The Contract Regulation Club

Braham Dabscheck*

Abstract

The Contract Regulation Club has been the dominant force in Australian industrial relations since the latter part of the 1980s. Its membership includes major business and employer organisations, leaders of the Liberal and National parties, various regulatory bodies, 'New Right' think tanks and media commentators. Its modus operandi is doublethink. It advocates deregulation of employment contracts while intervening in their operation and demanding more regulation to ensure that they are loaded in 'favour' of employers. The Club has a vision of an industrial relations nirvana where employees voluntarily align their behaviour to the needs of the enterprise. The paper argues that this vision is fundamentally flawed and is the basis of the Club's demand for more regulation. The paper examines the origins and consolidation of the Club, activities and interventions after the election of the Howard Coalition in 1996 and major features of the Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

Introduction

Since the latter part of the 1980s, The Contract Regulation Club[1] has been the dominant force in Australian industrial relations. It has brought about fundamental changes to Australian industrial relations, the most recent manifestation being the 762 page *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). Membership of the club has ebbed and flowed over the years, with changes in the political cycle and the creation of new regulatory bodies to further its objects. It includes major employer/business organisations, leaders of the Liberal and National parties, federal government bureaucrats, the Office of the Employment Advocate, the Australian Building and Construction Commissioner, New Right 'think tanks', media commentators, law firms, consultants and academics.

*Senior Fellow, Faculty of Law, University of Melbourne, bdabsche@bigpond.net.au

https://doi.org/10.1177/103530460601600202 Published online by Cambridge University Press

The modus operandi of The Contract Regulation Club is doublethink. It advocates deregulation of employment contracts, while at one and the same time intervening in their operation and demanding more regulation to ensure that such contracts are 'loaded' in favour of employers.

The Contract Regulation Club has a vision of an industrial relations nirvana, a place where workers fully understand and willingly embrace the leadership and decisions of management in pursuing the needs of the enterprise. For example, Angwin (2000: 8, 9 and 10), refers to a technique known as 'managerial leadership' which

> Encapsulates the approach to enabling employees to align their efforts with the business...leadership is about creating the circumstances in which all employees of the business are prepared to align their behaviours voluntarily...CEOs want to raise the capability of their employees and enable them to contribute their best to the business in order to improve the business performance.

The problem for The Contract Regulation Club is that institutions such as trade unions, industrial tribunals, courts and governments, especially Labor governments, with their historical connections to unions, have the potential to impede the realisation of this ideal. The Club wants what it regards as negative regulation to be removed and replaced by positive regulation, to enable the achievement of its vision.

Unions, industrial tribunals, courts and Labor governments can continue to have a role as long as their actions are supportive of this idealised relationship. If The Contract Regulation Club cannot dominate these others, or bend them to its will, action will be taken to nullify them, if not bring about their destruction. In the case of unions, especially if a Liberal National coalition is in power, legislation can be changed, new regulatory bodies, such as the Australian Building and Construction Commissioner created, and cases can be mounted before industrial tribunals and courts to restrict and restrain their activities and drain them of resources. 'Incorrect' or 'unpalatable' decisions of courts can be rectified by legislative changes. In the case of the Australian Industrial Relations Commission, its death can be made 'slow and agonising' (Dabscheck 2001b) by relocating many of its functions to other regulatory bodies, such as the Office of the Employment Advocate and the Australian Fair Pay Commission, the latter being a creation of the *Workplace Relations Amendment (Work Choices Act 2005* (Cth). This Act, in turn, overcomes the problem of errant State Labor governments doing anything they shouldn't, by abolishing state industrial relations systems.

Formation and Consolidation: 1983 to 1996

The Australian Labor Party won the 1983 federal election. Its electoral strategy was based on an Accord (Statement 1983) it had negotiated with the Australian Council of Trade Unions (ACTU), designed to solve economic problems of the early 1980s. The Accord championed 'consensus'. It maintained that the health of the economy could be restored by a centralised system of industrial relations regulation, where wage rises were linked to changes in prices, to be administered by the Australian Industrial Relations Commission (AIRC) and its predecessor. While the domestic economy improved under the Accord, Australia encountered international economic problems in the mid 1980s. In 1986, Treasurer Paul Keating said Australia was in danger of becoming 'a banana republic' (Dabscheck 1995: 23-28).

The Contract Regulation Club formed in response to the Accord, centralisation, the prominent role of the AIRC, and the entrenchment of what it regarded as union power. These were seen as harming, rather than enhancing, economic growth and recovery. From the early days of the Accord (and ever since) employer and business spokespersons mounted criticisms against the status quo and urged the creation of a 'new order' which emphasised 'the primacy of the relationship of manager and employee at the enterprise level' (Business Council Bulletin May-June 1985: 12)

An article, published by Henderson (1983) acted as a rallying point in the early days of the Contract Regulation Club. Henderson maintained there was an Industrial Relations Club, which was the dominant force in Australian industrial relations. This club, according to Henderson, comprised the (then) Australian Conciliation and Arbitration Commission, the Industrial Registry, the ACTU, the Confederation of Australian Industry (CAI) and the federal Department of Industrial Relations. Henderson (1983: 23-24 and 29) criticised it because of its reliance on 'consensus', 'negotiations' and 'doing deals...to secure industrial harmony'. He rejected this approach because 'economic realities take what is very much second place, if that... [decisions need to be] made according to tough-minded economic criteria'.

'Consensus', 'negotiations', 'doing deals' and 'securing industrial harmony' are precepts dear to the heart of The Contract Regulation Club. That which is anathema in one context is virtue itself in another. Is enterprise bargaining a Trojan horse for making 'tough-minded economic' decisions? Moreover, how will these decisions be made? Could they be imposed from above by legislation and/or institutions so empowered to

act?

Alternatively, those who have to be subjected to 'tough-mindedness' could understand and willingly accept the need for such decisions. Recall Angwin's statement about leadership creating the circumstances in which 'all employees of the business are prepared to align their behaviour voluntarily' (2000: 9). The servants of the master-servant relationship which are employment contracts are required, to quote Aldous Huxley's *Brave New World* (1964: 12), 'to love their servitude'. Cultivation of the 'loving of servitude' requires the combination of a variety of techniques. At the micro, or enterprise level, it is the task of human resource managers. The Australian Chamber of Commerce and Industry (ACCI) (2002: 16) points to how 'human resource management has become more integrated into workplace relations practices and policies'. At the macro, or societal level, again to quote Huxley (1964: 12), 'the task [is] assigned...to ministries of propaganda [and] newspaper editors'. The Howard government spent $55 million on advertising in support of its 2005 legislation ('Hey big spender: Canberra becomes No. 1 advertiser', *Sydney Morning Herald*, 24 November 2005: 4).

In early 1986, an organisation called the H R Nicholls Society formed. The opening sentence of a letter circulated to potential members said (*Arbitration* 1986: 314), 'Within the last two years in Australia a crucial debate concerning the role and purposes of Trade Unions, the Arbitration Commission and our various State wage fixing tribunals has begun to develop'. An inaugural seminar would be held to hear papers on what was referred to as 'our Higgins' problem' in an 'in club' atmosphere (*Arbitration* 1986: 317). The H R Nicholls Society holds annual conferences and publishes various papers on industrial relations issues. Its essential function is to provide a forum for members of The Contract Regulation Club to mount a continuing stream of criticism against unions and industrial tribunals, and to proffer advice to governments and anyone who will listen to adopt policies to overcome such perceived problems.

The Business Council of Australia (BCA) formed in September 1983. Its membership comprised 80 - it has grown to 100 - of the chief executive officers of Australia's largest corporations. Its major functions are to develop policies and lobby on behalf of members and/or business interests more generally. From its formation, the BCA criticised excessive government regulation and extolled the virtues of competition and markets. It wanted to move Australia away from the centralised Accord to a system based on the relationship between managers and employees at the enterprise.

In 1987, the BCA announced the formation of a study commission to report on legislative and institutional changes for the implementation of enterprise bargaining (BCA 1987). It produced its (first) report in 1989 (also see BCA 1991 & 1993). It said (BCA 1989: 13) 'The biggest single industrial relations impediment to more efficient competitive Australian workplaces is the antiquated structure of our [sic] trade-union movement...Ideally what is needed is one bargaining unit at each workplace'. In a section entitled 'Steps Towards Enterprise Focus' (BCA 1989: 94-96) it saw the creation of non-union workplaces as the final destination of its march.

Following its formation, the BCA found itself in competition with other employer organisations as the voice of business. The BCA wanted to create a new industrial relations system, while the CAI and Metal Trades Industry Association (MTIA), favoured reform from within. Moreover, MTIA members faced the problem of interacting with large and well resourced unions. In the early 1990s, both adopted positions which were closer to that of the BCA. The MTIA adopted a dual approach; it acted pragmatically in aiding members who interacted with unions, while advising others on techniques of union avoidance (Sheldon and Thornthwaite 1999a & 1999b).[2]

During the 1980s a struggle occurred within the federal Liberal party over industrial relations policy. The reformers were lead by John Howard, who, since 1996 has been Prime Minister. They wanted to enable employers and employees to be able to negotiate agreements outside the orbit of industrial tribunals, thereby downgrading their significance, and adopting a tougher stance against unions. Their opponents wished to introduce change from within existing structures. The reformers won the day (Kelly 1992: 228-270). Throughout the remainder of the 1980s, continuing into the 1990s, refinements were made to the federal coalition's industrial relations policy (see Dabscheck 1993), the most significant being *Jobsback!* (1992).

The distinctive features of *Jobsback!* were the abolition of compulsory access to industrial tribunals, the use of the common law, legislatively imposed rules for the transition from awards to non-awards/workplace agreements and a requirement that workplace agreements must observe five minima. These were a minimum hourly rate linked to an appropriate instrument, minimum hourly youth rates, four weeks annual leave, two weeks sick leave and twelve months unpaid maternity leave for twelve months continuous service. An Office of the Employee Advocate would be created to investigate 'legitimate' problems of workers under workplace

agreements. Coalition or non-Labor governments at the state level experimented with different models which enabled employers and employees, whether the latter were unionised or not, and on a collective and individual basis to negotiate deals outside the orbit of industrial tribunals (*Industrial Conciliation and Arbitration Act and Another Act Amendment Act 1987* (Qld); *Industrial Relations Act 1991* (NSW); *Industrial Relations Amendment (Enterprise Agreement and Workplace Freedom) Act 1992* (Tas); *Employee Contracts Act 1992* (Vic); *Workplace Agreements Act 1993* (WA); *Minimum Conditions of Employment Act 1993* (WA); *Industrial Relations Amendment Act 1993* (WA)).

The Contract Regulation Club had some initial success in this period. In the mid-1980s there were high profile disputes at the Mudginberri meat works in the Northern Territory (Kitay and Powe 1987), the South East Queensland Electricity Board (McCarthy 1985), Dollar Sweets in Melbourne (*Dollar Sweets v Federated Confectioners Association of Australia*) and Peko Wallsend in Robe River, Western Australia (Smith and Thompson 1987). These disputes demonstrated unions could be taken on and defeated and acted as a clarion call for the Club. In September 1986, following representations from the BCA, a work practices summit was held where representatives of the ACTU, CAI and BCA agreed on a need to remove restrictive work and management practices to enhance productivity, which would be most effectively achieved at the plant or enterprise level (Dabscheck 1995: 31-32).

In 1991, the AIRC convened a national wage case to consider arguments for and against, and the rules for the introduction of enterprise bargaining. It initially baulked at doing so because of fears that the parties lacked the maturity for such a system to operate (National Wage Case April 1991). The biggest critic of this reticence was ACTU secretary Bill Kelty. Despite opposition from significant sections of the union movement, who supported industrial tribunals, Kelty mounted a concerted campaign against the AIRC (Dabscheck 1995: 71-75). Members of The Contract Regulation Club presumably enjoyed watching such a spectacle. The leader of the union movement was criticising an institution which the Club viewed as an important source of union power, an institution which the Club wished to neuter. In 1992, the Labor government passed legislation (*Industrial Relations Legislation Amendment Act 1992* (Cth)) which required the AIRC to ratify workplace agreements made between unions and employers. The *Industrial Relations Reform Act 1993* (Cth) took this further by requiring it to ratify agreements made by employers and groups of non-unionised workers.

Constrained Activism: 1996 to 2005

The Liberal and National parties won the March 1996 federal election. Later that year, following compromises with the Democrats, who held the balance of power in the Senate, the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (and *Workplace Relations Act 1996* (Cth)) was passed. One of its objects was to ensure 'that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employee at the workplace level' (Section 3(b)).

Awards were to be stripped back to twenty 'allowable matters' to encourage, if not force, agreement making on an individual basis, in the form of Australian Workplace Agreements (AWA), or collectively, with either unionised or non-unionised groups of workers. Agreements would be subject to a 'no disadvantage test', where they would be compared to an existing employment arrangement. For AWA this test would be conducted by the Office of the Employment Advocate, a creation of the 1996 legislation, and by the AIRC for collective deals.[3]

In his second reading speech introducing the 1996 legislation, the Minister for Industrial Relations, Peter Reith (1996: 1298) said the

> legislation puts the emphasis on direct workplace relationships, and on the mutual interest of employer and employee in the success and prosperity of the enterprise. The bill promotes a legislative framework without unnecessary complexity or unwanted third party intervention.

Note the term 'unwanted third party intervention'. He did not say 'without...third party intervention'. The inclusion of the qualifier, 'unwanted' raises the prospect that there could, in fact, be 'wanted third party intervention'. The unwanted interveners, for the Howard government, were unions and industrial tribunals. The wanted interveners were common law courts, to reign in unions, and the government itself.

During his period as minister, Reith continually admonished employers who negotiated the wrong sort of deals and/or were too conciliatory towards unions. Thornthwaite and Sheldon (2000: 94) said of Reith that he was 'attempt[ing] to institute a form of 'political correctness' in industrial relations'. They found it novel 'that a conservative politician insists that he knows more about what is good for their businesses than business owners and managers themselves...[and] while spruiking about choice and self-regulation, the minister repeatedly and publicly interferes in an attempt to have his choice prevail'. The doublethink here is you can do whatever you want as long as it is what I want you to do.

Thornthwaite and Sheldon (2000: 93) also highlight how the Howard government, through funding, sought 'to impose a *de facto* industry agreement'[4] in universities. It is a practice that it has adopted in an increasing number of sectors, such as building and construction (Australian Government 2005), roads ('States battle PM on $12bn transport plan', *The Australian Financial Review*, 24 August 2005: 1 & 6), technical and further education ('Canberra to force AWAs on teachers', *The Australian*, 22 August 2005: 5) and universities again (Nelson 2005).

The two most conspicuous examples of intervention by the Howard government occurred in the stevedoring and building and construction industries. During 1996 and 1997, government ministers held a series of meetings with the two major stevedoring companies, P&O and Patrick, to encourage them to initiate industrial relations reform. P&O declined such entreaties. Patrick, on the other hand, after receiving an offer of loans up to $250 million to fund redundancies, plus other logistic support, decided to accept the Howard government's offer of support.[5]

Reform, in this instance, translated into ridding the waterfront of unionised labour, and hence unions, especially the Maritime Union of Australia (MUA). A potential stumbling block for the reformers was the freedom of association provisions contained in the *Workplace Relations Act 1996* (Cth) (Section 298). The reformers believed they could overcome this problem by corporate restructuring, whereby the workforce was placed into companies with limited, or zero, financial resources. At an appropriate time, the employment of the workforce could be terminated, not because they were union members, but because the companies were insolvent, having been placed into receivership. Against a backdrop of picket lines and clashes on waterfronts, the Federal Court (*Maritime Union of Australia v Patrick Stevedores*), and on appeal the Full Court of the Federal Court (*Patrick Stevedores v Maritime Union of Australia*) and the High Court (*Patrick Stevedores Operations v Maritime Union of Australia*), found there was an arguable case that the corporate restructuring breached the freedom of association provisions of the *Workplace Relations Act 1996* (Cth), and the Howard government, Patrick and others had engaged in an unlawful conspiracy.

Following these decisions the MUA agreed to changes to work practices and voluntary redundancies. The upshot of the dispute was that the MUA had defeated an attempt to bring about its destruction. The Howard government's intervention had been a failure. The MUA had survived. A different and 'more considered' approach was devised for the Construction, Forestry, Mining and Energy Union (CFMEU).

In August 2001, the Howard government appointed a Royal Commissioner (Letters Patent 2001) 'to inquire into and report on...the nature and extent of any unlawful or otherwise inappropriate workplace practices or conduct' in the building and construction industry. A 23 volume report was produced in early February 2003 (Final Report 2003).[6] Later that year, the *Building and Construction Industry Improvement Bill 2003* (Cth) was introduced. Lacking a majority in the Senate, the Bill was shunted off to a committee which issued a report in June 2004 (*Beyond Cole* 2004). The Democrats and the Howard government reached a compromise with the passage of the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (Cth). Following its achievement of a majority in the Senate, the Howard government passed the *Building and Construction Industry Improvement Act 2005* (Cth).

While criticisms have been mounted at the conduct and cost ($60 million) of the Royal Commission (Sheldon and Thornthwaite 2003; Marr 2003; Dabscheck 2003) and of the *Building and Construction Industry Improvement Act 2005* (Cth) (International Labour Organisation 2005; Howe 2005; White 2005), what is important to note here is that the building and construction industry is highly regulated.

The Act created an Australian Building and Construction Commissioner whose functions include monitoring and promoting appropriate standards of conduct (Section 10). The Minister can issue instructions to the Commissioner (Section 11) and issue a Building Code 'that is to be complied with by persons in respect of building work' (Section 27). Restrictions are placed on the right to strike (Section 36, Section 37, Section 38, Section 39) and agreements 'entered into with the intention of securing standard employment conditions' on a project site are unenforceable (Section 64). The Commissioner has power to obtain 'information or documents' from individuals. Non-compliance will result in imprisonment for six months (Section 52).

Section 52 means that an individual worker/union member who declined to divulge the contents of discussions with a union official, or what was discussed at a union meeting, would be imprisoned. The International Labour Office (ILO) (2005: paragraph 453) said of Section 52 that 'without clearly defined limits on judicial control, [this] could give rise to serious interference in the internal affairs of trade unions'. It also criticised the restrictions on industrial action as being inconsistent with freedom of association provisions, and that the Building Code, determined by the Minister, and Section 64, concerning project sites, were inconsistent with the ILO's Convention No, 98, Right to Organise and Collective Bargaining,

which had been ratified by Australia in 1973. It maintained (paragraph 448), that 'determination of the bargaining level' and 'the type of demands that may be made by one of the parties to negotiation, such as the establishment of a common wage, should be a matter for the parties concerned... [and] not imposed by law, by decisions of the administrative authority or the case law of the administrative labour authority'.

In March 1999, Peter Reith (1999) delivered a speech where he advanced the case for a national industrial relations system based on the corporations power-Section 51, paragraph xx, of the Constitution. In October and November 2000, he released three further discussion papers in support of a national system (Reith 2000a, 2000b, 2000c). In May 1999, he introduced the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Cth) as part of a second wave of industrial relations changes. The Democrats, holding the balance of power in the Senate, blocked both changes. In response, the Howard Government introduced a series of smaller bills, and entered into negotiations with the Democrats to gain their support. In the period 1997 to April 2005 fourteen were passed, 27 rejected (*Provisions* 2005: 165-174).

The Contract Regulation Club became increasingly frustrated with its inability to pursue additional reforms. In November 2002, the ACCI issued a document entitled *Modern Workplace: Modern Future* outlining a future reform agenda (ACCI 2002). It is riddled with doublethink. It says the 'ACCI strongly believes that any workplace reform must be organic and driven 'from below' by the needs and desires of Australian employees and employers' (ACCI 2002: 18), while advocating a raft of legislative changes to be introduced 'from above' by an understanding and sympathetic government; it criticises the notion of 'central regulation by 'one size fits all' rules' (ACCI: 14), while advocating a rationalised national system of regulation (ACCI: 39); it supports the use of common law remedies while complaining about its cost, that such litigation is 'fraught with delay and risks' and decisions are 'indicative of a system that inadequately balances the rights of [employers] in their commercial and industrial activities' (ACCI 2002: 69); and repeats the mantra 'that only employers and employees can select the approach that best suits their particular circumstances' (ACCI 2002: 27), while criticising those employers who indulge in pattern bargaining and 'Other employers...[who] rely solely on unregistered arrangements [because] [t]hey lack the expertise and resources to successfully use available bargaining options' (ACCI 2002: 49). Negotiating an agreement means not making use of available bargaining options!

A not too close reading of *Modern Workplace: Modern Futures* reveals the ACCI's lament is very simple: it is not having its own way; it is not achieving everything that it wants. It points to the blockage of legislation in the Senate. It adds (ACCI: 5)

> Corresponding with this period of parliamentary gridlock, labour market reform was also frustrated by legal action by some unions opposed to workplace change, some lack management leadership, by some decisions of courts and tribunals, and by state governments seeking to re-regulate their state workplace relations systems.

The ACCI lists a number of examples where unions have acted like unions in pursuing the collective interests of members (ACCI 2002: 12). The tenor of *Modern Workplace: Modern Futures* is how dare they! Unions have refused to lie down and die; are marching to the beat of their own drums, rather than embracing managerial leadership and all that it offers. Frustrated by this inability to have its own way, the ACCI turns to the Howard government and requests more regulation to overcome the regulation that is the *Workplace Relations Act* 1996 (Cth). The Howard government was able to respond to these requests[7], following the October 2004 federal election, which provided it with majorities in both houses of Parliament.

The Club Victorious: The Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

Kevin Andrews, Minister of the Department of Employment and Workplace Relations, delivered a speech in early 2005. In it he repeats the refrain of supporting 'a system in which employers and employees are encouraged to determine their own arrangements by looking to their common interests' (Andrews 2005a: 5-6). He then proceeds to contradict himself by saying 'the current system still focuses too much on only one pillar of employment policy, namely the determination of the relationship between the employer and employee...it overlooks the other equally important pillar of employment policy-that of ensuring work for all those who are capable of it'(Andrews 2005a: 5). An industrial relations policy which encourages the parties, or 'insiders', 'to determine their own working arrangements by looking to their common interests' is inconsistent with one that advocates the need to make decisions to help 'outsiders', in this case the unemployed. The problems of 'outsiders' will necessitate intervention, or regulation,

by 'wanted' third parties; intervention which will rain on the decision making of 'insiders'. Andrews' statements here are reminiscent of enterprise bargaining as a Trojan horse for 'tough-minded economic decisions', per Henderson above. The skill of the framers of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) was their ability to construct such a Trojan horse.

One object of the Act is 'ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employee at the workplace or enterprise level' (Section 3d). Note the phrase 'as far as possible'. It bears a strong resemblance to Reith's 'unwanted third party intervention' in his second reading speech of the *Workplace Relations Act* 1996 (Cth) (see above). With both, intervention into employment relationships can be mounted while maintaining that legislation 'is framed on the principle that the best arrangements are those developed by employees and employers at the workplace' (Andrews 2005b: 10).

The 2005 Act created a five person Australian Fair Pay Commission (AFPC) (Section 11). Its function is to establish the Australian Fair Pay and Conditions Standard (AFPCS) of five minimum employment entitlements (Section 171(2)). They are basic rates of pay and casual loadings, maximum ordinary hours of work, annual leave, personal leave and parental leave and related entitlements.

These are matters that were traditionally determined by the AIRC. They were transferred to the AFPC, according to Andrews (2005b: 4), because of 'the adversarial and legalistic nature' of cases conducted by the AIRC and the AFPC is 'charged with promoting the economic prosperity of the people of Australia'. In making this statement, he is seemingly unaware that the *Workplace Relations Act 1996* (Cth) (Section 89 (2) (b)) required the AIRC, in determining a safety net of fair minimum wages and employment conditions to have regard to 'economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment'. It is difficult to understand how the AFPC, which can determine its own procedures (Section 27), could be viewed as more open and transparent than the AIRC, which conducted its proceedings in the public gaze. Moreover, the operation of the AFPC makes a mockery of John Howard's (2005: 12) claim 'the era of the select few making decisions for the many in Australian industrial relations is over'.

Wages and employment conditions cannot fall below the AFPCS (Section 172). In addition, the AIRC is to determine protected allowable award matters (Section 354). These are rest breaks, incentive payments,

annual leave loadings, public holidays, monetary allowances, overtime or shift work loadings, penalty rates, outworker conditions and other matters specified in regulations to the Act. The AFPCS and these allowable award matters become the new benchmark for determining the 'no disadvantage test'; which is substantially inferior to the existing conditions test of the *Workplace Relations Act 1996* (Cth).

The Act distinguishes between different types of workplace agreements (Section 326). They are AWA, employee (non-union) collective agreements, union collective agreements, union greenfield agreements and employer greenfield agreements. With employer greenfield agreements, an employer makes an agreement with itself, before the employment of any person 'whose employment will be subject to the agreement' (Section 330 (b) (ii)). This non sequitor has the appearance of being a legislative roping-in exercise for employers. Being a de jure agreement, but not in fact, industrial action cannot be mounted during its currency (Section 435). An AWA takes precedence over a collective agreement (Section 348 (2)), and a workplace agreement over an award (Section 349).

Section 580 (4) requires an employer to honour employee obligations for a period of twelve months after the transmission of the whole, or part, of a business to another person. Employers can terminate the employment of workers 'for genuine operational reasons or for reasons that include genuine operational reasons' (Section 498 (5C)). Operational reasons are defined as 'reasons for an economic, technological, structural or similar nature relating to the employer's undertaking, service or business, or to a part [thereof]' (Section 498 (5D)).

Either one of the parties to an AWA, or a collective agreement, can unilaterally terminate a workplace agreement, after its expiry date, after having given notice of 90 days to the person, or persons, who are party to the agreement of their intention to so terminate (Section 392, Section 393). If the employer intending to terminate the agreement does not provide undertakings to employees as to their terms and conditions of employment (Section 394), then their terms and conditions will be replaced, or fall, to the AFPCS and allowable award matters determined by the AIRC under Section 354 (Section 399).

In October 2005, the Howard government released *WorkChoices* (2005), which provided extensive details on its forthcoming legislation. It provided a number of examples of what was regarded as beneficial effects of the impending legislation. One was of Billy, an unemployed worker who is offered an AWA, which 'explicitly removes award conditions' (*WorkChoices* 2005: 15). The example doesn't countenance the possibility

of an AWA being offered, which is lower than the pay and conditions contained in a collective (say union) agreement, which is allowable under the Act. The document says 'because Billy wants to get a foothold in the job market he agrees to the AWA and accepts the job offer' (*Work Choices* 2005: 15).

The way this example is presented, economic welfare is enhanced because Billy has obtained employment. However, if we incorporate into this analysis the situation of Johnny, in combination with Section 498, which allows for the termination of employment for 'genuine operational reasons', it is not so clear that economic welfare, at a minimum, in a pareto sense, has been enhanced. The employment of Billy, on lower conditions, on an AWA, may result in the employer deciding to terminate Johnny for 'genuine operational reasons', because of his higher conditions under an alternative workplace agreement. Billy's gain is Johnny's loss, with the employer obtaining a rent in the form of the difference between the two's wages and employment conditions.

Other sections of the Act enable employers to generalise this rent seeking across a workforce. A workforce is employed on individual or collective agreements of a certain level. Through corporate restructuring the employer creates a greenfield site, and participates in the oxymoron of negotiating a new agreement with itself (Section 326), and/or transmits their business to a new entity. The workforces' previous wages and conditions are protected for twelve months (Section 580 (4)). At the end of that period, the Act empowers employers to alter their wages and employment conditions, if the employer so desires, to lower levels contained in the employers' greenfield agreement and/or transmitted business. No bargaining has occurred here. The choice that confronts the workforce here is to accept the wages and employment conditions which have been unilaterally determined by the employer, or look for another job.

Once an agreement has expired, and appropriate notice has been provided by the employer, the employer can unilaterally terminate an agreement and unilaterally determine new wages and conditions (Section 394). Alternatively, if the employer decides not do so, wages and conditions will revert to the AFPCS and allowable award matters determined by the AIRC (Section 399). Such procedures will have a 'chilling effect' on bargaining. The employer has little need to enter into negotiations with workers, either individually or collectively. They provide employers with two means to unilaterally force down wages and conditions. The employer can simply say these are the wages and conditions which are on offer. If

you don't accept them, then your wages and conditions will fall to these minima, or you can look for work elsewhere.

The Act contains other provisions which restrict the ability of workers and unions to take collective action. Section 356 enables the Minister, by regulation, to specify matters that are prohibited content that cannot be included in agreements. A term of an agreement is void, to the extent, that it contains prohibited content and can be removed by the Employment Advocate (Section 358). The inclusion of prohibited content in an agreement carries a penalty of $33,000 (Section 357, Section 403 (2) (k)). Discussions concerning the inclusion of prohibited content in an agreement are subject to penalties of $6,600 for an individual and $33,000 for an organisation (Section 365, Section 407 (2) (n)).[8]

The Minister also has power to intervene in negotiations occurring between the parties. The Minister may make a declaration terminating bargaining if there is threatened, impending, probable or actual industrial action, which is, or is likely, to adversely affect those involved in negotiations, or endanger the life, personal safety or health, or welfare of the population or a part of it, or cause significant damage to the Australian economy, or an important part of it (Section 498 (1), also see Section 433)).[9]

These provisions enable the Minister to intervene and place restrictions on the issues the parties can negotiate and the manner in which they can be conducted. This will have a 'chilling' effect on negotiations. The parties, especially employers, will have little incentive to bargain, or be experimental and innovative, for fear of Ministerial intervention. Moreover, the Minister can suspend industrial action/negotiations, if unions wish to employ such a tactic. By making it difficult to participate in and conclude collective bargaining, the Act encourages individual bargaining, thereby strengthening the hand of employers.

Regulation is Deregulation. Deregulation is Regulation.

The Contract Regulation Club formed in response to the Accord. Its various members have produced a continuous stream, or more correctly, a torrent of writings on industrial relations reform. It experienced success during the period of Labor party rule in reorienting discussions of industrial relations away from centralisation, to the decentralised needs of enterprises and workplaces. Following the Howard government's election, it has preached deregulation while becoming increasingly interventionist. The best examples are the involvement of the Howard government in the

https://doi.org/10.1177/103530460601600202 Published online by Cambridge University Press

waterfront dispute, the Royal Commission into the building and construction industry, the creation of new regulatory bodies, such as the Employment Advocate, the Building and Construction Commissioner and the Australian Fair Pay Commission and the various ways the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) intervenes in the negotiation of employment contracts. The preaching of non intervention while intervening is a classic example of doublethink.

The Contract Regulation Club's reform agenda is driven by a vision where 'employees of the business are prepared to align their behaviour voluntarily' to the needs of the enterprise (Angwin 2000: 9). This vision is fundamentally flawed. Is or can industrial relations be a nirvana, or is it a site of struggle? Is industrial relations a site of human interaction where there is one view, or a multiplicity or plurality of views; even to the extent of 'wanted' or 'unwanted' third parties feeling the need to intervene in the negotiation of employment contracts?

The Contract Regulation Club's focus is the employment contract. It does not countenance the making of such contracts occurring between parties motivated by self interest. It does not perceive the resolution of competing self interests being resolved by negotiations between the parties. Its view of employment contracts is one sided; workers need to 'align their behaviour voluntarily' to the needs of the other party, the employer, with whom they are contracting. The Contract Regulation Club has trashed the discipline based on the analysis of self interest known as economics.

Let us speculate for a moment and visualise workers wanting their employers 'to align their behaviour voluntarily' to the needs of workers. Such needs might be that workplaces are safe, that employers don't indulge in inconsistent behaviour and decision making, that employers stick to agreements they negotiate, that they don't indulge in corporate restructurings to lower pay and conditions, that they pay workers their accumulated entitlements if made redundant, that workers are paid for the hours they actually work (including overtime rates), rather than fictitious amounts written on pieces of paper, don't dismiss workers unfairly and so on. If both sides to an employment contract are seeking to ensure that the other party 'aligns their behaviour voluntarily' to their needs, differences of opinion and conflict are inevitable. Henry, Bournes Higgins, the *bete noir* of The Contract Regulation Club, said 'where there are more wills than one, there must come collisions of will...regulation has come to stay' Bournes Higgins (1920: 136).

What is the meaning of someone, or a group, wanting others 'to align their behaviour voluntarily' to their needs? What is required of those who

have to 'voluntarily' agree to what others always want? They must 'voluntarily' accept whatever is demanded of them. They have no choice. For 'volunteers' this is nothing more or less than tyranny. What does this say about those who demand 'voluntary behaviour', or, as Aldous Huxley said, 'servitude'? It bespeaks insecurity, a fear of complexity, change, nuance and subtlety, an overarching need for control; a need for help and reassurance to overcome such fears; a need for everything to go their way resulting in demands for more and more regulation to overcome the problems of regulation, all in the name of deregulation.

Notes

1 This notion was first developed by the author in Dabscheck (2001a). Thornthwaite and Sheldon (2000, 84) have employed the term the Workplace Relations Club. They said, 'This club is something of a moveable feast, but it always offers an industrial relations diet produced from neoclassical economic assumptions...it includes senior, mainly federal state public servants, senior paid officials of employer bodies such as the Business Council, New Right publicists in the print media and in pro-business 'think tanks". Also see Thornthwaite and Sheldon (2001) and Sheldon and Thornthwaite (2002, 2004).

2 In 1992 the CAI merged with the Australian Chamber of Commerce to become the ACCI. The MTIA merged with the Australian Chamber of Manufactures in 1998 to become the Australian Industry Group.

3 See Mitchell et al (2005) for information on the shallowness of the 'no disadvantage test'.

4 Or what might be called pattern bargaining. The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) is opposed to pattern bargaining. See Section 421 and Section 431.

5 The material here draws on Dabscheck (2000) and Trinca and Davies (2000).

6 The twenty third volume was not made publicly available because it contained findings concerning 'criminal' or 'unlawful' conduct which was passed on to 'appropriate' prosecutory bodies for their consideration.

7 See Business Council of Australia (2005).

8 There are also limitations on pattern bargaining. See Section 421, Section 431, Section 439, Section 461 and Section 497.

9 Sections 423 to 509 place a number of restrictions on industrial action, including a requirement that a secret ballot be held before workers/unions can make use of industrial action.

References

Andrews, Kevin (2005a) 'What do we want Workplace Relations to be in Five Years?', Speech to Committee for Economic Development, Melbourne, 25 February.

Andrews, Kevin (2005b) Second Reading Speech, *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth), Parliament House, 2 November.

Angwin, Michael (2000) 'Managerial Leadership and Industrial Relations Reform' *BCA Papers*, September: 8-14.

Arbitration in Contempt (1986) H R Nicholls Society, Melbourne.

Australian Chamber of Commerce and Industry (2002) *Modern Workplace: Modern Future-A Blueprint for the Australian Workplace Relations System 2002-2010*. Melbourne.

Australian Government (2005) *Implementation Guidelines for the National Code of Practice for the Construction Industry*, Department of Employment and Workplace Relations, Revised September.

Beyond Cole: The Future of the Construction Industry: Confrontation or Co-operation? (2004) Employment, Workplace Relations and Education References Committee, The Senate, June.

Building and Construction Industry Improvement Bill 2003 (Cth).

Building and Construction Industry Improvement Act 2005 (Cth).

Business Council of Australia (1987) *Towards an Enterprise-based Industrial Relations System*, 24 March (mimeo).

Business Council of Australia (1989) *Enterprise-based Bargaining Units: A Better Way of Working*, Report to the Business Council of Australia by the Industrial Relations Study Commission, Volume 1.

Business Council of Australia (1991) *Avoiding Industrial Action: A Better Way of Working*, Employee Relations Study Commission, Allen & Unwin, Sydney.

Business Council of Australia (1993) *Working Relations: A Fresh Start for Australian Enterprises*, Employee Relations Study Commission, Business Library, Melbourne.

Business Council of Australia (2005) *Workplace Relations Action Plan For Future Prosperity*, 15 February.

Business Council Bulletin, May-June, 1985.

Dabscheck, Braham (1993) 'The Coalition's Plan to Regulate Industrial Relations', *The Economic and Labour Relations Review*, 4 (1): 1-26.

Dabscheck, Braham (1995) *The Struggle for Australian Industrial*

Relations, Oxford University Press, Melbourne.
Dabscheck, Braham (2000) The Australian Waterfront Dispute and Theories of the State', *The Journal of Industrial Relations*, December, pp.497-516.
Dabscheck, Braham (2001a) '"A Felt need for Increased Efficiency": Industrial Relations at the End of the Millennium', *Asia Pacific Journal of Human Resources*, 39 (2): 4-30.
Dabscheck, Braham (2001b) 'The Slow and Agonising Death of the Australian Experiment with Conciliation and Arbitration', *The Journal of Industrial Relations*, September, pp. 277-293.
Dabscheck, Braham (2005) 'Two and Two make Five: Industrial Relations and the Gentle Art of Doublethink', *The Economic and Labour Relations Review*. 15 (2): 181-198.
Dollar Sweets v Federated Confectioners Association of Australia [1986] VR 383,*Employee Contracts Act 1992* (Vic).
Final Report of the Royal Commission into the Building and Construction Industry (2003) Twenty Two Volumes, Commonwealth of Australia, Canberra.
Henderson, Gerard (1983), 'The Industrial Relations Club', *Quadrant*, September: 21-29.
Higgins, Henry Bournes (1920) 'A New Province for Law and Order-III', *Harvard Law Review*, December: 105-136.
Howard, John (2005) Prime Ministerial Statement: Workplace Relations, Parliament of Australia, 26 May.
Howe, John (2005) '"Deregulation" of Labour Relations in Australia: Toward Command and Control', Working Paper No. 34, Centre for Employment and Labour Relations Law, University of Melbourne, April.
Huxley, Aldous (1964) *Brave New World*, Penguin, Melbourne.
Industrial Conciliation and Arbitration Act and Another Act Amendment Act 1987 (Qld).
Industrial Relations Act 1991 (NSW).
Industrial Relations Amendment Act 1993 (WA).
Industrial Relations Amendment (Enterprise Agreement and Workplace Freedom) Act 1992 (Tas).
Industrial Relations Reform Act 1993 (Cth).
Industrial Relations Legislation Amendment Act 1992 (Cth).

International Labour Office (2005) Complaint against the Government of Australia, Case No. 2326, 338th Report of the Committee on Freedom of Association, Geneva, November: 95-112.

Jobsback! (1992) The Federal Coalition's Industrial Relations Policy (mimeo).

Kelly, Paul (1992) *The End of Certainty: The Story of the 1980s*, Allen & Unwin, Sydney.

Kitay, Jim and Powe, Rod (1987) 'Exploitation at $1000 Per Week? The Mudginberri Dispute', *The Journal of Industrial Relations*, September: 365-400.

Letters Patent to the Honourable Terrence Rhodes Hudson Cole RDF QC (2001) Entered on Record Register of Patents No.36, 29 August.

Marr, Jim (2003) *First the Verdict: The Real Story of the Building Industry Royal Commission*, Pluto Press, Sydney.

Maritime Union of Australia v Patrick Stevedores (1998) 79 IR 281.

McCarthy, Paul (1985) 'Power Without Glory: The Queensland Electricity Dispute, *The Journal of Industrial Relations*, September: 364- 382.

Minimum Conditions of Employment Act 1993 (WA).

Mitchell, R., Campbell, R., Barnes, A., Bicknell, E., Creighton, K., Fetter, J. and Korman, S. (2005), 'What's Going on with the "No Disadvantage Test"? An Analysis of Outcomes and Processes under the *Workplace Relations Act 1996* (Cwth)', *The Journal of Industrial Relations*, December: 393-423.

National Wage Case, April 1991, (1991) 36 IR 120

Nelson, Brendan (2005) Higher Education Bill Passes to Ensure Flexibility for Universities to Attract and Retain Outstanding Staff, Media Release, 10 November, Min 2041/05.

Patrick Stevedores v Maritime Union of Australia (1998) 79 IR 305.

Patrick Stevedores Operations v Maritime Union of Australia (1998) 79 IR 339.

Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005 (2005), Employment, Workplace Relations and Education Legislation Committee, The Senate, November.

Reith, Peter (1996) Second Reading Speech, *Workplace Relations and Other Legislation Amendment Bill* 1996 (Cth), *Hansard*, House of Representatives, 23 May: 1295-1305.

Reith, Peter (1999) Getting the Outsiders Inside-Towards a National Workplace Relations System in Australia, Speech, The National Press Club, 24 March.

Reith, Peter (2000a) *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*, Discussion Paper 1, *The Case for Change*, October.

Reith, Peter (2000b) *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*, Discussion Paper 2, *A New Structure*, October.

Reith, Peter (2000c) *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*, Discussion Paper 3, *A Focus on Agreement Making*, November.

Sheldon, Peter and Thornthwaite, Louise (1999a) 'The Australian Chamber of Commerce and Industry', in Sheldon, Peter and Thornthwaite, Louise (eds), *Employer Associations and Industrial Relations Change: Catalysts or Captives?,* Allen & Unwin, Sydney, pp. 25-46.

Sheldon, Peter and Thornthwaite, Louise (1999b) 'The Metal Trades Industry Association', in Sheldon, Peter and Thornthwaite, Louise (eds), *Employer Associations and Industrial Relations Change: Catalysts or Captives?,* Allen & Unwin, Sydney, pp. 70-93.

Sheldon, Peter and Thornthwaite, Louise (2001) 'Employer Matters in 2000', *The Journal of Industrial Relations*, June: 219-242.

Sheldon, Peter and Thornthwaite, Louise (2003) 'Employer Matters in 2002', *The Journal of Industrial Relations*, June: 224-253.

Smith, Howard and Thompson, Herb (1987) 'Industrial Relations and the Law: A Case Study of Robe River', *Australian Quarterly*, Spring and Summer: 297-304.

Statement of Accord by the Australian Labor Party and the Australian Council of Trade Unions Regarding Economic Policy (1983) (mimeo).

Thornthwaite, Louise and Sheldon, Peter (2000) 'Employer Matters in 1999', *The Journal of Industrial Relations*, March: 83-108.

Thornthwaite, Louise and Sheldon, Peter (2002) 'Employer Matters in 2001', *The Journal of Industrial Relations*, June: 263-289.

Trinca, Helen and Davies, Anne (2000) *Waterfront: The Battle that Changed Australia*, Doubleday, Sydney.

White, Chris (2005) 'Provoking Building and Construction Workers' (mimeo).

WorkChoices: A New Workplace Relations System (2005) Commonwealth of Australia, October.

Workplace Agreements Act 1993 (WA).

Workplace Relations Act 1996 (Cth)

Workplace Relations and Other Legislation Amendment Act 1996 (Cth)

Workplace Relations Amendment (Codifying Contempt Offences) Act 2004 (Cth).

Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (Cth)