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# SHOULD AUSTRALIA COPY U.S. EMPLOYEE RELATIONS PRACTICES?

As Australia debates the possibility of major changes in its labor laws, I am told that there are those who argue it should copy elements of the American system. How weird! While I love my country I never thought of it as a model of good labor relations. But based on the assumption that American experience has some relevance, this paper consists of three parts. The first describes recent developments in American employee relations broadly conceived (not just union-management relations). After all, if you want to copy U.S. practices you should know what they are. Next I comment briefly on one major but perhaps insufficiently recognized difference between our countries' labor relations: the U.S. is more legalistic. The final section deals specifically at some proposed changes in Australian labor law, supposedly suggested by American practice, though this practice may be misunderstood.

## Recent developments in US employee relations practice

### *Union decline*

Union-management relations are not a major issue in the US, not with overall union density down to 12 percent. True some unions have developed innovative organizing techniques and there have been notable organizing triumphs in some low-wage industries, which are heavily populated by recent immigrants, industries such as hotels and janitor service. But these gains have been counterbalanced by loss of membership in manufacturing and construction and by substantial wage cuts caused by concession bargaining in industries such as steel, autos, and airlines. HR managers in the US have other concerns than labor relations, as I discuss below.

Few already unionized workplaces have gone non-union, but many have downsized or gone out of business altogether, often shipping their work overseas. But neither have many new workplaces have gone union. Few non-union employers face a realistic union threat and those who do have a well stocked larder of well honed methods to keep themselves union free. Many of these are technically illegal but the penalties for violating the law are almost laughably weak. If the employer loses after a long drawn out legal procedure it must post a notice saying that it will not violate the law again and if an employee is found to have been discharged because of legal union activity he or she must be reimbursed for back pay lost less any pay the employee earned elsewhere in the interim or could have earned if she/he looked harder. Many employers view these trivial penalties as just a cost of doing business.

The public sector situation is very different. While private sector density dropped from roughly 40 percent in the 1950s to under 8 percent today that in the public sector has done the reverse: it jumped from very roughly 10 percent in the 1950s to 36 percent over the same period. Why the difference? Changes in the law (chiefly at the state level) legitimated public-sector union representation and collective bargaining; further few

public sector employers use private sector union prevention techniques. If they did they might be subject to political retribution. Besides striking, public employees can also vote, as can their families.

### ***From employees as assets to employees as costs***

“High commitment management” (also called “employee involvement” among other names) was the reigning fad among “progressive” firms circa 1990. IBM, Hewlett-Packard and other icons of the period proudly offered life-time employment. Forms of worker participation were common: job enrichment, quality circles, work teams, and the like. Jobs were broadly defined so as to give employees greater autonomy. Efforts were made to reduce obvious status differences, for example by calling workers “associates” and managers “team leaders. A heavy stress was placed on training and indoctrination, including ceremonies designed to deepen employees’ identification with their employer. Much of this involved efforts to emulate Japanese practices which were seen as more productive than those of American firms. Few companies carried these policies very far, but they did seem the wave of the future. Consultants made big money installing them. Many companies bragged about their policies in ads and annual stockholders’ reports .

Things have changed, both in rhetoric and practice. US management today pays less attention to high commitment policies generally. There is less emphasis on human resource development as either a social obligation or a source of company profits (especially since the payoff is in the long run). IBM and Hewlett-Packard, once known for their generous benefits and strong company culture today show little hesitance in laying off employees or cutting benefits. And these employees are not typical blue-collar types; they are knowledge workers. Management consultants preach sticking to “core competencies” while other functions are “outsourced” to specialized (typically non-union vendors). HRM departments have been downgraded in terms of size, status, and pay relative to other staff departments, especially Finance. Many functions, such as employee counseling, have been outsourced to independent firms.

There is less job security all around. There is a new argument that high mobility (sometimes called “boundary less careers”) is good: employees should be responsible for their own careers. Workers and especially managers should expect to work for many employers during their lifetime. In this way they learn more skills, become more versatile, and gain broader perspectives.

Job insecurity has spread even to top management. Particularly since recent scandals, such as at Enron, top executives today are watched more closely by their boards of directors. CEOs are being held increasingly responsible for both improprieties and bad judgment (and perhaps even for bad luck), Excess dependence on subprime mortgages led to the departure of CEOs from Merrill Lynch and Citigroup, two the world’s largest financial institutions. When hedge funds acquire a firm their emphasis normally is on quick, short-run results and then to take the firm public again. This typically means layoffs at all levels. Some call this a regime of “lean and mean.”

### ***From labor law to employment law***

Understandably, given the decline of unions, the importance of labor law, which is concerned with union-management relations, has also decreased In its place, a new field

has developed, employment law Rather than union rights this is concerned with individual's rights vis-à-vis their employers. As a consequence, law schools offer fewer classes in labor law today and many labor lawyers have converted themselves into employment lawyers,

Probably a majority of employment-law cases involve a series of laws passed beginning in 1972. These outlaw discrimination in terms of employment on the basis of race, gender, ethnicity, age (over 45), religion, physical disability, and in some states sexual preference. By contrast with only token penalties for employers that discriminate on account of union activity, these laws have real teeth. They are enforced by both administrative agencies and by trial in civil courts with juries which often award large damages. AT&T (a major telephone company), for example, recently paid \$66 million because it discriminated against employees on the basis of pregnancy. Earlier it paid \$75 million to settle two similar gender-related cases.

The result has been major changes in HRM practices. For example, if one ethnic group scores higher than another on a test, that test must be "validated": it must be shown to accurately predict performance on a key aspect of the particular job for which the test is being used as a selection device. Some wags call the requirement "The Psychologists Full Employment Act." Equal employment laws have also kept lawyers busy with difficult issues. For example, evolving law requires employers to make "reasonable accommodation" to physical disability provided employees can perform essential aspects of the job. What's reasonable? What's essential? One result has been to formalize HRM practices. Many companies elaborately document the performance of older employees to avoid charges of age discrimination if they are fired. Another result has been considerable expenditures on ramps and the like to make the required "reasonable accommodation" for physical disability.

Given management's reaction to unionism one might have expected companies to have vigorously resisted these laws as well. Though many did so at first, employers now are generally resigned to these new requirements. The current term for what was once called "affirmative action" is "diversity". Diversity is justified on the grounds that having a diverse workforce in an increasingly multi-ethnic society is just good business. Managerial performance appraisals increasingly take into account managers' success in integrating their work force. Though many will argue this is not enough, there has been progress at all levels, even the top managerial. Especially for women the "glass ceiling" has cracked. A growing number of blacks and women are or have served as CEOs. There have been women CEOs, for example, in Hewlett-Packard, Lucent, Xerox, Pepsi Cola, and Reynolds Tobacco.

Increasingly in "progressive" companies with large number of white collar jobs, efforts are being made to make work "family friendly". The law requires maternity leave (though unpaid). Beyond this, some companies provide child day care, flexible work schedules, lactating rooms, and washing machines on the job.

Despite this average wages for women, blacks and Hispanics are still well below those for white and Asian men. In the case of women this is in part because of family obligations. And after increasing rapidly in the post-war period, the proportion of

working-age women actually working has stabilized at roughly 60 percent and their salaries at roughly 80 percent of male salaries.

Another development has been the erosion of the common law doctrine of employment at will. State courts in particular have recognized a growing number of grounds for challenging employee discipline. These include “implied covenant of good faith and fair dealing”, “public policy”, and “implicit contracts”. In non-union firms in a small way these take the place of arbitration under union contracts (awards). To avoid legal hassles non-union firms are making increasing use of ombudsmen, informal grievance procedures and even binding arbitration.

Sexual harassment is a major issue (at least it makes the headlines), involving a large number of cases. Technically it is a form of discrimination on the basis of gender, even when a female supervisor harasses a male subordinate. Often it leads to large damages. In one case a jury awarded a legal secretary \$8,000,000 (later reduced) because at a drunken Christmas party a partner dropped ice cubes down her bras and attempted to fondle her breasts.

The law recognizes two forms of harassment: “quid pro quo”, e.g., sex in return for promotion, and “hostile environment”, e.g. subjecting female employees to suggestive sexual remarks. These raise difficult questions. What is harassment? What is a hostile environment? Some women may feel uncomfortable if a common room is plastered with women in various stages of undress. But may a male employee keep a picture of his bikini-clad wife on his desk? When can management be held responsible for permitting harassment? When should it be aware that this is happening? What should they do about them? Companies react by establishing elaborate procedures for reporting harassment. California law requires all supervisors (including professors who supervise students) to take a two hour course on sexual harassment.

Many cases involve individual job rights. For example when may employers establish dress codes, test for drug use, make use of polygraphs, test for genetic abnormalities, or disseminate medical or performance evaluation reports, etc? For example, is it religious discrimination to prohibit dreadlocks? Recently several top execs (one being Boeing’s CEO) were fired because they were insufficiently discrete in their consensual erotic relations with fellow execs. Does a top exec have the right to have an affair? To do so publicly?

Many of these issues involve changing social and even religious values and these differ over time and place. For example, what was once viewed as active flirtation or just “kidding around” is now sexual harassment. Attitudes towards gays and lesbians differ greatly from one part of the country to another. So do attitudes toward guns. Oklahoma law says employers must give employees the right to bring guns in their cars to company parking lots, provided car doors are locked. California, less gun-loving, might never pass such a law.

## ***Compensation***

In this area there have been what are in my view are some major injustices, if not scandals. Wages for the average worker have barely kept up with changes in the cost of living, though university graduates have done somewhat better than average. Middle

managers have done better yet and salaries for top management plus “performance” bonuses plus the value of stock options have exploded. High pay for successful managers is perhaps understandable but enormous “golden handshakes” have often been given failures. Michael Orvitz was given \$140 million to induce him resign after only 14 months of service as Walt Disney’s second-in-command. Stan O’Neal received \$160 million after being discharged as Merrill Lynch’s CEO, presumably for his responsibility in the sub-prime mortgage debacle. This raises some questions in comparative ethics. Tremendous salaries are OK. Consensual sex between executives is not. As gigantic payoffs are increasingly publicized, even boards of directors are showing growing concern

## **Benefits**

Space limits prevent me from covering a major current U.S. controversy, even in the 2008 Presidential campaign: this is over employee benefits, especially over pensions and health insurance, both publicly and privately provided. As the population ages all have become more expensive. Suffice it to say, the Bush administration and many employers sought to privatize these benefits, cut them back, and transfer various forms of risk from the employer to the employee. The Democrats wish to extend them, though Clinton and Obama disagreed as to the mechanisms. Disputes over health care have been major elements in the relatively few strikes still occurring in the U.S.

## **Which country is more legalistic: U.S. or Australia?**

When I first visited your country in 1979 I assumed your labor relations would be more legalistic than ours. After all, your disputes were settled by legally binding arbitration. But it wasn’t that simple. No one had told me that arbitrators’ courtroom was fitted with a dais and a table, one for arbitrating, the other for conciliating. Arbitrators did conciliate. Further Australia was bedeviled with numerous small strikes, few of which were settled by arbitral decisions or even by reference to the previous presumably legally binding awards,

A major difference between our two countries is that, at least in principle, in the US we make a sharp distinction between “*rights*” and “*interests*.”<sup>1</sup> Interests refer to the content of the union contract. Rights refer to how the contract is interpreted and applied. In other words the contract gives rights. Disputes over interests (that is over the terms of the contract) are settled through collective bargaining and strikes if bargaining fails. Disputes over interests are settled through an often elaborate grievance procedure, with binding arbitration if this fails.

U.S. union-management contracts tend to be much longer than Australian awards (at least the ones I’ve seen). The main points of many US contracts are printed in pocket-sized booklets so stewards and foremen have them instantly available. Some are far too long to fit in a pocket, so there are often supplements dealing with technical details such as pensions or required staffing levels. American contracts are long in duration as well as

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<sup>1</sup> 1. American readers (I hope there are not too many) will complain that I oversimplify things and that there are major differences in practice, not only between industries but between parts of the country. I agree. Blame my mean editor who won’t let me be more detailed.

size. Three years was once the standard duration. Now five years are increasingly common. Given lengthy contract duration, the many issues covered, and the binding nature of their terms, negotiations tend to be time consuming. Some start six months or longer before the contract expires. Almost all contain “no strike clauses” prohibiting strikes or lockouts (the latter rarely occur). Some make explicit provision for discipline if this clause is violated. “Wildcat strikes” (in violation of the contract) once common, are now quite rare.

Arbitrators are selected and paid for by the parties. Arbitrators’ awards are rarely violated. After all the big issues (unless they are new and unforeseen) are dealt with in the contract. Arbitrators deal with relative trivia. The fact that arbitrators are selected by the parties themselves may make a difference. (Once I told an American labor leader that Australians bow their heads to the arbitrator when entering an arbitral hearing room, “This would never happen in America,” he said. “After all we pay the [obscurities.]”)

Decisions by better respected arbitrators get published (after all this is a form advertisement which helps them get business). They are frequently cited by other arbitrators as well as by practitioners in their arguments in arbitration procedures. Together they form a new form of common law, often called “Industrial Jurisprudence.”

At least back in the 1980s Australian strikes were among the shortest in the world, the America’s were (and still may be) the longest. Strikes lasting over a year do occur. A major explanation in my opinion is that Australian strikes tend to be over minor issues not covered by the award. In the U.S. contractual rules tend to cover a broader set of issues. Contract negotiations concern not so much over how these rules are applied as to whether they should be changed. So negotiations are more complex and of greater significance for the parties. Since they may be bound for a long period, each side has an incentive to avoid giving in. Yet strikes are expensive for both sides and particularly for workers they are risky. With a few exceptions there is no legal obligation to rehire striking workers if they have already been replaced. Each side has an incentive not to make concessions. It is a self-reinforcing process.

In my opinion American arbitration procedure may get too legalistic. They may lead to suboptimal decisions which are the interest of neither party. On the other hand they provide certainty and there is far less guerrilla warfare than I saw in 1979 in Australia. The same may be said of American industrial relations as a whole. Five years between contracts may be too long. They let unresolved problems fester. After all a major union function is to allow workers to participate in decisions important to them. Based on this logic an occasional strike is a good thing: it provides an opportunity for participation.

## **Some American reactions to some proposed changes in Australian law**

My editor lets me make some strictly space-rationed comments as to what I’m told are some proposed changes in Australian labor law which presumably have American counterparts,

Representation elections (you call it “majority voting.”). Having them sounds reasonable. Workers should have the right to determine which union will represent them, if any, and they should do so freely by secret ballot. The trouble in practice is that in the

campaigning prior to elections management has some major advantages. For example it can call meetings in which all employees are required to attend (“captive audiences”) and at which management can make anti-union speeches often prepared by “union free” consultants. The union’s only chance to reply is if it can catch workers off the job. It’s a common practice for management to use spies to uncover union supporters and then to fire them. These are common practices. After lengthy National Labor Relations Board hearings thousands of workers are found to have been fired for union activity each year. But the law works slowly and as discussed earlier the penalties for violating it are trivial.

Unions today are lobbying for what has been called “The Employees’ Free Choice Act.” This would provide that a union will become employees’ representative once a majority of those in the relevant defined bargaining unit sign cards designating it as such. This would be faster than holding elections, but has the drawback of not being secret and still allow forms of coercion by both sides. Given a choice I would prefer greatly increasing the penalties for violating the law.

Defined bargaining units. If you are going to provide mechanisms for making a union an exclusive bargaining agent you have to decide which workers it will represent.

Union access to work sites. If a worksite is unionized the terms of access are normally determined by the contract. Access to non-union worksites has been increasingly limited by court decisions. For example, companies can prohibit non-employees from soliciting on company parking lots just as long as other forms of non-employee soliciting, say for a charity, are also prohibited. This means that if a union wants to distribute a flyer it must do so at the parking lot’s entrance and there is no guarantee that drivers will slow down enough to pick these up. or stop to talk. This makes it extremely difficult for unions to communicate with prospective members.

Pattern bargaining. I can’t understand why a labor supporter would be opposed to this. A major union objective is to “level the playing field” and take wages “out competition.” This also is in management’s interest. It prevents management from being subjected to “unfair competition.” Some countries “extend” contracts from union to non-union firms making pattern bargaining the law.

Good faith bargaining. This is a fairly meaningless requirement in the U.S. Actually the relevant Taft-Hartley Act requires “bargaining” but makes no reference to “good faith”. In practice the main requirements are the following :(a) the parties must be willing to meet at reasonable times and places. (b) They can’t begin negotiations by saying “I’ll never make any concessions.” Intent not to make concessions must be proved, something very difficult to do if the company has a good lawyer. There is no requirement they actually make concessions. (c) If requested to do so management should provide data relevant to bargaining, for example payroll records. And (d) if management says it can’t afford to meet the union’s demands it must provide financial data supporting this claim. The latter is the only significant requirement and means that management has learned it should never claim poverty.

Lockouts, these are rare in the U.S., but to preserve symmetry I would permit them.

Compulsory unionism. In the U.S. there are two main forms: the “closed shop” in which anyone the employer hires must be a union member already (and often is recruited from



the union hiring hall) and the “union shop” which requires that newly hired non-members join the union within a reasonable period of time. The closed shop is technically illegal, though the prohibition is often ignored. The union shop is legal in most states although employees need not actually join as long as they pay “reasonable” union dues. Unions perform important services for those covered by their contracts. It seems reasonable that they help pay for this service’s cost. .

Reinstatement of an individual right to protest a dismissal as unfair. As mentioned earlier, any discipline (not just discharge) can be challenged in the U.S. if it involves discrimination against a member of a “protected class” (such as African-American) or, as sometimes put, if the individual would not have been disciplined *but for* his/her membership in such a class. Most US union contracts offer much broader protection. The typical contract says that discipline shall be for “just cause” only and then leaves the term “just cause” largely undefined. This is not a serious problem because the term has been defined by thousands of arbitration decisions handed down by private arbitrators. These decisions constitute a major subject of “Industrial Jurisprudence” and deal with all sorts of discipline such as written warnings. Australians (both union and non-union) should be granted the same protections.

### **Some Hesitant Suggestions**

I hesitate to make further recommendations. My last visit to Australia was in 1996 and much has happened since then. Even by then I had learned that Australian practices which seemed very familiar to those in the U.S. in fact operated very differently. Beyond this I note that efforts to transfer elements of one country’s labor relations system to another often fail. At the end of World War II General McArthur took the advice of American labor relations experts and attempted to “Americanize” Japanese industrial relations. Somewhat similarly the Donovan Commission recommended that Britain adopt elements of US-style formalization. Today Japanese and American systems are vastly different. While British labor relations have become more formal (at least there is more legislation), it is hard to credit Donovan with this development. So what works in America might not work in Australia.

Given these caveats let me suggest that individual Australian workers’ rights should receive greater protection and in manner which does not depend on union strength in their particular place of employment. Since unions are unlikely to recover the power they had twenty-five years ago there should be independent tribunal(s) to which workers could appeal to enforce their rights without the need for unions or lawyers (though unions could play an important role here). Among the rights workers should possess are those not to be discriminated against on the basis of ethnicity, religion, gender, age, physical disability, sexual preference (including preference not to engage in sex, i.e., sexual harassment), and union activity. Beyond this there might be an independent agency to which workers and small businesses might turn for advice and information (though unions and large businesses might use their services if they want),

American unions have largely given up the right to strike while a contract is in effect and they have agreed to long-term contracts. Given Australia’s history and traditions I doubt whether your unions would agree to similar terms or whether Australian workers would

abide them even were a formal agreement reached. My personal preference would be leave this to the parties to work out by themselves.