Chapter Ten

Employee consultation in an Australian context: The Works Council debate and trade unions

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There are a number of reasons why unions should be encouraging a debate about works councils. The debate about works councils in an Australian context is a debate about the right of employees to be informed and consulted about the decisions that affect their lives. Professor Ron McCallum expressed the problem succinctly when he commented that

> It has always seemed incongruous to me that while Australian citizens are able to elect their governments, when they enter their work and become industrial citizens, they have no legal right to elect a consultative body to participate in workplace governance (*The Age*, 2001).

Mischievously, and to advance their own political objectives, some sections of the business and political community will no doubt try to characterise any debate about workplace consultative mechanisms as a debate about unions. They will say it's a back-door grab for membership, more evidence of the evil intent of union leaders. The current Prime Minister will warn in a tremulous voice of 'wall-to-wall trade unionists' with a socialist plan to take over the businesses of innocent employers. But both observers and participants in this discussion should remember that this is not a debate about the rights of unions in Australian workplaces. This is a debate about the rights of Australian citizens in the workplace. An employee's ability to participate in decision-making at work is arguably as critical to his or her citizenship in a democracy, as is the right to vote.

Some may argue that this is a radical new concept. But it is hardly radical when one considers the amount of time people spend at the workplace, and the critical part management decisions can play in an employee's ability to provide for themselves and their families.

So why do we need to have a debate about employee consultation in Australia?

Unlike citizens in many other developed democracies around the world, employees under Commonwealth law in Australia currently have no general legal right to be consulted in the workplace, although there are some limited legislative rights in relation to health and safety under state legislation, and in connection with redundancy, (Workplace Relations Act 1996 (WRAct)(Cth), Part VIA, Division 3, Subdivisions D and E) as well as some provisions achieved through bargaining and included in certified agreements.

This has not always been the case. Although we have never had the legislated mechanisms for consultation that exist in Western Europe, for example, the balancing of managerial prerogative with the right of employees to be consulted has in the past played some part in Australia's industrial relations system. It was in response to the ACTU's 1984 Termination, Change and Redundancy Test Case ('TCR Case') that the Industrial Relations Commission first created a legal basis for formalised consultation at work in Australia. ((1984) 26 AILR 256; (1984) 294 CAR 175; (1984) 8 IR 34 or the judgment in the following year (1985) 27 AILR 1; (1984) 295 CAR 673; (1984) 9 IR 115.)

As a result of that case, provisions were inserted into awards requiring employers to consult with employees and their representatives as soon as a firm decision had been taken about major changes in production, program, organisation, structure or technology which was likely to have a significant effect on employees.

In 1987, the High Court also held in Re Cram that issues that might be considered to belong to managerial prerogative, such as staffing levels, could also be included in awards as 'industrial matters'. (*Cram, Re; Ex parte NSW Colliery Proprietors Assoc Ltd* (1987) 163 CLR 117.) In this decision, the High Court unanimously rejected the notion that it is the sole and exclusive prerogative of

management to decide how a business should operate without the workforce having any stake at all in the making of such decisions.

Although the 1984 TCR decision did not establish any structural mechanism by which consultation was to take place, most awards also contained provision for consultative committees or some other form of consultative mechanism. These provisions were a result of the Commission's 1991 Wage Fixing Principles (*National Wage Case April 1991*, April 16, 1991, Print J7400) which made wage adjustments dependent on awards requiring enterprises to establish mechanisms for consultation with employees on matters affecting efficiency and productivity.

So what went wrong? What happened to the tentative steps we had taken towards employee consultation in Australia?

The current Federal Government stopped it. The 1996 amendments to the Workplace Relations Act unilaterally removed all provisions dealing with employee consultation from awards. In addition to this, the scope of the Commission's power to deal with issues relating to managerial prerogative, like staffing disputes, was also narrowed. All of these matters are now 'non-allowable', and cannot be included in awards (Section 89A of the Workplace Relations Act 1996 (Cth) (WR Act)). The current government, with the support of the Australian Democrats, wound back the consultation agenda and reinstated unilateral management prerogative. It is extraordinary that the Australian Democrats, who are committed to greater democracy at work as well as in the community, voted with the government in 1996 to remove the fairly minimal consultative rights of Australian workers by restricting the Commission's jurisidiction under the WR Act. The employee consultation picture in Australia is not positive. Even in unionised workplaces, where workplace union delegates are the mechanism for employee consultation, the number of Australian workplaces with any reasonable level of union delegate activity was only 19 per cent at last count (Peetz 1998, p. 116). And unions are battling all of the time to ensure that delegates have the representative rights necessary to fulfil this role. Unions are determined to lift this level of activity, and to establish rights for delegates.

It is not enough for us now to just look back at the abolition of consultation rights, and perhaps aspire to the re-establishment

of the minimal standards that once existed. It's time Australia took a fresh look at this issue, in particular a close look at democratic workplace structures that would deliver a statutory right to information and consultation. Hence the recent emergence of debate on the role of works councils.

There have been a number of key developments in other democracies around the world in recent years and we need to consider what these might mean in an Australian context. In its lack of commitment to consultation and participation by workers in the enterprise, Australia is now decades behind most of Western Europe and even the United Kingdom, which does not have any history of statutory consultation requirements.

The British Government has recently implemented the European Union's Works Council Directive, Transnational Information and Consultation of Employees Regulations 1999. The Regulations, which came into effect in the UK on 15 January 2000, apply to any undertaking with at least 1,000 employees in the European Union, and with at least 150 employees in each of two or more member states. On a request from at least 100 employees or their representatives, management must negotiate the establishment of a European Works Council with members elected by employees.

Workforces about to be downsized, corporatised, privatised, casualised or replaced by labour hire at least have the right to know what is happening to them under such a system. It is something of an irony that the Australian situation is so different, especially considering that this country has been tagged as the land of the 'fair go' and the home of egalitarianism.

Recent European developments provide that employees of large companies operating within an EU member state shall have the right to the establishment of a works council. While the UK's conversion to the principles of employee consultation is fairly recent, works councils have been long-established features of enterprise structures in most of Western Europe (see Bray et al, 2001).

These workplace-based organisations have different names and functions in different countries. In some cases they are established by statute; in others, such as in Italy, workers set them up directly, without legislation. Generally, the councils do not have employer membership and are directly elected from the

employees at a workplace or company, representing both union members and non-members. In some cases, unions have direct representation and/or put forward candidates for election.

Most countries with works council systems place statutory obligations on employers to provide them with information and to consult. While some works councils do engage in collective bargaining, the most common model is that employees negotiate wages and employment conditions not through the works council but through their unions, often at an industry or sectoral level. That is, unions remain the vehicle for collective bargaining. The works council is a vehicle for collective employee consultation. This is important because those of us who are committed to the right of employees to be consulted in the workplace, are also deeply committed to the right of unions to collectively bargain on behalf of members.

The union movement would not support any model for the establishment of consultative structures in the workplace that negated, undermined or diminished the right or ability of unions to organise, represent and collectively bargain on behalf of their members. However, if properly handled, the works council concept does not necessarily threaten this fundamental commitment. Any model for the establishment of formal consultative structures in the workplace must recognise the essential difference between collective consultation and union representation, collective consultation and collective bargaining.

The right and ability of workers to organise and associate together in unions is the most fundamental means of addressing the inherent power imbalance between an employer and an individual employee, ensuring fairness and justice in the workplace. This right can never be replaced by mere access to information and the act of consultation. However, it is also the case that the establishment of consultative mechanisms like works councils could complement union organisation. The conservative strategy is to assert management control through individual contracts. A collective consultative mechanism would at least ensure some form of collective organisational structure and culture, which would be a positive development.

What functions and characteristics should an effective and legitimate Australian approach to works councils have in order to secure union support? Some key considerations have already

been explored in this chapter. Furthermore, as unions, we have a responsibility to fully explore and reach a considered consensus policy position on the merits of a system of works councils in an Australian context. To do that, unions will need to keep encouraging the discussion of this concept at public forums in workplaces and in all union decision making bodies. However, to achieve a genuine democratic right for employees to information and consultation, we need to broaden the debate beyond traditional union structures, and traditional workplace structures.

This is a time of dramatic change in the workplace, and of momentous change in the economy. It is a time of deepening complexity in employment structures and relationships. It is a time of sustained support for collective employee rights. Employees deserve to know what is happening to them at work.

The appalling treatment of workers at G&K O'Connor's meatworks, who were locked out until they agreed to sign individual contracts substantially reducing their pay and conditions, is a case in point. One of the critical factors leading to the dispute was the refusal by management to provide the information to back up their claims for cuts to costs. If they had been required to provide that information things might have been different. The lack of consultation and the provision of information rights under the WR Act paled into insignificance compared to the intimidating power of the employer's nine-month lockout, and the lack of any real right for the workers to collectively bargain.

The current federal industrial relations system is in need of urgent reform. It is biased against employees; it gives employers too much power; it violates ILO conventions; and it deserves no place in a democratic society. It needs extensive and comprehensive change. In generating debate about works councils and employee rights to information and consultation, we are generating debate about just one amongst many important policy issues. The challenge for all of us, unions, employees and employers, is to look creatively and constructively for solutions that ensure a genuine fair go for people.

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