



Chapter Eleven

Giving employees a voice over business restructuring: A role for works councils in Australia

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'It's all happening so suddenly and we've been told nothing.'
(Michelle Nicholas, former One.Tel worker; quoted in Norington 2001)

The quote above illustrates the plight of an increasing number of Australian workers in recent years. While major companies like Ansett and One.Tel have crashed almost overnight, and many others have embarked on extensive restructuring programs (usually involving mass redundancies), their employees have been kept in the dark. This is perhaps most starkly illustrated by the One.Tel case. When the once high-flying telecommunications company was about to 'hit the wall' in May 2001, some of its employees had to resort to the Australian Stock Exchange's website to find out that their employer had been placed in the hands of administrators (Fyfe 2001). In other cases, employees have learned about firm closures and impending redundancies through the media; from expert management consultants brought in to 'choreograph' job cuts; or *via* company e-mail systems after final decisions have been made (see Ogier 2002).

This chapter is premised on the view that workers have a right to know about major workplace changes at a much earlier stage, and to have input into decisions that fundamentally affect their lives. Such rights flow from an acceptance of the notion of 'industrial citizenship', or the application of the participatory theory of democracy in the workplace (the case for which I support, but do not argue here; it has been forcefully put by others in recent years, see for example McCallum 1997, and Patmore 1999). Assuming the desirability of increased employee participation in

workplace decision making, my objective here is to consider how it can be achieved. I will argue that Australian workers could be given a much greater 'voice' in company affairs and business restructuring by looking to overseas laws that require employers to discuss these matters with workplace-based institutions called 'works councils'. In Europe, works councils are employee-elected bodies (legally distinct from trade unions), established under law for purposes of information provision, consultation and (sometimes) joint decision making between workers and management.

This chapter begins by examining how the law has failed to ensure that workers are heard in the context of recent corporate failures, downsizing and other business restructuring activities in Australia. This is followed by a brief overview of relevant German and European Union (EU) laws, which could form the basis for improvements in Australian law. It then considers the emerging debate over the possible role of works councils in Australian industrial relations, initially in response to the decline of unions and, more recently, as a mechanism for employee input over business restructuring issues. Finally, other matters are outlined that need to be considered in contemplating the adaptation of the German and EU laws to the Australian environment.

Going bust and wielding the axe ... but don't tell the workers!

The last few years have produced some of the largest corporate collapses in Australian history, affecting both long-standing companies such as Ansett and newer players like One.Tel. A string of other companies, including Harris Scarfe, Pasminco and National Textiles have joined their ranks, leaving many thousands of workers unemployed (the reasons for these corporate failures, and some emerging responses in the fields of corporate governance and regulation are explored in CCH 2001). Over the same period, a flurry of restructuring activity in corporate Australia (including mergers, site closures, relocations and redundancy programs) has seen further substantial job losses – around 50,000 in 2001 alone (Shaw 2002).

After the One.Tel collapse, which cost 1,400 workers their jobs, Prime Minister John Howard (quoted in Koutsoukis 2001) maintained that 'shake-outs' of this kind were inevitable in a market economy: 'No government ... or anybody else can really protect people against the consequences of their own investments

... that is what a free market system is about.' Taking this view further, some would suggest that it is in the public interest that financially unviable companies fail, to ensure that economic resources are not wasted (Clarke and Dean 2001, p. 74). However, this approach ignores the social impact of corporate crashes, in which employees often experience the double blow of losing their jobs *and* missing out on payment of their accrued employment entitlements. Further, according to Clarke and Dean (2001, pp. 74-75), 'the legitimacy of such a view is only appropriate in a setting in which verified indicators of changing wealth and progress, survival or failure, are matters of public record. All participants need to be reliably informed.'

For Australian workers, the position could not be further from this ideal. Instead, they face an 'information vacuum', arising from the absence of any legal obligation on Australian employers to tell their workers about the financial state of the business on an ongoing basis, or when crisis situations arise. Industry insiders, directors, major shareholders, banks and other secured creditors are privy (to varying degrees) to information that enables them to see the warning signs of corporate failure and act to protect their interests. (The legal position of these various stakeholders is considered, along with that of employees, in Adams and Jones 2001; the disadvantaged position of employees compared to secured creditors, whose access to information is enhanced by their use of sophisticated financial instruments to protect assets, is further examined in the context of the Ansett and National Textiles collapses in Riley 2002.) In contrast:

The employee is probably one of the last stakeholders to become aware of the red lights that the business has transgressed, and has the least influence on the outcomes. ... The employee will ... have a limited number of tangible indicators to look for (Adams and Jones 2001, p. 197).

Similarly, employees generally have few rights under Australian law to be informed and consulted when the businesses they work for are planning mergers, closures, outsourcing, or other forms of restructuring. Some federal certified agreements require employers to consult with the workforce over restructuring and redundancy proposals, although such provisions are not

widespread.¹ Employees and their unions might also be able to obtain information about plans for large-scale redundancies, and force employers into discussions about them, under federal industrial legislation (Workplace Relations Act 1996 (Cth) (WR Act), Part VIA, Division 3, Subdivisions D and E). While these provisions have been used with considerable effect in several recent cases (see Forsyth 2002a), this statutory process has some important limitations. Primarily, it does not impose any *positive* obligations on employers at all. It merely provides a mechanism whereby their *failure* to consult may be rectified 'after the event', through consultation orders made by the Australian Industrial Relations Commission (AIRC).

The 'social partnership' alternative: employee consultation law in Europe

The absence of legal support for employee consultation in Australia stands in stark contrast to the position under EU law and the national laws of countries like Germany, where workers enjoy extensive information and consultation rights about the financial position of their employer and plans for major business re-organisation. An important aspect of these European systems is that these and other workplace matters are discussed with works councils, while collective bargaining issues (such as wages and conditions) are negotiated with trade unions at industry level.

Under Germany's 1972 Works Constitution Act, employers must provide quarterly reports to their employees about the financial state and development of the business (section 110). In larger workplaces, the employer is obliged to keep a specially-constituted economic committee of the works council 'fully and promptly informed' about the company's financial 'affairs including sales figures, production levels, and current and projected investments (section 106). Before proceeding with restructuring proposals that could result in job losses or other adverse consequences for employees, such as business closures, relocations, mergers or the introduction of new technology, the employer must inform and hold talks with the works council (section 111). These discussions could lead to the negotiation of a 'social plan' providing compensation or retraining measures for dislocated employees, or (where no agreement can be reached) to conciliation and mediation processes (section 112).²

Although the law provides that works councils can be established in all German firms with five or more employees, they are generally concentrated in larger workplaces. While there is no legal requirement for trade union representation on works councils, in practice the two institutions interact closely with union members occupying around 80 per cent of works council positions (Müller-Jentsch 1995). Given the strong legal support for unions, works councils, and employee representatives on the boards of large companies, German workers are well placed to find out about business restructuring proposals in advance and to influence their outcome. These rights were extended to peripheral workers such as part-time, fixed-term, and external or agency staff, through major reforms to the Works Constitution Act passed by the German Parliament in 2001 (Addison et al 2002).

At EU level, there are several legal instruments regulating information provision and consultation with employees over business restructuring issues. First, the 1994 European Works Councils Directive (the EWC Directive; Council Directive 94/45/EC of 22 September 1994; see Barnard 2000, pp. 526-538) requires large multinational companies operating in the EU to hold annual meetings with employee-elected councils, where they must provide detailed information about the overall financial state of the business; employment, production and sales levels; and any plans for major changes in work organisation or corporate restructuring. The works councils are also entitled to information and an opportunity for dialogue about proposed relocations, closures or large-scale job cuts as they arise. Secondly, under the 1975 Collective Redundancies Directive (Council Directive 98/59/EC of 20 July 1998; see Barnard 2000, pp. 488-498), EU employers must notify works councils or trade unions in detail when they are contemplating mass redundancies, then meet with a view to reaching agreement about ways of avoiding job losses or reducing their impact. Thirdly, the 1977 Transfer of Undertakings Directive (Council Directive 2001/23/EC of 12 March 2001; see Barnard 2000, pp. 446-488) imposes similar obligations on both parties to proposed business transfers in the EU. It requires the transferor and the transferee to consult with representatives of their respective workforces, before any transaction takes effect, about its implications for employees.

From an Australian vantage point, these three EU directives

appear to provide vastly improved opportunities for workers to be involved in discussions over major workplace change than our domestic laws. However, the directives simply establish a minimum framework for implementation by individual EU member states, and in many European countries (such as Germany) employees are accorded even greater rights under national law. Viewed through the prism of these national systems, some observers see the EU directives as providing only a limited basis for employee influence over business restructuring issues, mainly because they leave management prerogatives unchallenged (see for example McGlynn 1995, p. 82). Several cases in recent years have highlighted some of these limitations, particularly in relation to the *EWC Directive*. These include Renault's relocation of its Belgian plant to Spain in 1997 (resulting in the loss of 3,000 jobs), without consulting the Renault EWC (Lorber 1997); and BMW's proposed sale of its Rover manufacturing plant in Britain in early 2000 (threatening employment for 9,000 workers), again bypassing the EWC and, in this case, local trade union representatives and the British Government (Villiers 2000).

These and other developments led to pressure for improved EU legislative initiatives in this area, which finally resulted in the adoption of the Directive establishing a general framework for informing and consulting employees in the European Union (the Information and Consultation Directive; Council Directive 2002/14/EC of 11 March 2002, see Blanpain 2002, pp. 217-301). This latest directive requires all business undertakings in EU member states with 50 or more employees to set up mechanisms for informing and consulting workers in three main areas: the recent and probable development of the business; employment levels and any threats to employment; and major decisions that could affect work organisation or threaten jobs in the business (Information and Consultation Directive, Article 4).

The precise content and timing of employers' consultation obligations under the Information and Consultation Directive are fairly open-ended, with the details to be prescribed by national implementing laws in the EU member states. It is generally considered that companies will have to establish national-level works councils to meet the new directive's requirements (Gollan 2002). So in countries like Germany, where works councils are already widespread under domestic law, the Information and

Consultation Directive will have minimal impact. By contrast in Britain, which (like Australia) has no tradition of employee representation through works councils, the new directive 'offers the prospect of the largest single extension of workplace consultation in British employment relations history' (Burns 2000, p.10). Britain's experience in implementing the new directive could therefore provide important lessons for Australia.

From union decline to business restructuring: the works councils debate in Australia

While stopping short of mandating formal structures like works councils, Australia's federal Labor Governments have experimented with a range of worker participation measures between 1983-1996 (Department of Employment and Industrial Relations, 1986). These included consultative councils and statutory 'industrial democracy plans' in the federal public service (Gurdon, 1985). However, it was not until the mid-1990s that the works council concept started to receive serious attention. In 1995 the labour think-tank, the Evatt Foundation, proposed the establishment in Australia of works councils based on the German and Dutch models. It was thought that these bodies could help unions in the new enterprise bargaining environment, particularly by playing a role under the provisions for non-union enterprise agreements, and assist in the reversal of union membership decline (Evatt Foundation 1995, pp. 128-133).

Since then, and particularly since the implementation of the federal Coalition Government's 'decollectivist' industrial relations agenda, works councils have attracted increasing interest. In 1997, Professor Ron McCallum responded to the attack on collectivism, the drastic fall in union membership levels, and the growth of casual and other 'atypical' forms of work, by arguing for recognition of the 'industrial citizenship' rights of Australian workers. Specifically, he proposed legislation mandating the establishment of works councils in all companies with 50 or more employees (McCallum 1997, pp. 409-12, 420-422). Two years later, the Australian Council of Trade Unions recommended that the merits of works councils should be debated, as institutions supporting collective bargaining and collective organisation (ACTU, 1999). The peak union body has driven this debate among Australian unions over the last few years. In early 2001, the ACTU sponsored a labour movement conference on works councils (see

Forsyth 2001; Murphy 2001), and promoted their potential to operate as institutions for workplace consultation so long as unions retain exclusive responsibility for collective bargaining (Combet 2001).

Much Australian discussion about works councils has focused on their possible role in closing the 'representation gap' caused by union decline and the ineffectiveness of non-union employee representative bodies (Bray et al 2001; Gollan 2002). The recent spate of corporate crashes, restructures and layoffs in Australia has added another dimension to the debate. For many observers these developments, particularly the sudden collapse of Ansett, have acutely highlighted the need for changes to Australian law to ensure that employees are not taken by surprise in this way again in future. As a result, a number of responses have emerged.

First, some have argued that as employees also bear risk in insolvency situations, they should have the same access to corporate financial data as banks and other secured creditors (Shorten 2002; Riley 2002). In addition, others (including several union leaders) have suggested that the information and consultation vacuum for employees in business restructuring cases could be filled by the introduction of works councils based on the European model (Long 2002; Birnbauer 2002). In my view, the adoption in Australia of laws like the EU directives would represent a major improvement on the current legal position, while Germany's works council laws offer an even more promising basis for reform.

Let's hear what the workers say: adapting works councils to the Australian setting

In looking to the German and EU laws as models for reform of Australian workplace consultation law, it is important to be aware that great care needs to be taken when attempting to 'transplant' laws and institutions, like works councils, from one national setting to another. To successfully transfer laws, close attention must be paid to contextual factors such as the economic, political, social and industrial relations environments of the countries involved (Kahn-Freund 1974). For example, the EU directives and Germany's Works Constitution Act are products of entrenched notions of 'social dialogue' and 'social partnership'. There might be considerable difficulties in transferring laws and institutions

embedded in a context of cooperation and tripartism, to the vastly different setting of Australia's adversarial industrial relations system and market-driven economy (Forsyth 2002b).

Nevertheless, in my view it would be possible to adapt elements of the German and EU laws to Australian conditions. For example, our federal industrial laws could be amended to impose obligations on employers to regularly inform employees about the financial state of the business, and to consult with them over a wide range of restructuring proposals, along the lines of the German legislation. It would be possible to do this without necessarily requiring, as the German law does, that information provision and consultation *must* take place with a works council. In the Australian context, the employer's obligation could be met by disclosing information and holding discussions with a relevant trade union or unions.

However, given the extent of union membership decline in Australia since the mid-1980s (see Deery and Walsh 1999), there are strong arguments for allowing works councils to be established in non-union or lightly-unionised enterprises. This would ensure that, where unions are absent or their presence is weak, employees have access to an independent institutional forum through which consultation can occur. Under British law, consultation for purposes of the EU directives must take place with 'recognised' trade unions or (in their absence) with elected or appointed employee representatives (Burns 2000, pp. 5-9). Australian law could adopt a modified form of this test, providing that a 'recognised' union is one that (for example) has a certified agreement with the employer. The law could designate that union as the appropriate body for information and consultation purposes, and require the establishment of employee-elected works councils to meet those purposes in all other cases. Alternatively, the law could provide for the establishment of works councils as the channel for information provision and consultation in both union and non-union settings. In unionised workplaces, works councils would then operate alongside established unions, which would continue to perform their traditional collective bargaining role.

The EU directives also provide a base on which to build Australian reforms, although several improvements would need to be made to ensure that such laws operated successfully here. In particular, a major criticism of the EWC Directive has been its

failure to provide codetermination rights. For this reason, some observers claim, the EWC Directive has sponsored the creation of mere 'information forums' rather than bodies that can meaningfully contest proposed mergers, transfers, closures or mass redundancies (see Ramsay 1997, pp. 318-320; compare Lecher et al 1999). Accordingly, in the Australian setting, any laws aimed at enhancing the information and consultation rights of employees over business restructuring matters must allow worker representative bodies more than a passive role as information recipients. This means that employees must be given the capacity, through their representatives, to negotiate over proposals for major workplace change. A mechanism is also required (like that under German law) for disputes over these issues to be referred for independent mediation, perhaps by the AIRC.

Other perceived deficiencies of the EU directives should be addressed in considering their adaptation to Australia. For example, there should be clear legislative direction as to the content of the information to be provided, and the timing of consultation over restructuring proposals (i.e. it must take place at the earliest possible opportunity, before any definite decisions are made.) These suggestions will no doubt challenge the entrenched Australian notion of managerial prerogative. However they are essential to ensure that, once established, works councils can play a role as genuine 'social actors'; rather than mere 'information committees' (see Lecher et al 1999).

In conclusion, the adoption of European-style laws requiring greater consultation with Australian employees over business restructuring issues is unlikely in the short term. Such a step would be inconsistent with the federal Coalition Government's winding back of legal protections for employees, and its overall deregulatory approach to workplace relations. However, reform may be forthcoming in the medium to long term, given the federal Labor Opposition's recent expressions of support for greater employee participation and input into management processes (McClelland 2002). In light of the increasing incidence of major restructuring and company collapses, momentum is building for changes to the law to ensure that employees are no longer treated as corporate 'outsiders', but are recognised as legitimate stakeholders in the enterprises that employ them.

The introduction of similar laws to the EU and German laws

discussed here, appropriately modified to suit Australia's economic, social and industrial relations conditions, would ensure that employees were fully informed about the financial problems confronting their employer and could make plans accordingly. It would mean that when large companies wanted to slash the size of their workforces, they would first have to sit down with workers' representatives to explain the need for such drastic measures and explore other options. They would also have to negotiate over the timing and extent of any redundancies that could not be avoided, and measures to minimise their impact on employees. In these various restructuring situations, employers would be compelled to deal with established unions, or permanent legally-supported forums like works councils. In that case, workers like those at One.Tel would no longer need to 'surf the net' to find out that their employer was facing insolvency, and that their jobs and livelihoods were therefore under threat. Nor should they have to.

Notes

- ¹ Only around 10 per cent of federal certified agreements since 1997 have included clauses requiring consultation with unions over workplace change, according to recent evidence from the Australian Centre for Industrial Relations Research and Training (ACIRRT): Callus 2001. Award provisions containing similar consultation clauses have been removed from awards, as they are no longer 'allowable matters' under section 89A of the Workplace Relations Act 1996 (Cth) (WR Act).
- ² It should be noted that German works councils also have 'codetermination' or joint decision making rights over 'social matters', like working hours, health and safety, and performance monitoring; and 'personnel matters' including proposed dismissals. In these areas, the employer cannot act without the works council's agreement: Works Constitution Act sections 87-105.

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