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COMPARING AUSTRALIA'S INDIVIDUALISED PROCESS OF COLLECTIVE AGREEMENT-MAKING AGAINST COLLECTIVE BARGAINING USING THE CONCEPT OF JOINT REGULATION

Abstract

The ILO regards freedom of association as an essential precondition for meaningful collective bargaining. This means worker collectives, usually organised as trade unions, are essential to the collective bargaining process. However, Australia's current industrial relations legislation, the Fair Work Act 2009, allows for collective agreements to be made without any trade union involvement. Instead the process is based on individual employee rights, including the right to appoint a non-union bargaining representative and to participate in a binding vote to approve or reject the employer's proposed terms. Australian politicians refer to this process as collective bargaining, yet this paper will demonstrate that it is at odds with the internationally-accepted group-based understanding of the concept. This presents an analytical problem for researchers: how should similarities and differences between Australian collective agreement-making and collective bargaining in other nations be articulated and compared. As the basis for such an assessment, an understanding of collective bargaining is distilled from ILO jurisprudence. A refinement of an existing system for classifying employment regulations is then proposed. This classificatory system suggests collective agreements made in Australia and those made via collective bargaining are similar because both involve employers and workers sharing responsibility for the authorship of employment rules. This category of rules is labelled joint regulations. While this articulates a key similarity, there is both considerable scope for overlap and also potentially great differences between the process of collective bargaining and Australia's highly permissive, individual rights-

based collective agreement-making procedures. Consideration of these differences reminds us of the features of collective bargaining that contribute to social justice.

Introduction

This paper grapples with the broad theoretical issues surrounding cross-national comparative analyses of employment regulation regimes. I seek to demonstrate that empirical developments in Australian industrial relations policies raise challenges not yet addressed in the comparative literature, and that reinvigorating seminal work by Allan Flanders and Hugh Clegg provides a fruitful way forward.

As with most analytical questions, answers are found by reflecting on the particular research questions and interests motivating the comparison. To date, leading scholarship in the area of comparative industrial relations has focused on the structures of collective bargaining in various countries (Bamber et al., 2011). Bray et al. (2014) offer a system for analysing bargaining structures according to five dimensions: the bargaining agents; the legal status of bargaining; bargaining's coverage of employees; the level of bargaining; and the scope of issues included in bargaining (Liu et al., 2015: is an example of this framework applied to labour contracting in China). Such analyses are invaluable in producing a wealth of descriptive knowledge in transferable and commensurable terms. However they give the unfortunate impression that bargaining relationships between employers, workers and unions represent the entire substance of industrial relations and employment regulation, at least as far as meaningful cross-national comparison is concerned. The intertwined subjects of industrial relations and employment regulation are not limited to collective bargaining, but include a variety of other interactions of the industrial parties, with the state and the law, as well as other bodies in society.

Collective bargaining coverage has experienced a sustained decline across the industrialised world in recent decades. This has occurred in spite of the 1998 ILO Declaration on Fundamental Principles and Rights at Work which obligates all ILO member states 'to promote and to realize… freedom of association and the effective recognition of the right to collective bargaining'. The absence of collective bargaining coverage should not imply the absence altogether of employment regulation. Bogg (2012: 423) suggests falling union coverage and collective bargaining will lead to experimentation with 'new institutions of regulatory bargaining and new conceptions of representational legitimacy'. It will become increasingly important for comparative scholars to articulate a sound conceptual basis for contrasting different countries' emergent forms of employment regulation.

This paper explores the issue of comparing different means of regulating employment, with a particular focus on recognising the distinctiveness of collective bargaining. It does so by focusing on recent developments in Australian labour law which deviates from the ILO's standards of collective bargaining in crucial respects and has encouraged Australian scholars to refer to collective agreement-making as a more accurate description of current practices (Walpole, 2015; Bray et al., 2014: Ch 11; Gahan and Pekarek, 2012a). This paper begins by reviewing definitions of collective bargaining using ILO jurisprudence, and then compares this to agreement-making in Australia. The majority of the paper focuses on reviving a system devised by Flanders and Clegg (1954) for classifying different methods of regulating employment and industrial relations. Consideration of the differences between methods of employment regulation reminds us of the distinctive features of collective bargaining that contribute to social justice. The paper concludes by discussing the potential value of this system as a basis for cross-national comparison of industrial relations and employment regulation systems.

Definition of Collective Bargaining

It is important to be a clear about the meaning of collective bargaining and what makes it a distinct method of regulating employment conditions and managing the relationship between the industrial parties. Collective bargaining now arguably has the status of a human right following the ILO's Declaration on Fundamental Principles and Rights at Work (Adams, 2011) and for practitioners clarity is needed to effectively protect and advance that right. For researchers, definitional precision is important to ensure accurate and valid conceptualisations and comparisons of empirical practices, especially when policymakers trial diverse and innovative approaches.

Collective bargaining was first elaborated by the Webbs as part of their investigation of trade union activities (Webb and Webb, 1902: [1897]). Although the Webbs preferred a series of examples to elucidate the nature of collective bargaining over formal definition, Niland (1978: 17) claims the term has a distinctive and specific meaning that has been used with relative consistency throughout the world. ILO conventions are a useful basis for definition because they provide internationally applicable standards of collective bargaining.

ILO conventions "clearly establish that the parties to collective bargaining are employers or their organisations, on the one hand, and workers' organisations on the other" (Gernigon et al., 2000: 12). Freedom of Association 'is an essential precondition for the effective realization of the right to collective bargaining' (ILO, 2014: 3) and the formation of independent organisations of both workers and employers capable of determining employment conditions through collective bargaining is one of the freedom's main objectives (ILO, 2006: 178). ILO member-states are specifically obliged to promote and encourage the recognition of trade unions as the representatives of workers and in all cases the standing and negotiating capacity of trade unions must not be undermined (Gernigon et al., 2000: 13).

According to the ILO, unions' status is 'not merely as representatives of individual employees in an agency relationship'; unions are 'representatives of workers at a workplace generally' and this is why collective bargaining is defined by agreements between unions and employers (McCrystal, 2011: 166). The right to collective bargaining entitles a trade union to negotiate an agreement applicable to all workers in an enterprise regardless of the level of unionisation. At a minimum, the union should be allowed to negotiate an agreement that applies to their members so that workers are not denied their human rights because of low union density. The ILO's Committee on Freedom of Association has upheld this principle even in a case where the national government claimed the employer had made an agreement directly with the majority of employees (ILO Governing Body 2005: 307-309).

Negotiation is an important aspect of collective bargaining. The Collective Bargaining Convention, 1981 (No. 154) 'is aimed at collective negotiations… Consultation involves ensuring that the voices of those concerned on a matter are given due consideration before a decision is taken. Successful negotiation, however, means that the parties concerned become partners in a decision-making process on matters of common interest' (ILO, 2014: 16). In order for workers' organisations to be full decision-making partners, the ILO 'recognizes the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests' (Gernigon et al., 1998: 11). According to the Collective Bargaining Convention, 1981 (No. 154), collective bargaining encompasses all negotiations between the parties regarding both employment regulations ('working conditions and terms of employment') and industrial relations between employer associations, employers, workers and unions.

Collective bargaining is an important means of both regulating employment and managing industrial relations. It is distinguished from other methods of managing these issues by two features: the parties are trade unions and employers or their associations; and collective agreements are settled via negotiation. The following section outlines how collective agreement-making in Australia deviates from collective bargaining defined by these key elements, and reflects on the conceptual challenges generated for comparative research.

Conceptualising Australian Industrial Relations: Collective Bargaining is Insufficient

Australia's current labour law, the *Fair Work Act 2009*, was initially described as collective bargaining's 'return to "centre stage"' in Australian industrial relations (Forsyth, 2009), the 're-regulation of collective bargaining' (Cooper and Ellem, 2009) and the '"rediscovery" of collective bargaining' (Creighton and Forsyth, 2012: 3). The Act made a strong prohibition on 'the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system' (Fair Work Act 2009, s3(c)) and strengthened union recognition enforcement. However, bargaining representatives are appointed by individual employees who are empowered to choose between union representation, collective or individual non-union representation, self-representation or no representation (Walpole, 2015). Furthermore, peculiarities of the legislation create uncertainty that the negotiation and decision-making partnerships characteristic of collective bargaining will occur. The Act does not require bargaining representatives to make concessions nor to actually reach agreement on the terms of the Enterprise Agreement (Fair Work Act 2009, s228(2)). There are also considerable restrictions on unions' and employees' freedom to use industrial action as an economic sanction during negotiations which (McCrystal, 2010a, 2010b) argues is necessary for voluntaristic collective bargaining to occur.

Consequently, Creighton (2012: 279) concludes ‘Australia has adopted only a much-attenuated form of the internationally recognised collective bargaining model’.

Recognising the limited applicability of collective bargaining, scholars have instead used the term “collective agreement-making” to reflect the full range of empirical practices in Australia. Collective agreement-making refers to any process that satisfies the legal requirements for registering an Enterprise Agreement, and ‘collective bargaining is viewed as one of potentially many analytically distinct collective agreement-making processes’ (Walpole, 2015; Bray et al., 2014: Ch 11).

Collective agreement-making has limited utility in comparative analysis despite its usefulness as descriptive shorthand for a variety of related processes encompassing the full range of empirical practices in Australia. Collective agreement-making requires considerable conceptual development because in Australia, collective bargaining has received far greater research attention than other collective agreement-making processes (Walpole, 2015). This lacuna notwithstanding, few other countries have equivalent concepts encompassing ‘collective bargaining, which is a subcategory of the larger construct’ (Bray et al., 2014: 329). An analogous concept is offered by Liu et al. (2015) who use “collective contracting” to describe practices in China which in some cases may reflect genuine collective bargaining, however it is not clear that Chinese collective contracting will be analytically equivalent to Australian collective agreement-making. Both may overlap with collective bargaining yet may still substantially differ from each other as methods of regulating employment and managing industrial relations.

In a few recent studies, collective agreement-making has been used as part of a broader conceptual framework for comparing Australia’s industrial relations system at different points in time. These analyses have compared how labour law changes have affected the practice of industrial relations

by altering employee voice mechanisms (Bray and Stewart, 2013a) and shifted the emphasis placed on different methods of regulating employment (Bray and Stewart, 2013b). Comparison in these analyses focuses on the relative importance the law placed on five broad rule-making processes in industrial relations: statutory regulation; delegated regulation; collective agreement-making; individual contracting; and, managerial prerogative. Together, these studies provide important insights into the shifting roles of the state, managerial decision-makers, trade unions and individual employees in Australia's industrial relations system.

These analyses illustrate the difficult analytical choices inherent in comparative research. Whilst acknowledging that some forms of collective agreement-making more 'resemble individual contracting or even managerial unilateralism' than collective bargaining, Bray and Stewart (2013b: 26) eschew the issue of distinguishing substantive practices by emphasising 'it is the collectivist form that matters for the purpose of our typology'. These ambiguities in the *nature* of collective agreement-making are compounded because 'the significantly different approach to collective agreement-making' in legislation at different times makes comparison across time difficult so 'even these similarities [in the status of collective agreement-making] can be exaggerated' (Bray and Stewart, 2013b: 20). Merely as a basis for comparison with previous iterations of Australia's industrial relations system, collective agreement-making has limited utility if seeking to move beyond legal forms to analysis of substantive practices. The limits of collective agreement-making are defined by legislated procedures, meaning the relationship with collective bargaining is dynamic, changing when the law does. This makes cross-national comparisons and attempts to integrate Australian practices into international theory, based primarily on the concept of collective bargaining, particularly challenging. A system of classifying types of employment regulation is proposed as the basis for integrating Australian experience into international theory.

Comparing Collective Bargaining and Other Employment Regulation Methods

The approach advocated here is based in the substance of employment rule-making, rather than legal forms and technicalities. It builds on foundational work by Flanders and Clegg (1954; Flanders, 1975; Clegg, 1976a) that debated the essential features of collective bargaining and what distinguished it from other methods of employment regulation. Their analysis focused on the parties involved in rule-making and the nature of their interactions.

The term "collective bargaining" had first been applied by the Webbs (Webb and Webb, 1902: [1897]), and Flanders particularly believed this label misrepresented the nature of the process being discussed. He felt collective bargaining too heavily carried connotations of economic bargaining and exchange, and regarded the Webbs' analysis as promulgating a misguided conception of collective bargaining as analogous to individual bargaining. Instead, he argued 'collective bargaining is primarily a *political* institution because... it is a rule making process and involves a power relationship between organisations' (Flanders, 1975: 220 original emphasis). He claimed this 'modern political view of collective bargaining which would make joint regulation a much more appropriate term to indicate its essential character' (Flanders, 1975: 222 original emphasis).

Having relabelled collective bargaining, Flanders also sought to revise the basis for comparisons with collective bargaining. The Webbs had compared collective bargaining with legal enactment and mutual insurance (Webb and Webb, 1902), which Flanders perceived was a misinterpretation requiring correction. Since unions used insurance benefits merely as an instrument of reward or punishment so they could impose working rules, 'it was the method of unilateral union regulation which stood in true comparison with collective bargaining (or joint regulation) and legal enactment (state regulation)' (Flanders, 1975: 223).

Yet, *Industrial Democracy* was an investigation of the nature and actions of trade unions. The Webbs' comparison is perfectly justified because these were three potentially complementary and/or substitutive techniques trade unions were observed using to establish employment regulations or "Common Rules" (Webb and Webb, 1902). The Webbs recognised that these were distinct processes because mutual insurance could be deployed unilaterally by the union, whereas collective bargaining involved negotiation with employers, and legal enactment required influencing the state through political and legal means.

Flanders' critique arguably does not expose a fundamental deficiency of the Webbs' interpretation, rather a different research agenda. Indeed, Fox (1975: 171) interjected a powerful defence of the Webbs' original analysis, arguing theirs was compatible with his strong emphasis on the political and regulatory aspects of collective bargaining that 'in some respects they went beyond him'. Flanders' and Clegg's research interest lay directly in comparing the various possible methods of employment regulation, and so their classificatory system was not limited to trade unions, incorporating also employer associations, the state and society (Clegg, 1976a).

Flanders (1975: 221-225) argued collective bargaining was distinctive because agreements were 'jointly determined by representatives of employers and employees' and had the quality of private legislation enacted by trade unions and employers to better manage their relationships in addition to regulating employment. The implication that different parties, and their various combinations, will engage in different methods of regulating employment is supported by the ILO's definition of collective bargaining. As identified above, collective bargaining is distinguished by two essential features: trade unions are parties to collective agreements with employers or employer associations, and agreement is pursued through bargaining and negotiation, not merely consultation (see also the definition of collective bargaining used in Clegg, 1976b). This understanding of collective

bargaining as a distinctive process involving particular actors interacting in specific ways provides a strong conceptual foundation for situating Australian agreement-making practices in comparative perspective.

Classifying Different Types of Employment Regulation

The classificatory tool developed here is intended to be generally applicable, that is, it is should be equally useful to researchers outside of Australia and is not limited only to categorising agreement-making processes. The key proposition of this classification scheme is different types of regulation will 'be distinguished from the rest by the *authorship* of its rules' (Flanders, 1975: 221 original emphasis). This is because different parties will have different interests in the employment relationship and organisational capabilities, and so would engage in making and enforcing rules differently.

The first observation is to distinguish forms of regulation such as managerial prerogative and individual contracting that involve only the direct parties of the employment relationship. Such rules 'can be changed without the consent of an external authority' and are referred to in general as 'internal regulation' (Flanders, 1975: 90).

In most other forms of employment regulation, the consent of an authority external to the employment relationship is required. The core types of regulation in this classificatory system are: joint regulation; state regulation; and, unilateral regulation imposed by either a trade union or employer association. Joint regulation and unilateral regulation by either employer associations or trade unions require the consent of an external authority because neither trade unions or employer associations are part of the employing organisation's 'social system, but [are themselves] a separate social system, though the memberships of the two overlap' (Flanders, 1975: 90). The state is a particularly important external authority.

This paper augments and nuances Flanders' and Clegg's understanding of rule authorship and regulatory authority, that is, the power to make and enforce rules. An external authority's consent to a rule does not require that authority actually participate in the authorship and formulation of those rules. For example, the state may require that all collective agreements be consented to or approved by a regulator according to certain procedural rules while leaving the bargaining parties free to determine the substantive terms of an agreement and so collective bargaining remains a form of jointly authored regulation (see Bogg, 2009: 50-78). However, if the state were to actively contribute to the negotiated terms, the process becomes tripartite regulation (Flanders, 1975: 95).

The purpose of this classificatory system is to compare methods of employment regulation. It begins by identifying the authorial parties involved in rule-making as the basis for categorisation. Any actor involved in employment regulation can be integrated into the framework, although representatives of the state, workers and employers will obviously be main actors. After the initial categorisation as unilateral regulation, joint regulation, tripartite regulation or state regulation, specific processes are distinguished by the nature of the parties' interactions. The state, employers and employees may each exercise their agency in several different ways, meaning multiple rule-making processes may be available to any given actor or combination of actors. For instance, different state actors create state regulations through clearly distinct processes: parliaments make rules through legislation; and courts in common law jurisdictions make rules through precedents.

Collective bargaining creates joint regulations, but other processes may as well. Collective bargaining refers specifically to workers organised as trade unions entering agreements with employers or employer associations through negotiation and joint decision-making. Recognising that joint regulation is a broad classificatory category, it is defined here as any situation with employers and employees sharing in the authorship of rules about employment subject to the consent of an authority external to the organisation.

Classifying Australian Collective Agreement-making

This discussion seeks to illustrate the limitations of collective bargaining to describe and conceptualise contemporary Australian industrial relations practices and to demonstrate the value of a classification system incorporating joint regulation. The focus is on identifying the authorial parties to the rules in Enterprise Agreements, and the potential character of their interactions. The Fair Work Act is highly permissive, so how parties participate in rule-making and how they interact are contingent upon the decisions of individuals. This is an analysis of the Fair Work Act and decisions of the Fair Work Commission. The purpose is to analyse the structures that 'empower or constrain the social actors and processes under scrutiny' (Frazer, 1999: 82) in order to 'discover the inner logic of the law' (Frazer, 2009: 74).

Whereas ILO definitions of collective bargaining specify that trade unions are party to collective agreement, unions are not legally a 'party principle' under the Fair Work Act (Forsyth, 2009). In Australia, Enterprise Agreements are made directly between an employer and the employees the agreement covers (s172(2)(a)). The employees have two key rights underpinning their involvement in agreement-making: each individual employee is entitled to nominate a representative in bargaining meetings with the employer (ss173-174), and to participate in a vote

to approve or reject a proposed agreement (s181). The agreement must then be approved by a statutory authority, the Fair Work Commission (FWC), before it can take effect.

Substantive collective bargaining, where employers reach agreement with a trade union(s) through a process of negotiation, is possible under the Act. However, this kind of process is far from assured because of how the legislation deals with employee representation, how it regulates bargaining meetings, and the way 'agreement' to proposed terms is ascertained.

Either the employer, an employee or union can propose that an agreement be made to regulate terms and conditions of employment. Once the bargaining period commences (an injunctive relief is available to employees and unions if an employer refuses to bargain), the employer has a duty to notify the affected employees of their right to representation in bargaining meetings (s173). It is uncertain whether a trade union will be involved in the agreement-making process at all because the type of representation depends on the decisions of individual employees. Virtually any person may be a bargaining representative, provided they are free from the control or undue influence of the employer or any other bargaining representative (Regulation 2.06). Employees consequently have five general representative choices: union representation, collective non-union representation, individual non-union representation, self-representation, or no representation (Walpole, 2015). Unions are granted bargaining representative status by default for their members (s176), and cannot be excluded from the process, if they are an official bargaining representative (s228).

Yet 'the Act does not require bargaining representatives to be actually appointed' ([2010] FWA 4509, [18]). FWC must be satisfied that employees 'genuinely agreed' to an Enterprise Agreement before it can take effect (s186(2)), however this does not imply that official meetings of bargaining

representatives are necessary. Instead, the FWC have determined that the requirement is simply that employees had the opportunity to appoint a representative. It is consequently uncertain whether a union, or indeed any, representative will be involved in formulating the employment rules contained in an Enterprise Agreement.

However, where bargaining representatives are appointed they are supported by enforceable Good Faith Bargaining (GFB) Obligations (s228). These require that employer and employee representatives meet at reasonable times, provide relevant information and reasoned responses to proposal terms. However, bargaining representatives are entitled not to make concessions and not to reach agreement (s228(2), meaning the employer is entitled to refuse to alter the terms they initially propose. Furthermore, the employer is free to move through the process as close to the legislated minimum timeframes as possible ([2010] FWA 1065, [31]-[33]). Even where employers are flexible with their proposals, this does not guarantee there will be a process of genuine negotiation. Instead, these interactions may be more consultative because 'the obligation (and opportunity) to find the appropriate consensus between competing employee demands appears to fall into the employer's hands' (Riley, 2012: 22). Although the legislation is facilitative where all participants are willing and able, whether these meetings constitute negotiation and joint decision-making is dubious/contingent.

Negotiation is not a necessary part of making an Enterprise Agreement because agreements are officially '***made*** when a majority of those employees who cast a valid vote approve the agreement' (s182(1), original emphasis), rather than when bargaining representatives mutually consent to terms. FWC have ruled 'there is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot' ([2010] FWAFB 3510, [30]). Instead, a doctrine of impasse has emerged, meaning that if FWC is convinced further bargaining meetings are unlikely to produce

progress towards consensus the employer is entitled to present their proposal to the employee vote. An employers' proposed terms do not become an Enterprise Agreement unless given majority approval in an employee vote. However a minimum level of participation in the vote is not required leaving 'open the prospect for undemocratic outcomes' ([2010] FWA 2105, [8]-[9]), although agreements 'cannot be made with a single employee' (s172(6)).

Legal technicalities present unusual barriers to genuine collective bargaining, though it is nonetheless possible. FWC have made clear that 'the bargaining process is, however, directed at achieving an agreement between [the employer] and its employees, rather than between [the employer] and the [union]' ([2011] FWA 7525, [7]). Since employee agreement is signified by voting, union representatives may struggle to convince employers to seek agreement with the union, which Read (2012: 142) has 'characterised as a refusal to accept that a position put by the representative is in fact the position of the employees, and consequently a denial of the representational relationship'. An essential question when studying collective agreement-making under the Fair Work is whether the employee vote was a mere formality because bargaining succeeded in finding a consensus position, or if both formally and substantively agreement was "made" at the ballot box by individual employees casting their votes.

How the terms of an agreement are derived is highly contingent. Employees may or may not be formally represented, and even if they are, trade union involvement is uncertain. In bargaining meetings with employer representatives, there may genuinely be negotiation of terms and joint decision-making, or some participants may refuse to engage with others to craft a mutually acceptable position, or the process may merely reflect consultation. The nature of bargaining interactions cannot be inferred or assumed even from Enterprise Agreements recorded as 'covering' a trade union (Gahan and Pekarek, 2012b). The only certainty about the origins of

employment regulations contained in an Enterprise Agreement is that they were approved by a majority of employees who cast a vote. Clearly coverage of Enterprise Agreements cannot be assumed to reflect the extent of actual collective bargaining coverage, and so is not immediately comparable with collective bargaining coverage in other countries.

The Value of Joint Regulation for Cross-National Analysis

Collective agreement-making under Fair Work satisfies the definition of joint regulation even though it need not involve either defining feature of collective bargaining. Enterprise Agreements reflect employers and employees sharing in the authorship of employment regulations subject to the consent of an authority external to the organisation (FWC). As part of the broad system classifying methods of employment regulation, joint regulation provides an appropriate conceptual basis for analysis and comparison of Australia's industrial relations system.

Since there is no positive requirement that employees actually be represented in meetings with the employer about the contents of a proposed agreement, it may seem dubious to refer to the employees as an authorial party. However, as Bray and Stewart (2013b: 26 original emphasis) explain, when analysing:

> 'processes for *creating rules*… it remains useful to distinguish between a process whereby parties formally and jointly signify their assent to an expressly articulated set of terms, and one that involves an employer being free to impose their own rules on a unilateral basis — even, if in practice, the former may involve as little bargaining as the latter.'

The voting procedure signifies that the regulatory content of an Enterprise Agreement has been jointly settled by the employer, who formally presents a proposal, and the employees, who by voting accept or reject. Clearly responsibility for the content of agreements is shared. FWC place

great faith in the efficacy of voting mechanisms to reflect the will of employees, declaring 'if the majority employee view is that further negotiations should occur… then that no doubt will be reflected in the outcome of the ballot' ([2011] FWA 3916, [43]). An employers' proposal only becomes an Enterprise Agreement when a majority of employees who vote give their consent.

Employers and employees share in the authorship of rules, yet Enterprise Agreements cannot legally be created or changed without the consent of FWC. This may appear to be a kind of tripartite regulation, however it is important to distinguish between regulations the state actively participated in formulating, which would be tripartite regulations, and privately negotiated collective agreements that may be legally enforceable (Flanders, 1975: 221). Once an agreement is made via employee vote, FWC is bound by a basic rule that it must approve the agreement if its terms satisfy the Better Off Overall Test for employee conditions and the agreement-making process complied with the procedural requirements of the Act (ss186-188). FWC may not alter the terms of an agreement itself during the approval stage, so registering Enterprise Agreements reflects joint regulation because FWC is not an authorial party.

While all such collective agreement-making reflects joint regulation, ascertaining the extent of genuine collective bargaining is difficult because of data limitations and the need for further theoretical development. Official data collected about Enterprise Agreements, such as whether any unions are 'covered' by an agreement, provides only a poor proxy for whether the union was practically involved in agreement-making, and no indication of the nature of interactions whether consultative or involving genuine negotiation. Australian researchers need to identify means of differentiating collective bargaining from other forms of collective agreement-making. Part of this will require further research to conceptualise distinct joint regulation processes other than collective bargaining so that we might say there are several types of state regulation, including

legislation, judicial precedent and executive decree, and several types of joint regulation, such as collective bargaining, X, Y and Z.

Conclusion

Despite forming the basis for most industrial relations theory, and being the focus of most comparative scholarship, the concept of collective bargaining has limited utility in comparative studies attempting to include contemporary Australia. This results from peculiarities in Australia's labour law. Whereas collective bargaining forges agreements between trade unions and employers or employer associations through processes of negotiation, in Australia collective agreements are legally made between employers and their employees, potentially involving a range non-union representatives or no formal employee representation, and potentially involving no discussion of terms before a proposal is put to employee vote. Although genuine collective bargaining is possible in this legal framework, it is an insufficient basis for comparison for two reasons. Firstly, limited data is available about whether unions actively participated in making an agreement and whether genuine negotiation and joint decision-making was involved (see Gahan and Pekarek, 2012b). Secondly, comparison only of collective bargaining practices and coverage would overlook the variety of related but analytically distinct processes of industrial relations management and employment regulation referred to generically by Australian scholars as collective agreement-making (Walpole, 2015; Bray et al., 2014: Ch 11; Gahan and Pekarek, 2012a).

This paper has proposed comparative studies involving Australia should proceed on the conceptual basis of a classification system incorporating Flanders' and Clegg's (1954) notion of joint regulation of employment. Employment regulation and industrial relations processes are classified according to key substantive features – which parties author rules of employment, and the nature of their interactions - forming a solid foundation for cross-national comparison. Any situation with

employers and employees sharing in the authorship of rules about employment subject to the consent of an authority external to the organisation is categorised as joint regulation. This concept therefore provides the basis for discussing the full range of collective agreement-making processes in Australia, as well as any practices approximating collective bargaining in the comparator country.

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