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- The engagement of labour has long been a field of law heavily regulated by statute.
- Sometimes statutes have been enacted to address the risks of exploitation faced by the most vulnerable workers as a consequence of their unequal bargaining power. We might describe this as protective legislation, and include statutes that mandate minimum wages and conditions of employment as examples.
- The so-called “deregulation” of labour markets has ironically required the enactment of extensive statutory provisions, and the creation and recreation of new regulatory institutions.
- Much of this new regulation concerns collective labour relations: the permitted role of trade unions, the regulation of collective industrial action, the establishment and empowerment of agencies (such as Fair Work Australia, the Fair Work Ombudsman and the Australian Building and Construction Commission) to supervise industrial activity and police compliance with the system.
- Current scheme of federal industrial regulation legislation is the *Fair Work Act 2009* (Cth), most of the provisions of which commenced on 1 July 2009.
- The Fair Work Act 2009 needs to be understood in the context of the three waves of neo-liberal labour market reforms that preceded it.
- The first wave was the *Industrial Relations Reform Act* introduced in 1993 by a Labor govt, which moved the traditional system based on conciliation and arbitration towards a North American collective enterprise bargaining-based system, but which retained compulsory arbitration for an award safety net of minimum wages and conditions. This legislation permitted the making of non-union collective agreements, subject to a no-disadvantage test.
- The second wave was the *Workplace Relations and Other Legislation Amendment Act* introduced by the Coalition govt in 1996, after considerable debate and substantial amendment in the Senate. Many of the original proposals in the Bill (including establishment of a legislated set of minimum employment conditions to replace arbitrated awards) did not survive Senate scrutiny. The legislation as passed further facilitated enterprise agreement making, including non-union agreements made directly by employers with employees. Perhaps the most significant innovation of this wave was the introduction of a form of enterprise agreement made between the employer and individual employees: Australian Workplace Agreements (AWAs).
- Employers who wished to avoid any engagement with trade unions, and to negotiate directly with individual employees were now permitted to do so. By using AWAs employers could avoid compliance with awards, but only to the extent that the AWA passed a no-disadvantage test, administered by a body called the Employment Advocate.