employers and employees could enter IFAs to vary working hours for reasons of flexibility, work life balance and family responsibilities. But on application of the principles in *Bupa*, an IFA containing a preferred hours clause would fail the BOOT because the non-financial reasons for entering an IFA are disregarded. Therefore if the statutory objective of flexibility is to be upheld in IFAs, *Bupa* was either wrongly decided or IFAs are subject to different requirements under the BOOT compared to enterprise agreements. The former conclusion is incorrect for the reasons previously addressed in this article and there is no evidence in the FW Act or extrinsic materials to suggest the latter.

The present confusion arises because the FW Act does not strike a fair balance between individual flexibility and the safety net with respect to IFAs. Two recommendations designed to achieve a balanced regulatory framework will now be assessed: the establishment of 'genuine need' as a condition precedent to a valid IFA and a revised BOOT that considers non-financial benefits to employees. The circumstances in which preferred hours clauses in

105 Ibid, s 144(4)(c) (awards); s 203(4) (enterprise agreements).

106 Ibid, s 144(4)(c) (awards); s 203(4) (enterprise agreements).

107 Murray and Owens, above n 3, pp 60–1.

108 Pittard and Naughton, above n 67, pp 856–7.

109 FW Act s 139(1)(j) (awards); s 189(6) (agreements).

110 Ibid, ss 50, 202(3)(b) and 204(3) (enterprise agreements); ss 45; 144(2)(b) and 145(3) (awards).

111 *Bupa* (2010) 196 IR 1; [2010] FWAFB 2762; Transcript of proceedings, *Bupa* (Fair Work Australia Full Bench, C2010/2624, SDP Acton, DP Sams and Williams C, 17 March 2010) at [423] and [437].

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an IFA can be part of this new regulatory framework are then explored.

Recommendations

Condition precedent

The first recommendation is to make the existence of a genuine need, which cannot be met by the relevant industrial instrument, a condition precedent to a valid IFA. IFAs were designed to facilitate greater flexibility in employment relationships.¹¹² An employee and employer enter this special arrangement in order to meet their genuine individual needs because the industrial instrument does not afford such flexibility. The condition precedent therefore gives legal effect to the unique purpose of an IFA. It also responds to concerns about employers exploiting the flexibility of IFAs in a similar manner to AWAs by providing a mechanism in addition to the BOOT which regulates flexibility. Employers subject to this additional requirement have less flexibility to 'contract out' of award and enterprise agreement provisions which can be varied by the IFA. The recommendation can be implemented by amending ss 144(4) (modern award) and 203 (enterprise agreements) of the FW Act dealing with flexibility terms to include the provisions in Table 1. In the case of enterprise agreements, this may also necessitate an additional clause in the model flexibility term requiring the employer to provide details of the needs of the employee and employer that cannot be met by the enterprise agreement.¹¹³

Table 1: Amendments to flexibility term provisions of FW Act

Enterprise Agreement <i>Requirement for Genuine Need</i>	Modern Award <i>Requirement for Flexibility Terms</i>
The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term is in order to meet the genuine needs of the employee and employer which cannot be met by the enterprise agreement.	The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term is in order to meet the genuine needs of the employee and employer which cannot be met by the modern award.

Operation of BOOT

The BOOT is a regulatory mechanism which balances flexibility and the safety net in both IFAs and enterprise agreements. Employers have the flexibility to vary the award safety net in enterprise agreements but that same safety net is used to underpin the agreement in order to achieve positive collective outcomes. IFAs offer a different kind of flexibility to enterprise agreements. An individual employee and their employer can vary the effect of particular conditions in the industrial instrument to meet their individual

112 Explanatory Memorandum, Fair Work Bill 2008 (Cth), above n 68, r 151.

113 Fair Work Regulations 2009 (Cth) Sch 2.2(3)(d).

genuine needs because the industrial instrument (which covers a collective group of employees) does not have the flexibility to do so. This individual flexibility was intended to provide employees with non-financial benefits that result from meeting that genuine need. For instance the FW Act states that flexible working arrangements are part of a balanced regulatory framework by 'assisting employees to balance their work and family responsibilities'.¹¹⁴ The Explanatory Memorandum to the Fair Work Bill provides an example of an IFA to demonstrate the non-financial benefits resulting from a preferred hours arrangement.¹¹⁵ Josh, a gym membership consultant, wishes to coach an under-12s football team 2 days per week. Josh's employer needs him to work from 9 am to 5:30 pm but Josh wants to start work at 7:30 am and finish at 4:00 pm on the 2 days. A 7:30 am start attracts penalty rates under the enterprise agreement. The parties enter an IFA which varies the effect of terms in the enterprise agreement dealing with hours of work and penalty rates. The Explanatory Memorandum then suggests that Josh's personal circumstances can be considered in assessing whether Josh is better off overall on the basis that it is an individual arrangement. Josh is better off overall because the non-financial benefit (work-life balance) arising from the genuine need (coaching an under-12's football team) outweighs the failure to receive penalty rates. In this example Josh's individual circumstances reveal his genuine need, and the non-financial benefit is the result of meeting that genuine need in an IFA.

The BOOT, as applied in *Bupa*, would hinder the individual flexibility intended by the FW Act for IFAs. A preferred hours clause in an IFA designed to accommodate the employee's individual circumstances such as family responsibilities (a non-financial benefit) would be considered a matter extraneous to the strict textual comparison of the industrial instrument (as varied by the IFA) against the industrial instrument (without the IFA) and therefore fails the BOOT. The IFA of Josh the gym consultant in the Explanatory Memorandum fails the BOOT for the same reason. This does not mean the interpretation of the BOOT in *Bupa* is incorrect or that the BOOT should be removed as a statutory requirement for assessing IFAs. As previously discussed in the context of preferred hours arrangements, the BOOT maintains the integrity of the employees' safety net of conditions in enterprise agreements by preventing employers from exploiting employee preferences to reduce labour costs. What is required is a revised BOOT for IFAs which is more attuned to the statutory objective of facilitating individual flexibility.

The second recommendation is therefore to amend the FW Act, perhaps at ss 144(4) (modern award) and 203 (enterprise agreements), to recognise non-financial benefits as a benefit under the BOOT. The revised BOOT could be renamed, to avoid confusion with the BOOT for enterprise agreements, and drafted in the following terms: In determining whether the employee is better off overall, the employer may have regard to any benefits (financial or non-financial) that the employee receives as a result of the IFA meeting the employee's genuine needs.

114 FW Act s 3(d).

115 Explanatory Memorandum, Fair Work Bill 2008 (Cth), above n 68, at [867].

The critics of IFAs would argue that this revised BOOT gives employers more flexibility to replace safety net employment conditions. This is a valid argument and one which is supported by the example of Josh the gym consultant in the Explanatory Memorandum. But the FW Act is not solely directed at maintaining the safety net of employment conditions. Individual flexibility is also part of the balanced regulatory framework. To achieve balance, the regulatory framework must engage in one or more trade-offs where statutory objectives conflict, as is the case with individual flexibility and the safety net. An IFA may undermine the employee's safety net of employment conditions, but this is traded off against the non-financial benefits that the employee receives as a result of the IFA meeting their genuine individual needs, needs which could not have been met by the safety net governing the collective. The revised BOOT mediates the trade-off in a way which the present BOOT cannot.

Preferred hours

A revised BOOT and the condition precedent of 'genuine need' would limit the circumstances in which an IFA can incorporate a preferred hours clause. The distinction between 'additional hours' and 'different hours' type arrangements becomes relevant here. If an employer has a need for staff to work additional hours, then the industrial instrument already meets that genuine need by enabling the employer to request the employee to work overtime hours, provided that the hours are reasonable according to the NES. The employer may balk at the prospect of paying overtime rates and instead elect to hire permanent, casual or labour hire staff to work those hours, but this does not detract from the fact that the employer's genuine needs can be met by the industrial instrument. An IFA containing an 'additional hours' clause would therefore be invalid because it does not satisfy the condition precedent. Similarly, a 'different hours' clause fails to comply with the condition precedent if the employer has a genuine need for staff to work particular ordinary hours, irrespective of the employees' own needs. The industrial instrument meets the employer's genuine need by enabling the employer to develop a roster requiring employees to work those particular hours.

A 'different hours' clause would satisfy the condition precedent for a valid IFA where the employee has a genuine need to work particular hours for family or personal reasons and the employer does not require the employee to work those hours. This is subject to the clause varying the effect of the industrial instrument. Josh, the gym membership consultant, provides a useful example. Recall that Josh wants to start work at 7:30 am. The 'different hours' clause would not comply with the content requirements for a valid IFA if the span of ordinary hours under the enterprise agreement (ie, hours that do not attract penalty rates) was sufficiently broad to cover Josh's preferred hours. This is because the clause would not vary the effect of penalty rate provisions in the enterprise agreement — Josh would be paid at the same ordinary rate whether he started work at his preferred time of 7:30 am or his current time of 9:00 am. Now assume that the span of ordinary hours under the relevant enterprise agreement is 8:00 am to 6:00 pm. Josh's genuine need to work different hours cannot be met by the industrial instrument. In other words, the industrial instrument cannot force an employer to roster hours to suit the

employee's circumstances when the employer does not require the employee to work those hours. To do otherwise would expose the employer to payment of penalty rates for preferred hours worked at nights and on weekends and overtime rates for employees who prefer to work outside the prescribed span of ordinary hours. As in Josh's case, a 'different hours' clause which varies the effect of penalty rates and/or overtime provisions in the industrial instrument would meet the genuine needs of the employee by enabling the employee to work their preferred hours. The employer's business needs are also met because the employee still performs the work required by the employer (albeit at different times) and no additional wage costs are incurred by agreeing to change the employee's working arrangements.

The revised BOOT is then applied to the IFA should the 'different hours' clause comply with the condition precedent. The employer must first identify the benefits and detriments of the IFA vis-à-vis the relevant industrial instrument. The non-financial benefits received as a result of the IFA meeting the genuine need can be considered a benefit under the revised BOOT. The second step involves a self-assessment of whether the benefits outweigh the detriments of an IFA. This step will be particularly problematic for employers when assessing the non-financial benefits because they cannot be objectively measured. The employee places a value on the non-financial benefit, but the employer is ultimately responsible for determining that value. An employee will be better off overall with the IFA provided that the value assigned by the employer outweighs the financial detriment of being paid at ordinary and not penalty rates.¹¹⁶ It is clear that employers will need guidance from the Fair Work Ombudsman on how to approach this difficult task of self-assessment.

Conclusion

There are two sides to flexibility under the FW Act. As Flora Gill points out '[f]lexibility is not intrinsically virtuous. It can be a virtuous agent when in the service of a virtuous cause, but it can also be a euphemism for a desire to attain the flexibility necessary for pure and naked exploitation of newly found economic bargaining power.'¹¹⁷

This article has demonstrated that the preferred hours clause, when examined through the lenses of flexibility and the safety net, cannot generally be part of a balanced regulatory framework because of its oxymoronic effect. It is a mechanism which offers flexibility in working arrangements, but enables employers to exploit that flexibility to reduce labour costs to a level below the safety net of employment conditions. Preferred hours arrangements do have limited scope through the NES and contract of employment, but their impact will likely be greater in enterprise agreements approved under the public interest test and in IFAs. A balanced framework, in both circumstances, is achieved through a trade-off involving the safety net. Under the public interest test, there is a trade-off between employment conditions below the safety net in an enterprise agreement and exceptional circumstances which trigger other public interest considerations such as unemployment,

¹¹⁶ Ibid, at [868].

¹¹⁷ F Gill, 'Labour Market Flexibility — To What End?' (1989) 61 *Australian Quarterly* 456 at 461, referred to in Stewart, above n 18, at 102.

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underemployment and business shutdown. With IFAs the recommended amendments to the FW Act strike a fairer exchange between the safety net and the flexibility of an IFA to meet an individual employee's genuine needs. The public interest test and the revised BOOT for IFAs mediate the trade-offs so that flexibility remains a virtuous agent for a virtuous cause — cooperative and productive workplace relations.



Legislative Note

Public Sector Wages 'Cap': The New Framework for the Determination of Public Sector Wages and Conditions in New South Wales

*Giuseppe Carabetta**

Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 (NSW) and Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW)

Introduction

The Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 NSW (the Amendment Act) was assented to and commenced on 17 June 2011. In an unusual and highly controversial move that some have labelled 'worse than Work Choices',¹ the new Act amends the Industrial Relations Act 1996 (NSW) (IR Act) to require the Industrial Relations Commission of New South Wales (the commission), when dealing with public sector wages claims, to give effect to certain aspects of government policy on conditions of employment of public sector workers. Any award or order of the commission that is inconsistent with the government's declared policy has no legal force. The current policy² is given effect via the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW) (the Regulation). The Regulation applies to a wide range of public sector employees, including state teachers, health workers, transport workers, prison officers and other Crown employees.³ At the heart of the policy — aimed at reducing the state's 'wages bill' — is a requirement that

* Senior Lecturer, The University of Sydney Business School. I am grateful to the *AJLL's* anonymous referee for their helpful comments and to Lyn Lim for her research assistance.

1 A Smith, S Nicholls and P Correy, 'Public Service Revolution', *Sydney Morning Herald* (Sydney), 25 May 2011, at <<http://www.smh.com.au/nsw/public-service-revolution-20110524-1f2ky.html>> (accessed 5 December 2011).

2 Department of Premier and Cabinet (NSW), *NSW Public Sector Wages Policy 2011*, June 2011 (*Wages Policy 2011*).

3 See the definition of 'public sector employee' under s 146C(8) of the IR Act. While the Regulation itself applies to police officers, there is an exemption from the application of the government's declared policy under the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 for pending proceedings concerning police officers: see text accompanying n 28.

any increases to employee-related expenses above a 2.5% per annum 'cap', including wages and conditions of employment, must be offset by employee-related cost savings.⁴

In this note, I will outline the background and purpose behind the legislative and regulatory changes, highlight the key elements of the new legislative framework and the associated Regulation and wages policy, and reflect on some of the implications of the new initiatives for public sector pay disputes. In the course of the discussion I will also consider developments from three recent decisions where there has been some consideration of the operation and effect of the new scheme.

Background and Context

Before looking at the provisions of the IR Act and the Regulation in detail, it is useful to outline the context and background to their introduction. Like other Australian jurisdictions, for many years New South Wales has had a system of 'conventional' conciliation and arbitration. A well-recognised feature of this system has been broadly cast legislation with significant powers for the commission to hear and determine pay disputes.⁵ New South Wales had retained this regime for its public sector employees, despite referring its industrial relations powers over private sector employees to the Commonwealth in 2009.⁶ The new framework significantly modifies this scheme by imposing on the commission specific restrictions when dealing with public sector claims that seek to increase salaries or conditions of public sector employees, particularly the requirement that any increases above 2.5% per annum be offset by 'employee-related cost savings'. The former government's public sector wages policy similarly referred to increases above 2.5% as being conditional on cost savings.⁷ The major difference under the new scheme (aside from the more prescriptive nature of the policy) is that the IR Act now stipulates that the commission's prime objective in public sector wages matters is to give effect to the government's wages policy; and, further, the policy itself is enshrined in the Regulation.⁸

The government has made it plain that the new policy is primarily about 'fiscal discipline'.⁹ In introducing the changes, the Minister for Finance and Services said they were designed to ensure that the 'wages policy or the government's fiscal strategy is not rendered ineffective by decisions of the

4 Regulation cl 6(1)(b); *Wages Policy 2011*, above n 2.

5 B Creighton and A Stewart, *Labour Law*, 5th ed, Federation Press, Sydney, 2010, p 15.

6 See Industrial Relations (Commonwealth Powers) Act 2009 (NSW) s 6(c), providing for the exemption.

7 The policy was contained in a policy statement reflected in a Premier's Memorandum 2007–12: New South Wales Department of Finances and Services, Regulatory Impact Statement — Industrial Relations (Public Sector Conditions of Employment) Regulation 2011, September 2011 (Regulatory Impact Statement), p 4, at <http://www.industrialrelations.nsw.gov.au/pdfs/RIS_FINAL_16.09.11.pdf> (accessed 4 December 2011).

8 This is by virtue of the IR Act ss 146C(1)–(7), inserted by the Amendment Act. These provisions are discussed below.

9 New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 2011, p 889 (G Pearce) (Parliamentary Debates — Pearce).

Industrial Relations Commission'.¹⁰ The same remarks have been echoed in later government statements concerning the budget 'bottom line' and the need to deliver on services and infrastructure.¹¹ According to the Minister:

action needs to be taken to control government expenditure. Employee-related costs are the largest component of government expenditure . . . In 2010–2011 approximately half of government expenses will be employee-related and are projected to be \$28 billion. Managing this expenditure is a major challenge, given that front-line services such as education, health care and policing are labour intensive. Each 1% increase in wages permanently increases government expenses by around \$277 million per annum.¹²

The President of the commission, Justice Boland, was one of the first to speak out against the amendments, saying they would bring to an end 100 years of bipartisan support for the commission's independent role in determining public sector pay disputes, and that the commission would now 'simply be required to rubber stamp the government's wages policy regardless of what that policy dictates'.¹³ The leader of the Opposition, John Robertson, reportedly said the changes were 'worse than Work Choices' and an 'unprecedented attack on the rights of nurses, teachers and police', while the secretary of Unions NSW, Mark Lennon, was reported as saying they were a 'blank cheque' to determine the wages and conditions of the government's own employees.¹⁴ The Public Service Association of New South Wales (the PSA), with the support of other unions including the Teachers Federation, Health Services Union and the Police Association, has been leading a major industrial campaign against the 'fundamental unfairness' of the reforms, saying that they will ultimately reduce real wages.¹⁵ In a separate process, the PSA has questioned the constitutional validity of the new framework, arguing that the amendments impair the institutional integrity of the commission when in court session, in a manner incompatible with Ch III of the Australian Constitution.¹⁶ Having lost an earlier argument in the Full Industrial Court on this ground and an alternative claim questioning the validity of the new Regulation,¹⁷ the PSA now intends to challenge the provisions in the High Court of Australia.¹⁸

According to the government, the problem with the previous public sector

10 Ibid.

11 See, eg, Regulatory Impact Statement, above n 7, pp 5–6.

12 See Parliamentary Debates — Pearce, above n 9.

13 See 'Wage-Setting Changes to Make Tribunal a "Rubber Stamp", Says President', *Workplace Express*, 16 May 2011, referring to a speech his Honour made to the NSW Industrial Relations Society. Similarly, see New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 June 2011, p 2502 (C Moore).

14 Smith et al, above n 1.

15 J Cahill, *Challenge to O'Farrell's IR Laws — Report from John Cahill*, (9 November 2011) News: PSA News, at <http://www.psa.labor.net.au/news/1320812738_24753.html>. The campaign has included widespread industrial action by public sector workers and in September 2011 major rallies were held marching past Parliament House in protest against the new laws.

16 *Public Service Association and Professional Officers' Association Amalgamated Union of NSW v Director of Public Employment* [2011] NSWIRComm 143 (31 October 2011) at [4].

17 Ibid, at [51]–[67].

18 'Union Continues Public Sector Wage Cap Legislation Fight in High Court', *Workplace Express*, 30 November 2011.

wages policy was not so much the policy itself but that it was not followed, with this leading to 'a blowout in unfunded public sector wages'.¹⁹ In its Regulatory Impact Statement, the government argues that the failure to implement the policy was partly because there was no legal imperative to do so, since it was 'not strengthened by a legislative instrument' requiring the commission to give effect to the policy.²⁰ The government maintains that (aside from additional restrictions) the fact that the new wages policy is expressed in a Regulation ensures that it will be consistently applied in different agencies.²¹ Furthermore, in the government's eyes, '[a]n unenforceable policy statement presents risks to employees and their rights, since a policy statement is not subject to Parliamentary scrutiny and does not require the Governor's assent'.²²

The Industrial Relations Amendment (Public Sector Conditions of Employment) Act 2011 (NSW)

The Amendment Act amended the IR Act via, inter alia, s 146C. Section 146C of the IR Act, as amended, relevantly states:

Commission to give effect to certain aspects of government policy on public sector employment

- (1) The commission must, when making or varying any award or order, give effect to any policy on conditions of employment of public sector employees:
 - (a) that is declared by the regulations²³ to be an aspect of government policy that is required to be given effect to by the commission, and
 - (b) that applies to the matter to which the award or order relates.
- (2) Any such regulation may declare a policy by setting out the policy in the regulation or by adopting a policy set out in a relevant document referred to in the regulation.
- (3) An award or order of the commission does not have effect to the extent that it is inconsistent with the obligation of the commission under this section.

Section 146C(6) of the IR Act goes on to state that these provisions and any Regulation made under s 146C (unless the Regulation otherwise provides) extend to proceedings that are pending in the commission on the commencement of s 146C.²⁴

An important stipulation in s 146C(7) of the IR Act is that the above provisions have effect despite ss 10 (the commission's power to fix fair and reasonable conditions of employment) and 146 (the commission's general functions obliging it to take into account the public interest, the objects of the

19 Parliamentary Debates — Pearce, above n 9.

20 Regulatory Impact Statement, above n 7, pp 6–7. Opponents of the changes, including Justice Boland, have denied government claims that the commission had rejected the previous wages policy: see 'Wage-setting Changes to Make Tribunal a "Rubber Stamp", Says President', *Workplace Express*, 16 May 2011.

21 Parliamentary Debates — Pearce, above n 9.

22 Regulatory Impact Statement, above n 5, p 7.

23 The current regulation for these purposes is the Regulation, discussed below.

24 Section 146C(4) also provides that s 146C extends to appeals or references to the Full Bench of the commission, while s 146C(5) provides that s 146C does not apply to the commission in Court Session.

Act and the state of the economy), and any other provisions of the IR Act. Sections 10 and 146 clearly give a broad discretion to the commission in exercising its wage determination functions²⁵ but, as detailed in the next section, that discretion, when exercised now in relation to public sector employees, is subject to certain obligations and jurisdictional restrictions when the commission is dealing with claims that seek to increase salaries or wages and conditions involving employee-related costs.

For the purposes of s 146C, 'public sector employee' means a person employed in the government service, the teaching service, the police force, the health service, the service of parliament or any other Crown servant. Section 146C also extends to any person employed in the service of any body other than a council or other local authority that is constituted by an Act and that is prescribed by the Regulations for the purposes of s 146C.²⁶ The immediate effect of the legislation on the police force is limited by the current Regulation, which declares the government's policies with respect to s 146C, as discussed in the next section of this note. The Regulation exempts pending proceedings concerning police officers from the application of those government policies.²⁷

The Industrial Relations (Public Sector Conditions of Employment) Regulation 2011 (NSW)

The current regulation is the Industrial Relations (Public Sector Conditions of Employment) Regulation 2011, promulgated on 22 June 2011. The Regulation declares, for the purposes of s 146C, elements of government policy that are to be given effect to by the commission in exercising its wage determination functions. The current policy is the *NSW Public Sector Wages Policy 2011* (Wages Policy 2011).²⁸

The 2.5% 'cap' rule

The policy as regards wages and conditions is set out in cl 6 of the Regulation.²⁹ At the heart of the provisions is the availability of a 2.5% increase in wages and conditions per annum, with increases beyond this requiring sufficient 'employee-related cost savings'³⁰ offsets before any increase can be awarded. Clause 6 provides:

Other policies

25 In his second reading speech, the Minister argued that these two provisions in particular, combined with the commission's own wage fixing principles for public sector disputes, have been 'conducive to submissions that the Government's wages policy should be disregarded or that other considerations are more significant': see Parliamentary Debates — Pearce, above n 9.

26 IR Act s 146C(8).

27 The exemption is limited to those proceedings as in force on the commencement of the Regulation and related proceedings on a cross-claim or counter application: Regulation cl 10.

28 *Wages Policy 2011*, above n 2. Only *core* elements of this policy are enshrined in the Regulation; other elements appear only in the policy document.

29 See also *ibid*, pp 1–2. Clause 6 is subject to compliance with two 'paramount policies' set out in cl 5, discussed below.

30 The meaning of 'employee-rated cost savings' is discussed below.

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(1) . . .

- (a) Public sector employees may be awarded increases in remuneration or other conditions of employment that do not increase employee-related costs by more than 2.5% per annum.
- (b) Increases in remuneration or other conditions of employment that increase employee-related costs³¹ by more than 2.5% per annum can be awarded, but only if sufficient employee-related cost savings have been achieved to fully offset the increased employee-related costs.

. . .

The *NSW Public Sector Wages Policy 2011* states that the 2.5% is ‘designed to maintain the real value of public sector wages over the medium term in line with the mid-point of the Reserve Bank of Australia’s target range for inflation over the cycle’.³²

In line with the government’s aim of reducing costs, cl 6(e) of the Regulation provides that changes to remuneration or conditions of employment may operate only ‘on or after the date the relevant parties finally agreed to the change (if the award or order is made or varied by consent) or the date of the commission’s decision’. Further, according to cl 6(d), awards and orders are to resolve ‘all issues the subject of the proceedings’, not reserve leave for a matter to be dealt with at a later date, or allow extra claims to be made during the term of the relevant award or order. However, this does not prevent variations made by agreement between parties.

The Full Bench of the commission has considered the effect of these provisions in *Re Crown Employees (Public Sector — Salaries 2011) Award (No 3)*³³ and in *Re Health Employees Conditions of Employment (State) Award and Other Awards*,³⁴ concerning applications for new public sector awards and variations to existing awards. In the *HSUeast* case, it was submitted by the employers that it was not open for the commission to make an interim award allowing for an initial 2.5% increase in circumstances where it had also sought to have a later hearing to determine whether there could be increases beyond the 2.5%. It was argued that the effect of s 146C and the Regulation was that only one award could be made and that, in accordance with the terms of cl 6(1)(d) of the Regulation, a matter could not be reserved or dealt with at a later time to allow extra claims to be made.³⁵ The effect of this submission, if accepted, would have required the unions’ applications for an interim increase of 2.5% to be either granted as a final increase, or, alternatively if the applicants wished to proceed for an increase beyond 2.5%, to adjourn the case so that the entire matter could be dealt with then.³⁶

31 ‘Employee-related costs’ include the salary, wages, allowances and other remuneration payable to the public sector employees; and superannuation and other personal employment benefits: Regulation cl 8.

32 *Wages Policy 2011*, above n 2, at [1.2].

33 [2011] NSWIRComm 104 (10 August 2011).

34 (2011) 208 IR 201; [2011] NSWIRComm 129 (26 August 2011) (the *HSUeast* case). See also *Notification under s 130 by Director General, Department of Education and Communities of a Dispute with New South Wales Teachers Federation Re Schedule A* [2011] NSWIRComm 160 (1 December 2011), discussed below.

35 *HSUeast* (2011) 208 IR 201; [2011] NSWIRComm 129 at [15]–[16], [24]–[26].

36 *Ibid*, at [16].

The Full Bench, however, held the Regulation allows the parties to engage in a 'two stage process'. It said:

The Regulation itself . . . contemplates the possibility of a two-stage process. The first stage is the availability of 2.5% per annum for all public sector employees — these are the increases that the Minister referred to in his second reading speech as being assured under the amendment as being available. The second stage involves any claims seeking increases beyond that assured 2.5% and requires sufficient employer-related cost savings to be achieved to fully offset the cost of the increase to be granted. A union seeking increases above the 2.5% is not required to demonstrate or make available cost savings to cover the initial 2.5%, which is assured and paid in accordance with cl 6(1)(a) of the Regulation. There are, therefore, no specified policy reasons for requiring these two elements of the proposed increase to be dealt with only in one hearing.³⁷

This two-stage approach allowing for a 2.5% interim increase has recently been applied to a dispute concerning a new award for public school teachers,³⁸ their current award expiring on 31 December 2011. The commission declined in that case, following the reasoning in the *PSA Salaries* case and *HSUeast* case, to extend the nominal term of the current award where the award was merely being varied after the expiry of its nominal term.³⁹ From the union's perspective, this was significant because it meant teachers could gain a 2.5% wage increase on the expiry of their award, but will now have the time to prepare claims seeking additional increases.

Guaranteed minimum conditions of employment and equal remuneration

Clause 5 of the Regulation sets out two 'paramount policies': (i) guaranteed minimum conditions of employment; and (ii) the principle of equal remuneration for men and women doing work of equal or comparable value. These policies prevail over the policies in cl 6 above.⁴⁰

Subclauses 7(1) and 7(2) establish the guaranteed minimum conditions of employment. These are:

- Unpaid parental leave as under the National Employment Standards;
- Paid parental leave if currently entitled;
- Employer payments to employee superannuation schemes or funds (being the minimum rate under the relevant Commonwealth law);
- Long service or extended Leave, annual leave, sick leave, and public holidays standard entitlements under the relevant Commonwealth or state Act; and
- A written and signed part-time work agreement under the IR Act.

These are the only minimum guarantees listed in the Regulation. From the perspective of public sector employees, the only other safeguard is cl 6(1)(c), which provides that for the purposes of achieving employee-related cost

37 Ibid, at [37].

38 *Notification under s 130 by Director General, Department of Education and Communities of a Dispute with New South Wales Teachers Federation Re Schedule A* [2011] NSWIRComm 160 (1 December 2011).

39 Ibid, at [29] to [33].

40 Regulation cl 6(1).

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savings (required to offset wage increases beyond the 2.5% cap), existing conditions 'of the kind but in excess of the guaranteed minimum conditions may only be reduced with the agreement of the relevant parties'. Further, as will be seen below, 'employee-related cost savings' are defined as involving 'a significant contribution from public sector employees'⁴¹ and are generally expected to involve direct changes to work practices or other conditions of employment. These two factors combined have led to claims that important conditions (working hours, loadings, leave entitlements and allowances⁴²), will inevitably have to be traded off for wage and salary increases beyond the 2.5% 'cap'.⁴³

Employee-related costs and cost savings

For the purposes of the Regulation, 'employee-related costs' include costs related to the salary, wages, allowances and other remuneration payable to the public sector employees, and superannuation and other personal employment benefits.⁴⁴

Clause 9 provides that 'employee-related cost savings' are savings:

- (a) that are identified in the award or order of the commission that relies on those savings, and
- (b) that involve a significant contribution from public sector employees and generally involve direct changes to a relevant industrial instrument, work practices or other conditions of employment, and
- (c) that are not existing savings (as defined in subcl (2)), and
- (d) that are additional to whole of Government savings measures (such as efficiency dividends), and
- (e) that are not achieved by a reduction in guaranteed minimum conditions of employment below the minimum level.

Subclause 9(2) defines 'existing savings' as savings identified in a relevant industrial instrument made before the commencement of the Regulation (or in an agreement contemplated by it) and are relied on by that industrial instrument, whether or not the savings have been achieved or were or are achieved during the term of that industrial instrument.

The *NSW Public Sector Wages Policy 2011* (but not the Regulation) provides guidelines on 'measures from which employee related cost savings may arise'.⁴⁵ These include:

- where they [produce] direct changes to the provisions of an industrial instrument or to working conditions including changes to staffing levels, human resource policies, rostering arrangements, workforce composition, work intensity or job redesign, provided they lead to savings;

41 Regulation cl 9(1)(b).

42 Examples from the government's own *Wages Policy 2011* are provided below.

43 The Police Association has voiced concerns over potential cuts to over-time rates, shift allowances, transfer costs, workers compensation 'top-ups' and 'many other matters listed in [relevant] awards': Police Association of New South Wales, 'Fact Sheet: Implications of Industrial Relations (Public Sector Conditions of Employment) Regulation', at <www.pansw.org.au/sites/default/files/public/FactSheet_IR_Regulation.pdf> (accessed 5 December 2011).

44 Regulation cl 8.

45 *Wages Policy 2011*, above n 2, at [7.1].

- changes to conditions of employment which increase employee productivity and which will be realised as a cost saving;
- the expansion of the scope of work public sector employees perform in ways that enhance their productivity and realise savings; and
- the agreed implementation or modification of workforce management policies which result in better utilisation of staff.

To further reinforce these objectives, the *NSW Public Sector Wages Policy 2011* provides the following examples of employee-related cost savings:

- changes to rostering arrangements to better reflect customer service;
- increases to normal working hours that involve direct customer interaction;
- reduction in the days of absence allowable before a medical certificate is required;
- requiring a minimum period of leave every 12 months to reduce leave liabilities;
- limiting access to 'top up' sick leave;
- reduced accrual of leave during unpaid sick leave;
- limiting access to transferred employees compensation payments;
- call backs within 4 hour periods not to attract additional payment;
- higher duties allowances only paid after a minimum of 5 days acting; and
- reduction in the accrual of maximum rostered days off.⁴⁶

The clear signal emerging from this list — provided as a guide to public sector agencies — is that basic matters such as working hours and leave entitlements will become bargaining target areas.⁴⁷ The *NSW Public Sector Wages Policy 2011* also states that employee-related cost savings should not include productivity improvements which do not result in employee-related cost savings.⁴⁸ Furthermore, it will be recalled that the Regulation requires that increases beyond 2.5% may only be awarded if sufficient employee-related cost savings have been achieved. For this purpose, although increases may be awarded before the savings have been achieved, they are not payable until they are realised.⁴⁹ As with the question of what constitutes adequate employee-related cost savings, and how to quantify these, it will be interesting to see how these requirements are interpreted by the commission as and when claims for such increases are received.

Conclusion

The O'Farrell Government has wasted little time in introducing legislation to reform — *fundamentally* — the system of public sector pay setting in New

⁴⁶ Ibid, at [7.2].

⁴⁷ This is also reflected in comments by the government referring to, as an example of employee-related cost savings, changes made in 2009 to award provisions relating to sick leave: see New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 June 2011, p 58 (M Baird).

⁴⁸ *Wages Policy 2011*, above n 2, at [7.3.1].

⁴⁹ Regulation cl 6(1)(b)(ii). Clause 6(1)(b)(i) states that whether relevant savings have been achieved is to be determined by the parties or, failing that, by the commission.

South Wales. While the government maintains that the changes follow the previous public sector wages policy, the major difference is that the commission is now compelled to apply the new *NSW Public Sector Wages Policy 2011*, limiting its 'standard' discretionary wage-fixing powers. Other differences lie in the content of the policy, including the requirement that increases beyond the 2.5% cap will not be payable until relevant employee-related cost savings are achieved. This is in keeping with the government's aim that employee-related cost savings are 'actually delivered, not just promised'.⁵⁰

That labels such as 'public sector revolution' have been used in describing the changes is perhaps not surprising, given the history of bilateral wage determination in Australia. In the United States, many jurisdictions are currently also enacting or considering reforms to limit public sector collective bargaining.⁵¹ Yet, unlike the position in Australia, many public sector and emergency services workers in the United States (particularly in southern states) have no bargaining rights, their wages and conditions being established unilaterally by government or individual agencies. Like the US reforms, however, the major driver behind the NSW reforms has been the need to cut public spending.⁵² Ironically, however, to the extent that the reforms are based on disproportionate wage increases amongst NSW public sector employees, there is evidence to suggest that when factors such as education and work experiences are considered, they earn similar wages as their counterparts in the private sector.⁵³

The government has said that while the aim of the reforms is to regulate costs, the unconditional annual pay increase of 2.5% is aimed at securing a fair wage outcome for front-line public sector workers. However, if (as is being predicted) the rate of inflation exceeds 2.5%, either real wages will fall or there will need to be cost savings offsets which could include a significant reduction in employment conditions. The changes also frame the bargaining parameters in favour of the employer and, as Professor Stewart has pointed out, will have a 'flow on effect'⁵⁴ on public sector workers' approach to bargaining, given that they will know the commission is required to follow the government's policy.⁵⁵ Either way, in the event that major employee entitlements are lost, it is suggested this will lead to reductions in the quality

50 New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 June 2011, p 58 (M Baird).

51 See, eg, S Greenhouse, 'Ohio's Anti-Union Law Is Tougher Than Wisconsin's', *New York Times* (New York), 31 March 2011, at <http://www.nytimes.com/2011/04/01/us/01ohio.html?_r=2> (accessed 6 December 2011).

52 The NSW reforms reflect overtly the tensions between the roles of government as an employer and controller of public finances.

53 Y Andrienko and S Yu, 'Are NSW Public Sector Workers paid Excessively?', Research Note 2, Workplace Research Centre, The University of Sydney, 2011. An earlier study by Dr John Buchanan, shows that senior teachers, police constables and nurses in New South Wales — 'typical NSW public sector workers at the top of their pay scales' — are paid similar wages as their counterparts in other states. See <http://sydney.edu.au/business/workplace_research/research/notes> (accessed 5 December 2011).

54 Professor Andrew Stewart as cited in 'Unions Angry Over Proposed NSW Public Sector Workplace Changes', *ABC News* — 'AM', 25 May 2011, at <<http://www.abc.net.au/am/content/2011/s3226112.htm>> (accessed 5 December 2011).

55 Ibid.

and quantity of essential public and emergency services.

A major area of contention will be the provisions relating to employee-related cost savings. In particular, the extent to which certain matters are available to off-set increases beyond the 2.5% cap and the quantification of such matters is likely to involve complex issues. Similarly, where a claim is made to create an additional condition of employment, such as a new classification structure, this too, will need to be assessed in line with the policy. This will increase the administrative burden on both the parties and the commission.⁵⁶ However, with the likely increase in the number of cases before the commission over these issues, the commission's role in interpreting and applying these provisions will be critical and (all else remaining equal) will determine to what extent it continues to play an important role in public sector wage determination.

⁵⁶ In its *Regulatory Impact Statement*, the government concedes the possibility of there being an increased number of cases before the commission where parties cannot agree on employee-related cost savings; however, it argues that this is 'likely to be less costly than if [the former] 2010 wage fixing principles still had effect in relation to the public sector': *Regulatory Impact Statement*, above n 7, pp 8–9.



Recent Case

A Safe Touch-down for Qantas?

*Joellen Riley**

Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd; Licenced Aircraft Engineers (Qantas Airways Ltd) Workplace Determination 2012 [2012] FWAFB 236; Minister for Tertiary Education, Skills, Jobs and Workplace Relations [2011] FWAFB 7444; BC201170021.

First FWA Workplace Determination

Fair Work Australia (FWA) made its first workplace determination under the Fair Work Act 2009 (Cth) (FW Act) on 23 January 2012, to resolve (at least until 31 December 2014) the long-running dispute between Qantas Airways Ltd and the Australian Licenced Aircraft Engineers Association (ALAEA), representing licensed aircraft maintenance engineers (LAMEs).¹ The 'decision' (if what was essentially a consent order warrants that label) was somewhat anti-climactic, after the excitement surrounding Qantas' announcement on 29 October 2011 that it would ground its entire international air fleet in anticipation of a lockout of staff, and the subsequent FWA Full Bench decision to terminate all protected industrial action taken in support of three proposed enterprise bargains.² Nevertheless, it is worth reflecting on the workplace determination, and the original decision to terminate protected industrial action, to consider what they contribute to an understanding of the FW Act's collective bargaining framework.

The whole Qantas story would provide copy for an entire book. These reflections will concentrate on the issues apparent in the termination and workplace determination decisions, and touch only briefly (by way of introduction) on the real contention at the heart of the airline's several disputes with pilots, LAMEs and baggage handlers: job security for Australian employees in the face of potential offshore expansion of the Qantas group's operations.³

* Professor of Labour Law, Sydney Law School, University of Sydney.

1 *Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd; Licenced Aircraft Engineers (Qantas Airways Ltd) Workplace Determination 2012 [2012] FWAFB 236 (Workplace Determination Decision).*

2 *Section 424 Application to suspend or terminate protected industrial action: Minister for Tertiary Education, Skills, Jobs and Workplace Relations [2011] FWAFB 7444; BC201170021 (Termination Decision).* The three proposed agreements were with the ALAEA in respect of engineers, the Transport Workers' Union of Australia (TWU) in respect of baggage handlers and catering staff, and the Australian International Pilots Association (AIPA) in respect of long haul pilots.

3 According to the Qantas Annual Report 2011, Notes to the Financial Statements at item 32 (pp 94–6), the Qantas holding company controls well over 100 subsidiaries, including the

The Battle for Job Security

Qantas Airways Ltd is one of several employing entities in a group which includes the discount carrier, Jetstar, the regional airlines trading under the Qantaslink brand, and also the wholly-owned Jetconnect subsidiary, established in New Zealand in 2001. Qantas is the group's premium brand carrier, and is reputed to offer what are commonly described as 'legacy' pay and conditions to employees.⁴ This legacy is said to arise as a consequence of the airline's history as a government-owned national carrier which operated for many years without significant competition. Times have changed, Qantas was privatized in the 1990s,⁵ and the privately-owned company has responded to the pressures of competition from other domestic carriers by maintaining the Qantas brand as a premium carrier, while competing in the budget travel market by establishing Jetstar.

In recent years, Qantas has also sought to compete on price with other international carriers by outsourcing some of its operations to lower cost providers.⁶ One of those lower cost providers is Jetconnect, which employs cabin crew and pilots in New Zealand (under terms and conditions determined by NZ's labour laws), and hires them to fly trans Tasman routes under the Qantas brand.⁷ The trade unions representing the various constituencies of airline employees have vociferously resisted proposals for more outsourcing and off-shoring of work.⁸ The application brought by the Australian and International Pilots Association (AIPA) against Qantas and Jetconnect Ltd, which was heard by a full bench of FWA in September 2011, illustrates the contest between the airline and its employees over these strategies.⁹

This application, made under the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) (Transitional Act) Sch 3, Items 10 and 12, sought to vary the Qantas Shorthaul Pilots' Award, 2000 (Transitional), with the effect that Qantas and Jetconnect would be required to extend the pay and conditions of the Australian award to pilots employed in New Zealand by Jetconnect and hired to Qantas to operate Qantas aircraft on Qantas short haul routes across the Tasman. Jetconnect leased Qantas planes from Qantas, and hired them back complete with crew — an arrangement described as a 'wet lease'. The union argued, among other things, that the arrangements between Qantas and Jetconnect warranted lifting the corporate

100% owned Jetstar Airways Pty Ltd, Jetstar Asia Holdings Pty Ltd, the several Qantaslink subsidiaries (including Eastern Australia Airlines Pty Ltd and Sunstate Airlines (Qld) Pty Ltd), and Jetconnect Ltd in New Zealand.

4 See S Oxenbridge, J Wallace, L White, S Tiernan and R Lansbury, 'A Comparative Analysis of Restructuring Employment Relationships in Qantas and Aer Lingus: different routes similar destinations' (2010) 21(2) *International Jnl of Human Resource Management* 180 at 182.

5 See the Qantas Sale Act 1992 (Cth).

6 Oxenbridge et al, above n 4, at 186.

7 See *Australian and International Pilots Association v Qantas Airways Ltd and Jetconnect Ltd* [2011] FWAFB 3706 at [9]–[15] for an explanation of the labour hire arrangement between Qantas and Jetconnect.

8 See C Penfold, 'Trade Union Responses to White Collar Off-shoring' (2007) 18 *Economic and Labour Relations Review* 53 for a general discussion of the challenge of off-shoring.

9 *Australian and International Pilots Association v Qantas Airways Ltd and Jetconnect Ltd* [2011] FWAFB 3706.

veil between the parent and its subsidiary, either on the basis that Jetconnect was merely an agent for Qantas, or that the arrangements between them were a sham to avoid Australian industrial laws.¹⁰ Either way, the AIPA argued that Qantas should be required to pay Australian rates to all pilots flying under the Qantas brand, and that the way to achieve this would be to extend coverage of the award to Jetconnect employees.

The application failed, largely because a majority of the FWA Full Bench held that Jetconnect was incorporated in New Zealand, employed pilots who were resident in New Zealand and eligible to join the New Zealand Air Line Pilots Association Industrial Union of Workers (NZALPA), and was subject to NZ's labour laws. The NZ pilots were already covered by a collective enterprise agreement with the NZALPA, or by individual employment agreements made under NZ's employment laws.¹¹ The extraterritorial reach of the Workplace Relations Act 1996 (Cth) (preserved by the Transitional Act) extended only to employees of an Australian employer, and this was not the case here.

The Jetconnect decision was very bad news for Qantas pilots, cabin crew and LAMEs, whose jobs are particularly susceptible to competition from personnel hired off-shore. Aeroplanes can be serviced wherever they land, and crew can join aircraft at any port. If Qantas can side-step its Australian enterprise bargain terms and conditions by these 'wet lease' arrangements with a NZ subsidiary, why not also with a Singapore subsidiary? Or indeed a subsidiary incorporated in any of a number of off-shore jurisdictions? Fear of the prospect of more of these kinds of arrangements motivated much of the industrial action taken by the LAMEs and pilots in the lead up to the termination decision. The baggage handlers are not so exposed to competition from foreign workers, but are at risk from outsourcing arrangements with lower cost domestic labour hire firms.

Concerns about job security drove a concerted campaign of industrial action by a number of unions representing Qantas employees throughout 2011.¹² The chronology of industrial action appended to the termination decision records regular disruption to Qantas operations, largely as a consequence of short stoppages and partial work bans.¹³ It appears that the unions took best advantage of the provisions in the FW Act dealing with partial work bans to cause maximum irritation to Qantas, without sacrificing too much in the way of members' wages. Some of the bans included 1 and 2 minute stoppages.

Whereas the Workplace Relations Act punished any industrial action (including protected industrial action) by docking pay by a minimum of

10 Ibid, at [36] and [38].

11 There were also reasons based on the statutory requirements to be met before a transitional award could be varied: see Ibid, at [106]–[113].

12 See, eg, the statements of the ALAEA reported in M Skulley, 'Pilots and engineers to stand firm on job security', *Australian Financial Review*, 1 November 2011, p 6: 'At no stage will we sit idle and watch Qantas continually shrink at the expense of new entities based offshore as a means of sidestepping Australian labour laws and aircraft maintenance principles.' See also *Qantas Airways Ltd v Transport Workers' Union of Australia* [2011] FCA 470 for a chronicle of the TWU's industrial action in 2009.

13 See [2011] FWAFB 7444; BC201170021 Attachment 1.

4 hours,¹⁴ the FW Act provides only that pay should be withheld for the actual duration of protected industrial action.¹⁵ Before an employer can make any deduction for a partial work ban, FW Act s 471 places the onus on the employer to provide written notice that the employer will not accept incomplete performance of duties and will reduce pay to reflect the proportion of work withheld. The Fair Work Regulations provide that the proportionate reduction in pay is to be calculated on the basis of the amount of time, relative to usual working hours, that the employee would normally spend on the duties in dispute.¹⁶ So the proportion attributable to a 1 or 2 minute work ban will be insignificant, regardless of the relative importance or value of the actual duties that ought to have been performed in that 1 or 2 minute interval. Section 471(2)(b) permits FWA to order a different proportion, but that would require the rigmarole of an application to FWA under s 472.

An employer's only option if it does not want to pay at all for incomplete performance of duties is to refuse to accept any service at all — a measure tantamount to a lock-out limited to the staff proposing the action.¹⁷ Although the partial work bans began in July, it appears that Qantas did not issue a notice asserting that it would not pay for partial performance until mid October. When it did so, the TWU lodged an application to FWA for a good faith bargaining order, claiming that Qantas's notice was a breach of the good faith obligations in s 228.¹⁸ This was one of many applications for a range of interventions by FWA over the course of 2011, some of which were withdrawn before resolution. A nationwide 1 hour stop work meeting of all ground staff on 28 October appears to have been the last straw for Qantas management. Chief Executive Officer, Alan Joyce, responded on 29 October by announcing that Qantas would ground its fleet and lockout staff from 31 October.

According to FW Act s 414(5), before taking such 'employer response action'¹⁹ an employer must give written notice of the action to bargaining representatives and take reasonable steps to notify all employees who are to be covered by the proposed agreement, but there is no stipulated period of notice, and there is no requirement for notice to customers or any other third parties likely to be affected by the action. The immediate grounding of the fleet caused considerable public outrage, and triggered the Minister's application under FW Act s 424 for termination of all protected industrial action related to all three proposed enterprise bargains, on the basis that the industrial action taken by all parties to the various disputes was 'threatening to cause significant damage to the tourism and air transport industries'.²⁰

Termination Decision

A Full Bench of the FWA, comprising Giudice P, Watson SDP and Roe C, was assembled urgently on 31 October, and in a crisp 18 paragraph decision, they

14 Workplace Relations Act s 507(2)(a).

15 FW Act s 470(1). The 4 hour rule remains in place for all unprotected action.

16 See FW Regulations reg 3.21.

17 FW Act s 471(4).

18 There is no record on the FWA website of this application proceeding to a hearing.

19 See FW Act s 411.

20 [2011] FWAFB 7444; BC201170021 at [10].

unanimously agreed to order immediate termination of all protected industrial action over the three contested enterprise agreements. They based their finding that termination was necessary to avert significant economic damage upon the employer response action taken by Qantas, which maintained that it would pursue its lock-out strategy until each of the three unions engaged in protected industrial action abandoned certain of the job-security related claims.²¹ The Full Bench held that the three unions' program of partial work bans and stoppages alone were not likely to cause the level of economic harm required to justify an intervention under s 424, however the employer's response action was likely to cause significant damage to the \$24 billion a year inbound tourism industry.²²

One of the questions raised in the explosion of press commentary at the time of the lockout was: why did Qantas itself not seek a termination or suspension of the unions' industrial action under FW Act s 423, s 424 or s 425 before grounding its fleet? The short answer (without examining any evidence Qantas may have been able to present of economic harm to itself (for the purposes of s 423), or the economy), is that applications by employers under these provisions have rarely succeeded.²³ The string of failed employer applications include *Transit Australia Pty Ltd v Transport Workers Union of Australia*²⁴ (concerning the provision of public transport); *St John Ambulance Australia (NT) Inc v United Voice*²⁵ (paramedics providing patient transport); *GEO Group Australia Pty Ltd v United Voice*²⁶ (correctional officers escorting prisoners); *Tyco Australia Pty Limited trading as Wormald v CEPU (Qld Division Branch)*²⁷ (fire protection systems maintenance); and *Toyota Motor Corporation Australia Limited v AMWU and CEPU*²⁸ (automotive industry). The application by *Patrick Stevedores Holdings Pty Ltd v Maritime Union of Australia*²⁹ for a cooling off period under s 425 was equally unsuccessful. Some cases have resulted in very short suspensions. For example a 4 week suspension was ordered in *Sucrogen Australia Pty Ltd v AMWU*,³⁰ because of the impact of the dispute on supply of a seasonally produced and perishable commodity.³¹ Maintaining electricity supply warranted a 3 week suspension in *Pelican Point Power Ltd*;³² and Victorian nurses were required to suspend protected industrial action for 90 days in *Victorian Hospitals' Industrial Association v Australian Nursing Federation*.³³ The only successful

21 Qantas claimed that 'the airline's commercial viability would be seriously impaired or destroyed' if it were to grant those claims: [2011] FWAFB 7444; BC201170021 at [8].

22 [2011] FWAFB 7444; BC201170021 at [8]–[9].

23 See S McCrystal, *The Right to Strike in Australia*, Federation Press, Sydney, 2010, pp 186–95.

24 [2011] FWA 3410.

25 [2011] FWA 4782.

26 [2011] FWA 9025.

27 [2011] FWAFB 1598.

28 [2011] FWA 6268.

29 [2011] FWA 3059.

30 [2010] FWA 6192.

31 *Ibid.*, at [40].

32 [2010] FWA 8666.

33 [2011] FWAFB 8165.

terminations under s 424 in recent times have been for ambulance drivers³⁴ and child protection workers employed by the Victorian Government.³⁵

It is by no means clear that an application by Qantas prior to its own lock out would have met the stringent threshold for proving real economic harm, and not mere inconvenience, before the unions' right to take protected industrial action should be limited. In the face of a global grounding of the Qantas fleet, however, FWA found the necessary threat to broad economic interests. The unions' arguments for a suspension of industrial action for 90 or 120 days were rejected, on the basis that the aviation and tourism industries were vulnerable to uncertainty. A temporary suspension would not avert the risk of further lockouts and fleet groundings.

Some of the press commentary at the time questioned why Qantas needed to actually ground its fleet. Could not the threat of a grounding be sufficient to warrant a termination of protected industrial action, without actual disturbance to the airlines operations and its customers? Given that a termination withdraws the unions' rights to take protected industrial action, it would have created a very poor precedent if an employer could secure industrial peace with nothing more damaging to itself than a threat. A threat alone would have left FWA in the invidious position of second-guessing whether the threat was genuine, or just a game of brinksmanship. Notwithstanding the furore around the decision, the Fair Work bargaining system is based on voluntary agreement and aggressive industrial tactics are legitimate so long as they conform to the requirements for protection. This is the only 'right to strike' that Australian workers enjoy, and it ought not be surrendered too easily.³⁶

Following the decision, the AIPA complained that the pilots' very limited protected industrial action (involving making unauthorised announcements from the cockpit, and wearing non-regulation red ties with their Qantas uniforms) did not warrant termination under s 424. The lockout was arguably a disproportionate response to the pilots' limited industrial action. There is no explicit requirement in FWA s 411 or s 413 that requires employer response action to be proportionate to the employee claim action initiating the dispute. Whether such a requirement is implicit in the requirement that a person be 'genuinely trying to reach agreement' in s 413(3), is an open question. Whether bargaining representatives' conduct was 'reasonable during bargaining' is certainly a matter to which FWA can have regard when making a workplace determination, but this provision comes into play only after a termination of protected industrial action.

The pilots have taken their protest to the Federal Court, in the form of an application for judicial review of the FWA termination decision.³⁷ The LAMEs, however, accepted the umpire's decision and proceeded to negotiate with the employer. The first 21 day period passed without resolution, as did a further 21 day extension of time. So the matter finally returned to FWA as an

34 *Ambulance Victoria v LHMU* (2009) 187 IR 119; [2009] FWA 44.

35 *Victoria v CPSU* [2011] FWA 9245.

36 See generally McCrystal, above n 23.

37 This matter was listed for hearing on 20 February 2012.

application for an 'industrial action related workplace determination' under FW Act s 266.

Workplace Determination Decision

By the time the matter came before a Full Bench (comprising Watson VP, Boulton J and Roe C) on 19 December 2011, Qantas and the ALAEA had either reached agreement or withdrawn all the matters in dispute between them. So although the decision was technically a determination by the Full Bench, there was no need to arbitrate a solution to any claim. Most of the short decision reiterates the relevant statutory provisions, and explains that a workplace determination must contain mandatory, agreed and core terms, plus 'terms dealing with the matters at issue'. Since all the terms dealing with the matters at issue were also agreed, subsequent to the 42 day negotiating period but before hearing, all that was required of the Full Bench was to tick off their agreement that these terms were satisfactory. They did so in respect of all 12 matters, most of which dealt with hours, rosters and allowances.

Anyone following the job security debate at the heart of this dispute will be justifiably disappointed that the workplace determination made no explicit reference to those matters. The Job Security clause³⁸ of Licenced Aircraft Engineers (Qantas Airways Limited) Workplace Determination 2012 is precisely the same as the corresponding clause in the enterprise agreement (EBA 8) which it replaces. It does not include any of the contentious contracting-out clauses that have been the source of argument in a number of other bargaining disputes.³⁹ So this decision casts no light on the question of whether a clause dealing with the terms upon which a contractor can be engaged is a permitted matter in an enterprise agreement.⁴⁰ It is clear that a clause seeking to forbid or restrict contracting out is not a permitted matter.⁴¹ It is also reasonably clear that protected industrial action can be taken in support of an agreement which includes a clause requiring the employer to extend the same pay and conditions applying to direct employees to any contractors or labour hire workers.⁴² This is because it is reasonable on the current state of the law for unions to believe that such a clause would be a permitted matter, and reasonable belief is all that is necessary to justify taking employee claim action under FW Act s 409(1)(a). Nevertheless, the decisions permitting protected action ballots over such matters do not go so far as to assert categorically that such clauses would be permitted matters within FW Act s 172(1) and could be enforced as such. In the absence of clear Federal Court authority, that remains an open question. So it would have been very

38 Clause 11.

39 See, eg, *Australian Industry Group v ADJ Contracting Pty Ltd* [2011] FWA 6684; *CFMEU v Asurco Contracting Pty Ltd* [2010] FWA 5335; *Australian Postal Corporation v CEPU* (2010) 191 IR 1; [2010] FWA 344.

40 See A Forsyth, 'Enterprise Agreements' in B Creighton and A Stewart, *Labour Law*, 5th ed, Federation Press, Sydney, 2010, at [12.30]–[12.43] for a concise explanation of permitted matters.

41 See *Australian Postal Corporation v CEPU* (2010) 191 IR 1; [2010] FWA 344 at [53].

42 *Ibid*, at [58]; *Asurco Contracting Pty Ltd v CFMEU* (2010) 197 IR 365; [2010] FWA 6180.

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interesting to see if FWA could be persuaded to include such a clause in a workplace determination.

The ALAEA did not press the job security issue before FWA. There are no clauses in the workplace determination encouraging Qantas to engage direct employees in preference to contracting out, and no clauses requiring it to extend the benefits of the agreement to the employees of contractors. Instead, ALAEA has negotiated improved redundancy pay for existing Qantas staff. Redundancy pay has been increased from 3 to 7 weeks pay for each year of service up to 5 years, and from 4 to 8 weeks pay for years in excess of 5 years service.⁴³

Conclusions

The agreement between Qantas and the ALAEA avoided the need for FWA to consider the factors in FW Act s 275 governing its power to make a determination of matters remaining in dispute. These factors — the public interest, productivity improvement, and the extent to which bargaining parties behaved reasonably and in good faith during the failed bargaining exercise — would be difficult matters to assess indeed, in this dispute over the iconic national airlines' outsourcing and off-shoring strategies. The collective bargaining framework of the FW Act, like that of the Workplace Relations Act, depends upon parties reaching their own agreements. The scope for third party intervention in bargaining conduct is narrow — FWA's multiple conciliations and hearings during the course of the dispute did not avert the ultimate stand-off in this case. The scope for intervention to decide contentious matters, outside of wages, allowances and rostering for direct employees, is narrower still. The system is predicated on agreement, not arbitration. At the time of writing the TWU and pilots disputes were yet to be resolved. Nevertheless, it is difficult to see how FWA could arbitrate any solution to the thorny job security questions raised by the Qantas dispute — not, at least, under current legislation.⁴⁴

43 [2012] FWAFB 236 at [17] and [30].

44 Senator Nick Xenophon has sought to find a solution outside industrial laws by seeking amendments to the Qantas Sale Act 1992 (Cth) and the Air Navigation Act 1920 (Cth): see the Qantas Sale Amendment (Still Call Australia Home) Bill 2011 and the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011. A discussion of these Bills (which in the author's view are unlikely to pass in any event), and also the Senate Enquiry into Qantas' action, is beyond the scope of this note.



Books received

G Davidov and B Langille (Eds), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011.

S Hayter (Ed), *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice*, ILO and Edward Elgar, Cheltenham, 2011.

S Lee and D McCann (Eds), *Regulating for Decent Work: New Directions in Labour Market Regulation*, ILO and Palgrave Macmillan, Basingstoke, 2011.

K MacDonald and S Marshall (Eds), *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalizing Justice*, Ashgate, Farnham, 2010.

E McCarthy, E Jenkin and A Stewart, *Parental Leave: A User-Friendly Guide*, Thomson Reuters (Professional) Australia, Pyrmont, 2012.

C Sappideen, P O'Grady, J Riley and G Warburton, *Macken's Law of Employment*, 7th ed, Thomson Reuters (Professional) Australia, Pyrmont, 2011.

M Tooma, *Safety, Security, Health and Environment Law*, 2nd ed, The Federation Press, Annandale, 2011.

S Velluti, *New Governance and the European Employment Strategy*, Routledge Research in EU Law, Oxford, 2010.

D Walters, R Johnstone, K Frick, M Quinlan, G Baril-Gringras and A Thebaud-Mony, *Regulating for Workplace Risk: A Comparative Study of Inspection Regimes in Times of Change*, Edward Elgar, Cheltenham, 2011.



Style Guidelines

In preparing material for submission of articles, authors should be guided by the following points.

1. *Manuscript Presentation* All manuscripts should be emailed to the address provided in the Note to Contributors.
2. *Title* Each manuscript should have a title which is both succinct and descriptive.
3. *Abstract* An abstract of no more than 150 words must be supplied at the beginning of each article. The abstract should briefly outline the structure and content of the article and summarise its conclusions.
4. *Footnotes* These should be numbered consecutively throughout and appear at the foot of the page. All bibliographical details, case citations etc should be contained in the footnotes and not in the text. Footnotes should not be used to make substantive points.
5. *References and Citations*

Cases The full citation of a case should always be used when a case is first mentioned eg, *Smith v Brown* (1983) 6 ALR 100 or *Smith v Brown* [1972] 2 All ER 100. Note that full points should not be used. Media neutral citations and BC numbers, where applicable, should be included.

- Where a case is mentioned frequently it may be given an abbreviated title, eg, *Smith's case*.
- Page references other than to the initial page in reports are preceded by 'at', eg, *Smith v Brown* [1972] 2 All ER 100 at 106, or at 106-7.
- A reference to the footnote of the initial citation may be used when subsequently referring to a citation, eg, above n 3, at 108.

Books

- Initial references to books are as follows: E Sykes, *Labour Law in Australia*, Vol 1, Butterworths, Sydney, 1980, p 2.
- Subsequent references should appear as, Sykes, above n 3, at p 43.

Chapters within Books

- R R S Tracey, 'Individual Rights in Industry', in D W Rawson and C Fisher (Eds), *Changing Industrial Law*, Croom Helm, Sydney, 1984, p 10.

Journal Articles

- Initial references to journal articles are as follows, M Christie, 'Legal Duties and Liabilities of Federal Union Officials' (1986) 15 *MULR* 591. Page references other than to the initial page are preceded by 'at' eg, '591 at 594'. Note that journal names and abbreviations should be italicised.
- Subsequent references should appear as, Christie, above n 5, at 594.

Legislation

- Initial references are to short title, eg, Conciliation and Arbitration Act 1904 (Cth).
- Subsequent references may be descriptive, eg, Conciliation and Arbitration Act.

6. *Capitals* Capital letters should be kept to a minimum and used primarily when referring to proper nouns eg, Supreme Court of NSW or the Human Rights Commission, and thereafter, eg, court, commission.
7. *Autobiographical Notes* Authors are requested to supply details of their full name, academic qualifications and current position as part of the first footnote.
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Elizabeth Bluff et al, 'Enforcing Upstream: Australian Health and Safety Inspectors and Upstream Duty Holders';

Craig Cameron, 'Oxymoronic or Employer Logic? Preferred Hours under the Fair Work Act';

Giuseppe Carabetta, 'Public Sector Wages "Cap": The New Framework for the Determination of Public Sector Wages and Conditions in New South Wales';

Joellen Riley, 'A Safe Touch-down for Qantas?';

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