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INQUIRY INTO IMPACT OF COMMONWEALTH WORKCHOICES LEGISLATION

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Inquiry into the impact of the Commonwealth work choices legislation

Standing Committee on Social Issues
Legislative Council of New South Wales

Submission
by
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In this brief opening statement, we shall highlight several shortcomings of the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) ("*Work Choices*") which substantially amended the *Workplace Relations Act 1996* (Cth).

1. The ability of workers to genuinely bargain

In our considered opinion, *Work Choices* does not enable workers to effectively bargain for the following reasons. Firstly, it elevates individual bargaining above collective bargaining. An individual workplace agreement will always override a collective agreement, even when the collective agreement is in operation.

Secondly, *Work Choices* does not provide any mechanism for employees that requires their employers to engage in collective bargaining or at the very least, to deal with them on a collective basis. In other words, even if a majority of workers at an employing undertaking wish to collectively bargain with their employer, whether or not they are represented by a trade union, the legislation does not require the employer to engage in collective bargaining. In our considered opinion, *Work Choices* breaches, Convention 87, *Freedom of Association and Protection of the Right to Organise Convention, 1948* and Convention 98, *Right to Organise and Collective Bargaining Convention, 1949* of the International Labour Organisation. In our view *Work Choices* also breaches article 2(a) of the 1998 *Declaration on Fundamental Principles and Rights at Work* of the International Labour Organisation.

In the United States and Canada, where a majority of employees wish to collectively bargain with their employer, the employer is required by law to recognise their trade union and to bargain in good faith with it. In the United Kingdom, after a consultative process, employers may be required to engage in collective bargaining where a majority of their employees wish to collectively bargain. In New Zealand, where any group of employees wish to be dealt with collectively, even where they are not a majority of employees at the undertaking, the employer must deal with them collectively (for details see, Ronald McCallum, 'Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws' (2002) 57 *Relations Industrielles* pp225-251 attached).

It is also our view that the individual workplace agreement mechanism (that is Australian Workplace Agreements) in *Work Choices* provides insufficient protections for employees, and especially for women and young persons. Under the legislation, it is possible for an individual agreement to take away all of the existing protected award provisions of an employee, provided that it complies with the fair pay and conditions standard. Under the original *Workplace Relations Act 1996* (Cth) as in operation immediately before the coming into force of the *Work Choices laws*, greater safeguards were in place. Under that regime, individual workplace agreements had to be approved by the Office of the Employment Advocate, where they were subject to a "no disadvantage test" where the terms of the agreement were measured against existing or designated award provisions. The current workplace agreement provisions do not offer individuals even this level of protection. In our considered opinion, unskilled employees, and especially women and young persons amongst them, will suffer disadvantage under this individual bargaining mechanism (see Ronald McCallum, "Justice at Work, Industrial Citizenship and the Corporatisation of Australian Labour Law", the Kingsley Laffer Lecture, (2006) 48 *Journal of Industrial Relations* pp131-153 attached).

2. Work Choices will undermine security of employment

2.1 Reduction in protection against unfair dismissal

Post *Work Choices*, many employees in NSW who have their employment arbitrarily or capriciously terminated may not have recourse to an unfair dismissal jurisdiction either at the state or federal level. The unfair dismissal jurisdiction of the Industrial Relations Commission of NSW ("the NSW Commission") has been dramatically reduced in scope given that employees employed by constitutional corporations may no longer have any recourse to unfair dismissal remedies in the NSW Commission. *Work Choices* has also drastically reduced the scope of federal unfair dismissal laws. Under the amended *Workplace Relations Act 1996* (Cth) an employee employed by a constitutional corporation cannot make a claim for unfair dismissal if that corporation and its related entities employs 100 or fewer employees. Moreover in the federal jurisdiction an unfair dismissal claim cannot be made if the employee was dismissed for "operational reasons". "Operational reasons" is defined extremely broadly. These reductions in unfair dismissal rights means the threat of dismissal is now ever present for the vast bulk of workers in NSW who will now work in the shadow of job insecurity. These *Work Choices* reforms will significantly increase the ability of constitutional corporations to arbitrarily terminate employees engaged in standard, ongoing forms of employment and re-engage those employees on less secure arrangements with less favourable terms and conditions attached.

2.2 reduction in regulation by industrial awards

Prior to *Work* Choices, industrial awards emerged as a primary method of satisfactorily regulating the manner in which workers were engaged. Consequently, the reduction or elimination of the regulation of employment terms and conditions by industrial awards is also of grave concern for the security of employment for large numbers of workers in NSW. *Work Choices* abolishes the ability of the NSW Commission to make awards regarding the terms and conditions of employees employed by constitutional corporations. Existing state awards in so far

as they operate with respect to constitutional corporations were converted into notional agreements preserving state awards ("NAPSAs") upon commencement of *Work Choices*. These NAPSAs cease to have effect 3 years after the commencement of *Work* Choices. Furthermore, the ability of the Australian Industrial Relations Commission to make new awards has also effectively been abolished. In addition, upon commencement of *Work Choices* existing certain non-allowable award matters in existing federal awards ceased to have effect. Those non-allowable award matters include matters regarding the conversion of casual employment to another type of employment; prohibitions on an employer employing employees in a particular type of employment and restrictions on the engagement of independent contractors and labour hire workers.

It is our considered opinion that NSW employees, other than those performing short term, intermittent and irregular work, should have all the normal entitlements of permanent employment. The philosophical underpinning of the *Work Choices* reforms contradicts this opinion. In particular, the reductions that the *Work Choices* reforms make to the regulation by industrial awards of the terms upon which employees are engaged will greatly exacerbate the already alarming growth in casual employment, labour hire arrangements and contract labour. As the *Secure Employment Test Case* [2006] NSWIRComm 38 highlighted, much casual employment is not genuine but rather involves workers performing regular, ongoing work on a casual basis. Labour hire and contract labour is also used to substitute for direct, permanent employment and to avoid the operation of industrial instruments. *Work Choices* eliminates many existing award restrictions that had previously fettered constitutional corporations from converting permanent employment engagements into less secure work arrangements with less favourable employment terms and conditions. Accordingly, it is our concern that *Work Choices* will considerably reduce the level of secure employment in NSW and this will have negative social and economic consequences for many NSW workers.

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16/6/06.

Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws

RON MCCALLUM

When Australia deregulated its economy in the 1980s, political pressures built up leading in the 1990s to the dismantling of Australia's industry-wide conciliation and arbitration systems. New laws established regimes of collective bargaining at the level of the employing undertaking. This article analyzes the 1993 and 1996 federal bargaining laws and argues that they fail to protect the right of trade unions to bargain on behalf of their members. This is because the laws do not contain a statutory trade union recognition mechanism. The recognition mechanisms in the Common Law countries of the United States, Canada, Britain and New Zealand are examined, and it is argued that Australia should enact trade union recognition mechanisms that are consonant with its industrial relations history and practice.

Free market economics has swept over the industrialized world, affecting local markets everywhere. This economic globalization has narrowed the scope of liberal collectivist industrial regimes in most western economies, especially in those countries in which the legal system is based upon the principles of the Common Law and where the default position is the individual common law contract of employment. At the same time, computer-based information technologies have altered the manner in which

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much remunerated work is performed by facilitating the use of high performance production regimes and the outsourcing of many functions to smaller workplaces. There is no doubt that these two trends have tipped the political, social and economic balances in the industrialized world towards the setting of wage rates and work rules on an individual basis and away from the support of liberal collectivist labour relations mechanisms. The liberalization of trade regimes, including regional free trade agreements such as the North American Free Trade Agreement, have further added to these pressures. Thus, since the early 1980s, but especially over the last decade, the economic underpinnings of collectivist industrial relations regimes in Common Law countries like Canada and Australia have been undermined by these trends (International Labour Organization 1997).

The Canadian pluralist industrial relations regime, which took root at the close of the second world war[1] and blossomed until the late 1970s, has begun to unravel in the face of economic globalization (Arthurs 1996, 2000). In particular, as has been pointed out by a number of scholars (Adams 1993, 1995; Fudge and Glasbeek 1995; Fudge and Vosko 2001, 2001a), the bargaining regimes established by Canadian labour law legislation have failed to shield private sector workers from the economic winds of globalization. Based on the paradigm of industrial employment prevalent from the 1940s to the 1960s in which workers (mainly men) were permanently employed by large employing undertakings, the North American collective bargaining laws mainly confine bargaining to the level of the employing enterprise and oblige trade unions to mobilize a majority of the workers either in each undertaking or to organize categories of employees within the enterprise into particular bargaining units. The Canadian legal regimes contain statutory trade union recognition mechanisms that oblige each union to obtain majority employee support in the bargaining unit before the employer is required to bargain with it in good faith in order to conclude a collective agreement. When a collective agreement is signed (and this is important for our subsequent discussion of Australia), its clauses become the employment code for all of the employees in the bargaining unit and the individual Common Law contracts of employment between employee and employer are nullified (Summers 1998: 48–49).

In the year 2001, only one in every three Canadian workers (32.6%) were governed by collective bargaining law (Akyeampong 2001). However, it is the unionization of the public sector that maintains Canadian collective bargaining at this level. In Canada's private sector, collective bargaining has declined to cover only one in five employees (20.5%), with

1. The federal Government introduced the North American model of labour regulation into Canada when it promulgated Wartime Labour Relations Regulations, PC 1003, 17 February, 1944.

the remaining 79% governed by unilateral employer regulation through the individual contract of employment (Akyeampong 2001). In Canada's public sector, on the other hand, three quarters of the employees (73.7%) are governed by collective agreements (Akyeampong 2001). What is of special interest to this antipodean observer is that Canadian private sector collective bargaining has diminished in size and coverage, yet its collective bargaining laws have largely remained intact, in part because they have not been a significant impediment to an increase in the growth of individual employment relationships that entrench unilateral employer control.

Australia provides a compelling case study in how the pressures of globalization and information technologies—in different ways and depending upon the socio-legal features of national states—have led to an alteration of liberal collectivist regimes. In the case of Australia, I contend, the pressures of economic globalization have made the enactment of changes to labour law a major pre-occupation of federal and State politicians throughout the 1990s. Australia's mechanisms of compulsory conciliation and arbitration, which took root at the beginning of the 20th Century, set most market wage rates on an industry basis and protected employee terms and conditions of employment by eliminating much of the competition in industry-specific labour markets. In order to increase labour flexibility, politicians of all complexions sought, in varying ways, to dismantle compulsory conciliation and arbitration and establish mechanisms to determine wages and conditions at the level of the firm, business unit or plant. In fact, the neo-liberal labour law alterations of the last decade have been of such a magnitude that current Australian labour law bears little resemblance to the pre-1990 laws mandating compulsory conciliation and arbitration for the settlement of labour disputes.

Given that the powers to make labour laws are shared between Australia's federal (Commonwealth) Parliament and the parliaments of the States,[2] it is not possible here to examine all of these regimes and how to varying degrees they have dismantled compulsory conciliation and arbitration (see McCallum and Ronfeldt 1995; Nolan 1998). However, as federal labour law covers half (50.3%) of the Australian workforce (Reith 2000),[3] as well as governing the nation's most significant and largest

2. This article does not examine the constitutional law aspects of Australia's labour laws and, in particular, the constitutional underpinnings of the post-1992 federal labour law amendments. The most readable account of the constitutional aspects of federal labour law is to be found in Williams (1998).

3. Federal coverage was increased in late 1996 when the Parliament of Victoria abolished most aspects of that State's labour relations mechanism and referred most of its powers concerning labour relations to the Commonwealth Parliament. For details, see Victorian Industrial Relations Taskforce (2000: Ch. 4).

industries, this analysis will focus on the post-1992 alterations to federal labour law.

In 1993, in an endeavour to protect collective labour relations from the harsh winds of economic globalization, Prime Minister Paul Keating's Australian Labor Party federal Government enacted the Industrial Relations Reform Act 1993,[4] which made more changes to federal labour law than at any time since its establishment some 90 years earlier. Federal labour law was partially deregulated as aspects of compulsory conciliation and arbitration were dismantled to make way for the full implementation of voluntary collective bargaining at the level of the employing undertaking. Other beneficial measures were also enacted, with the major one being an unfair dismissal regime based largely on International Labour Organization standards (for details of these reforms, see *Australian Journal of Labour Law* 1994; McCallum 1994).

Three years later with the election of Prime Minister John Howard's Liberal Party and National Party coalition federal Government, major changes were once more made to federal labour law at the close of 1996. These alterations built upon the Keating Government's partial deregulation, but the objective of these 1996 neo-liberal reforms was to diminish the role of trade unions and to facilitate an increase in unilateral employer control. These laws, which are set out in the Workplace Relations Act 1996,[5] facilitate employer control in several ways: by curtailing the powers of the Australian Industrial Relations Commission (the federal Commission); by the establishment of freedom of association provisions that outlaw all forms of trade union security; by making it easier for employers to make arrangements directly with their employees free from trade union interference; and by providing for statutory individual agreements known as Australian workplace agreements (see *Australian Journal of Labour Law* 1997; Riley 1997; Mac Dermott 1997, 1998; Coulthard 1999; McCallum 1997, 2001).

This article examines the voluntary collective bargaining laws enacted in 1993 and amended in 1996. I shall argue that they fail to adequately protect collective bargaining by trade unions. This argument will be developed by showing that when legislating for voluntary collective bargaining in 1993, the Keating Australian Labor Party government—which should have known better—failed to adopt legal procedures for trade union recognition largely because they did not perceive the manner in which these

4. The Industrial Relations Reform Act 1993 (Cth) amended the Industrial Relations Act 1988 (Cth) (hereafter "IR Act").

5. In 1996, the Commonwealth Parliament enacted the Workplace Relations and Other Legislation Amendment Act 1996 (Cth), which amended the IR Act and also changed its name to the Workplace Relations Act 1996 (Cth) (hereafter "WR Act").

new laws would reshape Australia's trade union movement. The argument proceeds in four steps.

The first section examines Australian compulsory conciliation and arbitration as it existed until ten years ago and, in particular, the special legal position of trade unions within these regimes. The second section focuses on the 1993 voluntary collective bargaining laws. The *Asahi* decision will be used as a test case to show how the lack of a trade union recognition procedure in these bargaining laws has inhibited the ability of trade unions to engage in collective bargaining. In this case, a trade union, which did not have any of its members employed by an undertaking, unsuccessfully sought to obtain bargaining in good faith orders against the undertaking.

The current federal labour relations regime will be examined in the third section. Through an analysis of the recent *BHP Iron Ore* litigation, I shall highlight the limitations and contradictions in Australia's federal bargaining laws. In the *BHP* litigation, trade unions sought court orders that when breaking off collective bargaining negotiations and offering individual contracts to its employees, the employer had discriminated against the unionized members of its workforce contrary to the federal freedom of association laws.

In the fourth section, I shall argue that in order to ensure the maintenance and growth of collective bargaining by trade unions, Australia's voluntary bargaining laws—and especially those at the federal level—should be altered to enable employees to exercise the right to be represented by trade unions in collective bargaining. In particular, an examination will be made of the trade union recognition procedures in the United States, Canada, Great Britain and New Zealand with a view to determining what Australian policy-makers can learn from these regimes. Australian law makers should give consideration to enacting trade union recognition mechanisms that take account of Australia's history of labour regulation and its unique mix of arbitral, collective bargaining and individual contracting laws. The conclusion seeks to draw all of these threads together.

THE CLASSICAL PERIOD OF AUSTRALIAN LABOUR RELATIONS 1900–1992

In the early years of the 20th century, a majority of the Australian parliaments enacted compulsory conciliation and arbitration statutes establishing courts of conciliation and arbitration (Portus 1958: 100–115; Mitchell and Stern 1989). These courts—what would now be called industrial relations commissions—possessed power to settle labour disputes

by conciliation and, if conciliation failed, could utilize powers of final and binding interest arbitration to impose a settlement on the parties (Isaac and McCallum 1987: 6–11). Australian compulsory conciliation and arbitration (at least until the 1970s) was one of three interlinked economic and social strategies pursued by all political parties. It went hand in hand with a "white Australia" immigration policy designed to keep out cheaper Asian labour and with significant levels of tariff protection for Australian industries. During this classical period of regulation, the industrial relations commissions usually arbitrated settlements on an industry and/or occupational basis. The arbitrated decisions of the commissions were embodied in awards specifying market wage rates and related terms and conditions of employment, which all the employers in the industry or occupation were bound to apply to all of their employees, whether or not they were members of the relevant union. Even as late as 1990, approximately 80% of the Australian workforce had their market wage rates and related work rules either specified in or governed by federal or State awards (Australian Bureau of Statistics 1990).

Increases in national wages were determined by national test cases in the federal Commission and its predecessor bodies, and the State commissions usually followed its lead. In fact, test cases by the federal Commission were the means of bestowing benefits upon Australian workers with test case decisions covering not merely hours of work, but a range of other conditions such as forms of equal pay for women,[6] four weeks annual leave, twelve months unpaid maternity leave[7] and later parental leave,[8] consultations with trade unions over redundancies,[9] and superannuation payments to workers.[10] Subsequently, many of these measures were enacted into legislation by the federal and State parliaments, largely because these test case pronouncements gave these benefits legitimacy within the social mores of Australia.

These juridical labour law mechanisms could not have functioned without the cooperation of Australia's trade unions. When they became registered under the labour relations statutes, they were given either de

6. *Equal Pay Case 1969* (1969) 127 CAR 1142; and *National Wage and Equal Pay Case 1972* (1972) 147 CAR 172.

7. *Maternity Leave Case* (1979) 218 CAR 121.

8. *Parental Leave Case* (1990) 36 IR 1.

9. *Termination, Change and Redundancy Case* (1984) 8 IR 34 ; and *Termination, Change and Redundancy Case (Supplementary Decision)* (1985) 9 IR 115. See now WR Act ss 170Fa-170GD.

10. *National Wage Case 26 June 1986* (1986) 301 CAR 611.

facto or actual legal personality, and were granted exclusive coverage over particular modes of industrial and/or occupational employment. As late as 1990 with some minor exceptions, registered trade unions were the exclusive spokespersons for Australia's workforce before the network of State and federal commissions. Moreover, they possessed the capacity to seek arbitrated settlements of industrial disputes between themselves and the employers within the industries over which they had coverage.

Given the significant role of registered trade unions (and this is of crucial importance), the law regarded them as "parties principal"[11] who had the obligation to initiate industrial disputes to safeguard the wages and conditions of all of the employees in the relevant industries and/or occupations over which they had coverage (Frazer 1995; Shaw 2001). Registered trade unions were regarded as parties principal because as juridical persons separate and distinct from their members, they possessed the capacity to police the relevant industries and/or occupations by securing fair and up-to-date wages and terms and conditions of employment through arbitration awards. Put another way, registered trade unions did not act as agents for their members. Rather, they possessed the legal capacity to obtain arbitrated awards on their own account. In this respect, trade unions spoke for the entire working class. In 1990, approximately 46% of workers were members of trade unions (Trade Union Statistics 1990). Trade unions also had a political dimension because most were affiliated to the Australian Labor Party where they endeavoured to obtain employment benefits through the political process.

The federal and State commissions prescribed market wage rates and work rules for all employees, whether or not they were unionists and whether or not they desired this form of state intervention. This was because the establishment of wage rates on an industry basis was regarded as a social good supported by the parliaments, the trade unions, the Catholic Church and, to a lesser extent, by most Protestant denominations. While employers may not have liked trade unions, they were required to deal with them because, failing an agreement, the unions could seek an arbitrated settlement that would bind employers.

Much has been written on the economic and political changes that led to the partial dismantling of Australia's compulsory conciliation and arbitration regimes in favour of voluntary collective bargaining (Dabscheck 1989, 1995; McCallum and Ronfeldt 1995; McCallum 1996; Nolan 1998).

11. The role of registered trade unions as parties principal was recognized by the High Court of Australia in *Burwood Cinema Ltd and Ors v The Australian Theatrical and Amusement Employees Association* (1925) 35 CLR 528.

Suffice it to emphasize here that when elected to office in 1983, the Hawke Australian Labor Party federal Government sought to establish a form of neo-corporatism by entering into a series of prices and incomes "accords" with the Australian Council of Trade Unions. However, the economic downturn of the mid- to late-1980s led to the virtual demise of this strategy. Instead, the government focused upon encouraging trade union amalgamations and in facilitating a managed form of decentralization of the setting of wages within the award system presided over by the federal Commission (ACTU/TDC 1987; Mitchell and Rimmer 1990).

The economic pressures on the Australian economy were significant at this time. Towards the close of the 1980s, Australia was feeling the winds of global competition. The Australian dollar had been floated at the close of 1983, tariffs were reduced and the national debt level sharply increased. Key employer bodies, like the Business Council of Australia, were in favour of increasing productivity and employer flexibility by enabling wage rates and work rules to be set at the level of the employing undertaking through collective bargaining. In its influential 1989 report, the Business Council (Business Council of Australia 1989) argued that increased productivity and flexibility would occur if enterprise bargaining was substituted for industry-wide wage fixation, and that the award-making powers of the federal Commission should be circumscribed to providing minimum labour standards through a safety net of award terms and conditions of employment (Frenkel and Peetz 1990).

Other more radical groups like the H. R. Nicholls Society (1986) asserted that collective labour relations mechanisms should be dismantled altogether and be replaced primarily by individual employment contracts, and these groups were heartened in 1991 when the New Zealand Government enacted its Employment Contracts Act. In 1992, the Australian State of Victoria, whose manufacturing industrial base was hardest hit by global competition, abandoned its conciliation and arbitration regime altogether and replaced it with employment agreements (Creighton 1993; Victorian Industrial Relations Taskforce 2000: Ch. 2).

By the early 1990s, however, the Australian Council of Trade Unions was faced with neo-liberal labour law enactments at the State level. It fell into line with moderate business groups and the federal Government and threw its political and industrial weight behind enterprise bargaining as a bulwark against further neo-liberal deregulation. After limited legislative changes to encourage enterprise bargaining in 1988 (McCallum 1990) and in 1992 (McCallum 1993), the Keating Government enacted its fully operational voluntary collective bargaining mechanism in 1993.

THE KEATING VOLUNTARY BARGAINING LAWS AND THE ASAHI CASE

The primary purpose of the Keating Government's 1993 voluntary collective bargaining laws was to increase productivity by shifting the determination of wage rates and work rules from industry level to individual enterprises. This was to be achieved by enabling trade unions and employing undertakings to negotiate enterprise-specific wage outcomes in collective agreements. These were to become enforceable once certified by the federal Commission. In order to increase flexibility, it was permissible for collective agreements to provide terms and conditions of employment less favourable than those in the awards, which were binding upon the parties, provided that the workers did not suffer an overall disadvantage. This feature of the certification process became known as the "no disadvantage" test. For example, a collective agreement might provide a substantial wage increase, but in return the starting and finishing times of work as specified in the relevant award might be overridden by more flexible arrangements. When certifying the collective agreement, it was the function of the federal Commission to specify that such flexible arrangements did not disadvantage the employees (Naughton 1994; Ross 1995).

Unlike its counterparts in Canada and the United States, Australian collective agreements are not entire codes that nullify individual employment contracts. Juridically speaking, they are akin to awards in the sense that they prescribe a floor of wage rates and work rules. They are enforceable but do not prohibit the employer from bestowing more favourable wage rates and terms and conditions on employees, either generally or selectively.

For the Keating Australian Labor Party Government and the Australian Council of Trade Unions, the drafting of the 1993 bargaining laws required them to come to grips with three labour law issues. First, should trade unions and employers be entitled to utilize the economic weapons of the strike and the lock-out when bargaining for a collective agreement? Second, should enterprise bargaining take place in the growing non-union sector of the workforce? Finally, what legal mechanisms should be put in place to require employing undertakings to bargain with trade unions?

Up until the passage of the 1993 laws, all strike action was illegal, either because it was prohibited by one or more statutes and because it violated one or more of The Australian Common Law civil wrongs, which are called torts (Ewing 1989; Creighton 1991; for a recent exposition of the current strike laws, Di Felice 2000). Up until the 1980s, what Breen Creighton has aptly named "the Australian paradox" occurred with respect to strike action (Creighton 1991). While strikes were illegal, instead of

seeking remedies through the courts, employers were content to broker a settlement of these disputes in the relevant federal or State Commission. By the mid-1980s, however, as employers faced stiffer competition, they became more prepared to seek court remedies against industrial action that violated statutory provisions and the Common Law torts. Matters came to a head in late 1989 when the airline employers and the Hawke Australian Labor Party Government took proceedings against striking airline pilots and obtained a judgment awarding the airline employers several million dollars in damages[12] (McEvoy and Owens 1990; Smith 1990).

If the 1993 laws did not enable trade unions to take industrial action to press their demands, employers would have the upper hand as they could utilize the law and obtain injunctive relief and damages whenever employees engaged in strike activity. Accordingly, the 1993 laws provided a narrow legal window where lawful primary strikes would be permitted, provided they were confined to the employees of the relevant employing undertaking. When a trade union and an employing undertaking were engaged in bargaining, the employer or the employees of the undertaking who were members of the trade union could take industrial action to press their demands. This became known as protected action.

As globalization increased the pace of economic restructuring and manufacturing declined in favour of service oriented occupations, trade union membership began to fall. A growing number of Australian workplaces contained none or very few union members. If the collective bargaining laws confined bargaining to the level of the undertaking and only permitted trade unions and employing businesses to sign collective agreements, this would disadvantage non-union undertakings. They would be governed by the existing industry-wide arrangements in awards and would not be able to enter into more flexible arrangements. Prime Minister Keating made his views clear that labour flexibility was required in all workplaces, whether unionized or not.

The 1993 bargaining laws established two bargaining streams. First, trade unions could enter into collective agreements with employing undertakings. Second, incorporated employers could enter into what were called enterprise flexibility agreements directly with their workers. Provided that a majority of employees voted in favour of the agreement, and provided the federal Commission certified the agreement as passing the "no disadvantage" test, these employers could enter into these more flexible arrangements. As a safeguard, trade unions with award coverage of

12. *Ansett Transport Industries (Operations) Pty Ltd and Ors v Australian Federation of Air Pilots and Ors* [1991] 1 VR 637.

the employees could intervene in certification proceedings before the federal Commission and argue that certification should be withheld.

In my view, the Keating Government and the trade union movement did not squarely face the issue of anti-union employers refusing to bargain with trade unions. More importantly, they did not appreciate that trade union bargaining at the level of the employing undertaking was of a different juridical nature from obtaining award coverage through an industry-wide arbitrated settlement by the federal Commission. In the United States and Canada, for example, collective bargaining almost always occurs between the employing undertaking and the local union whose members are employed in the undertaking. In Australia, on the other hand, the local union does not exist and the trade unions, which are registered on an industrial and/or occupational basis, are juridically ill-equipped to engage in collective bargaining at the level of the enterprise.

The 1993 laws did not contain a trade union recognition provision requiring employing undertakings to recognize and to bargain in good faith with the relevant union or unions. Instead, they bestowed rather limited bargaining in good faith powers upon the federal Commission. As part of its conciliation apparatus, the Commission could order the parties to meet and to negotiate (Naughton 1995).[13]

The limitations of these provisions and the change in the concept of trade union representation that resulted from enterprise bargaining became apparent in 1995 when the federal Commission handed down its decision in the *Asahi* Case[14] (Frazer 1995; Naughton 1995; Shaw 2001). Asahi Diamond Industrial Australia Pty Ltd (Asahi) operated a small industrial plant in Sydney and it was bound by an award to which the Metal Workers' Union (AMWU)[15] was a party. Asahi did not employ any members of the AMWU. Although union officials had visited the plant on a couple of occasions, they had not signed up any members. However, the AMWU served a bargaining notice on Asahi seeking to negotiate a collective agreement with it as part of a pattern bargaining exercise. The 1993 laws did enable a union and an employer who were parties to an award to negotiate a collective agreement, even when the union did not have members employed in the employing undertaking.[16] When Asahi refused to meet with the AMWU, the union sought and, at first instance, obtained bargaining orders from

13. IR Act s. 170QK which must be read together with s. 111(1)(t).

14. *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385.

15. Automotive, Food, Metals and Engineering Union (AMWU).

16. IR Act s. 170MA.

the federal Commission requiring Asahi to meet and to negotiate with the AMWU. However, a Full Bench of the federal Commission overturned these orders.

In a narrow reading of its powers, the federal Commission said that these types of orders were designed to assist actual conciliation proceedings, and that these provisions should not be utilized to compel negotiations. The Full Bench were mindful that the 1993 laws did enable employers to enter into enterprise flexibility agreements directly with their workers, and they did not wish to have this avenue blocked by unions who did not have members in the employing undertaking.

This decision made it clear that even if registered unions remained parties principal when seeking award coverage, they no longer possessed this status when engaging in voluntary bargaining. Within the confines of the 1993 laws, no legal mechanism existed mandating employers to bargain with trade unions, even if a union did have majority support amongst its employees. Of course, where the union had industrial muscle, its members in the undertaking could take protected action to press their demands. However, both secondary boycotts and sympathy strikes are illegal in Australia. It was also open to the federal Commission to make a market wage rates award for the undertaking and it did exercise these powers on occasions, but without great success.[17]

THE HOWARD GOVERNMENT'S VOLUNTARY BARGAINING LAWS AND THE BHP IRON ORE LITIGATION

The Howard Government's 1996 voluntary bargaining laws are squarely designed to enable employing undertakings to choose their most appropriate form of labour regulation and, to this end, the powers of trade unions and the federal Commission have been curtailed. This aim is specifically set forth in the Workplace Relations Act 1996, where it is provided that one of its objects is to enable " ... [E]mployers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this act."[18] Although this provision speaks of employee choice, in reality, the Workplace Relations Act 1996 places the levers of choice firmly in the hands of employers.

17. See, e.g., *Re Aluminium Industry (Comalco Bell Bay Companies) Award 1983* (1994) 56 IR 403 (the *Bell Bay* Case) which was overruled on technical grounds in judicial review proceedings *Comalco Aluminium (Bell Bay) Ltd v O'Connor and Ors* (1994) 59 IR 133; *Australian Manufacturing Workers' Union and Ors v Alcoa of Australia Ltd and Ors* (1996) 63 IR 138 (the *Weipa* Case).

18. WR Act s. 3(c).

No longer may trade unions intervene in certification proceedings with respect to non-union agreements merely on the basis that they are parties to the relevant awards. Instead, they are only entitled to represent any of their members over which they have coverage in negotiations with an employer concerning a non-union agreement, provided the member has requested their assistance.[19] Where assistance has been requested, the trade union will have standing to intervene in certification proceedings but not otherwise.[20] The legislation makes it clear that apart from greenfield agreements, which are entered into before the hiring of employees, a trade union may only make a collective agreement with an employing undertaking, where the union has at least one member employed in the undertaking.[21] The ill-fated bargaining in good faith powers that the 1993 laws had bestowed upon the federal Commission have been repealed.

A further way in which the capacities of trade unions have been limited is because the Workplace Relations Act 1996 has established a freedom of association regime[22] that also covers the State labour law systems with respect to private sector employment. These laws protect the right of employees and contractors to join or not to join trade unions and employer associations. However, they also prevent trade unions from seeking union security, that is preference to trade union members provisions, either in awards handed down by the federal and state Commissions, or in collective agreements with employers. In my view, these freedom of association laws have played a part in the steady decline of trade union membership in Australia because union security provisions did create a climate in which employees understood that their employers were not opposed to them joining the relevant trade union. The outlawing of all forms of trade union security arrangements has hastened the drop in trade union membership. In the year 2001, trade union membership has fallen to 24.5% of the workforce, with less than one in five private sector employees (19.2%) being a trade union member, but with almost half of the public sector workforce (47.9%) being enrolled in trade unions (Australian Bureau of Statistics 2002).

The award-making powers of the federal Commission have been narrowed. First, awards may only cover minimum wage rates and a slim range of matters, which in most instances specify employment standards like minimum rates of wages, hours of work, annual leave and parental leave.[23]

19. WR Act s. 170LK(4).
20. WR Act s. 43(2)(a).
21. WR Act s. 170LJ(1)(a).
22. WR Act Part XA.
23. WR Act s. 89A(1), (2).

Second, and more importantly, the federal Commission may only make minimum rates awards[24] and may not make market rates awards. This means that where an employer is engaging in anti-union tactics, the federal Commission is unable to step in and use its award-making powers to bind the parties by arbitrating market terms and conditions of employment.

Under the Workplace Relations Act 1996, most employers within federal coverage may choose either to conclude a collective agreement with one or more trade unions, to enter into a non-union agreement directly with the workforce, to make statutory workplace agreements with its employees or, provided it abides by the existing awards, the employer may utilize unilateral employer control via the Common Law contract of employment. Unless an employer agrees to engage in collective bargaining with a trade union, no legal mechanism exists to force the employer to recognize and to bargain in good faith with a trade union, no matter that the vast bulk of employees are also its members (for details on all aspects of these 1996 laws, see *Australian Journal of Labour Law* 1997; Riley 1997; Mac Dermott 1997, 1998; Coulthard 1999; McCallum 1997, 2001).

In the year 2000, slightly more than one third of Australian workers (35.2%) had their wage rates and work rules governed by collective agreements certified by the federal and State Commissions (Australian Bureau of Statistics 2001). This includes both collective agreements made with trade unions and agreements entered into directly with the employees of the undertaking. When these collective agreements covering 35.2% of the workforce are divided between the federal and State jurisdictions, 21.7% of the Australian workforce are covered by agreements certified by the federal Commission, with 13.5% of employees being governed by collective agreements certified by the State commissions (Australian Bureau of Statistics 2001). When the level of collective bargaining is further analyzed, however, as is the case with Canada, collective bargaining is far more prevalent in the public sector where four out of every five employees (83.2%) are subject to collective agreements (Australian Bureau of Statistics 2001). In the private sector, on the other hand, slightly less than a quarter of the workforce (22.3%) operate under collective agreements (Australian Bureau of Statistics 2001).

The legal weakness of trade unions under Australia's bargaining laws came to the fore in the *BHP Iron-Ore* litigation, which spanned the two year period from November 1999 to November 2001 (see Riley 2000; Richardson 2000; McCallum 2000). BHP Iron Ore Pty Ltd (BHP) carries out iron ore production and processing in a remote area of the State of Western Australia known as the Pilbara. Under Western Australian labour

24. WR Act s. 89A(3).

law,[25] BHP had signed collective agreements with the relevant unions and, in 1999, was seeking to negotiate further collective agreements. However, in November of that same year, in an endeavour to cut labour costs, BHP offered its employees individual statutory workplace agreements under Western Australian law[26] and refused to continue collective bargaining with the trade unions. The implementation of this strategy, if successful, would mean that the unionized workforce would become de-unionized. This is because, for all practical purposes, the acceptance of individual statutory agreements would leave no room for the trade unions to operate collectively and most employees would cease to maintain their status as trade unionists. In order to persuade its workforce to sign the statutory workplace agreements, these individual contracts contained higher wage rates and greater employee benefits than those specified in the awards and collective agreements that covered the employees. By 24 January, approximately 46% (481 out of 1039 employees) had signed individual statutory agreements.

The trade unions brought proceedings in the Federal Court of Australia in order to obtain interlocutory injunctions, that is temporary restraining orders that would operate until a full trial. They sought to prevent BHP from offering its employees further statutory workplace agreements on the grounds that these offers violated the federal freedom of association regime. The primary arguments of the unions were that BHP had breached these provisions in two ways. First, the Workplace Relations Act 1996 prohibits employers from engaging in conduct that will "injure an employee in his or her employment,"[27] or "alter the position of an employee to the employee's prejudice"[28] because the employee is a member of a trade union. Second, the Workplace Relations Act 1996 forbids employers from inducing an employee, "whether by threats or promises or otherwise ... to stop being a member" of a trade union.[29]

On 31 January 2000, Justice Gray issued interlocutory injunctions holding that there was a serious question to be tried concerning whether BHP had breached these provisions.[30] First, he held that it was arguable that in offering employment benefits to employees who would sign workplace agreements, BHP injured and prejudiced its remaining employees.

25. Industrial Relations Act 1979 (WA).

26. Workplace Agreements Act 1993 (WA).

27. WR Act s. 298K(1)(b).

28. WR Act s. 298K(1) (c).

29. WR Act s. 298M.

30. *Australian Workers' Union and Ors v BHP Iron Ore Pty Ltd* (2000) 96 IR 422.

In fact, the vast bulk of them were unionists and they were receiving lesser benefits from collectively determined instruments. Second, it was also arguable that BHP had induced employees to leave their union, not by threats or promises, but because a consequence of offering more beneficial workplace agreements was that accepting employees would resign their union membership and that this amounted to inducement. In other words, to prove an inducement it was not necessary to show that BHP intended to induce, only that the effect of conduct amounted to an inducement.

On 7 April 2000, a Full Federal Court upheld the interlocutory injunctions,[31] but not on the ground that the offering of more beneficial workplace agreements injured or prejudiced the remaining employees. In a rather narrow reading of these provisions, the judges emphasized that they were written in the singular and held that the offering of more beneficial arrangements could not amount to injury or prejudice to each remaining employee because this did not amount to intentional conduct to injure or to prejudice. Rather, it was conduct designed to offer more beneficial terms to signing employees, but not to detract from the existing conditions of employees governed by collective instruments. In my view, this interpretation means that when offering more beneficial individual contracts, employers can never be held to have injured or prejudiced non-accepting employees. However, the Full Court did uphold the injunctive relief because the judges held that there was a serious question to be tried as to whether BHP had engaged in impermissible inducement. Although their reasoning is difficult for this commentator to follow, they do contemplate the possibility that conduct, if it is of a sufficient nature, may amount to an inducement even though there was no evidence that the perpetrator intended to induce.[32]

This matter went to trial and, on 10 January 2001, Justice Kenny held that on the evidence BHP had not contravened the freedom of association provisions when offering individual statutory workplace agreements[33] (Noakes and Cardell-Ree 2001). In relation to inducement, she found that there was no evidence of a course of conduct of such an unequivocal nature that it could be said that there was inducement otherwise than by threats or promises. Given the pronouncements of the Full Court and the evidence of BHP that its primary motives in offering the individual contracts was to cut costs in a competitive and volatile industry, this holding was unsurprising.

31. *BHP Iron Ore Pty Ltd v Australian Workers Union and Ors* (2000) 102 FCR 97.

32. See the thoughtful comments on inducement by Finkelstein J in *Finance Sector Union v Commonwealth Bank of Australia* (2000) 106 IR 139.

33. *Australian Workers' Union and Ors v BHP Iron Ore Pty Ltd* (2000) 106 FCR 482.

Once the injunctions were lifted, BHP was free to offer further statutory workplace agreements to its workforce. However, perhaps owing to the legal proceedings and re-grouping by the trade unions, very few employees accepted these offers. BHP found itself in the position of having half of its workforce on workplace agreements with the remainder on awards and collective agreements. On 2 November 2001, the Western Australian Industrial Relations Commission utilized its powers and handed down an award rescinding all existing awards and collective agreements and specifying market wage rates and terms and conditions of employment that appear to be comparable to the provisions of the workplace agreements.[34] While there were differences between the parties, BHP acquiesced in the making of a new award. In my view, it did so in order to simplify the existing pattern of awards and collective agreements, as well as to bring about a symmetry of arrangements between its workers on workplace agreements and collective instruments. However, it is important to appreciate that had the workers been covered by federal labour law, it would not have been possible for the federal Commission to have made a market wages rates award because it only possesses the capacity to hand down safety net awards containing minimum wage rates and minimum terms and conditions of employment.

STRENGTHENING AUSTRALIA'S NEO-LIBERAL VOLUNTARY BARGAINING LAWS

Australia's neo-liberal voluntary bargaining laws fail to uphold the right of employees to be represented by trade unions when collectively bargaining with their employers. Although what follows concentrates upon the federal voluntary bargaining regime, much also applies to the State systems. Even where the overwhelming majority of a workforce desires to be represented by a trade union in collective bargaining, no legal mechanism exists under federal labour law where the employees can enforce this outcome. If an employer simply refuses to bargain, the federal Commission lacks the power to make a market rates award to impose a fair settlement upon the parties. Furthermore, the BHP litigation has shown that the freedom of association regime will not protect the right of trade union members to be collectively represented by their trade unions.

The current voluntary bargaining laws were enacted by the Howard Government. In November 2001 it was elected for a third term, which

34. *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch v BHP Iron Ore Pty Ltd and Ors Western Australian Industrial Relations Commission in Court Session* [2001] WAIRC 040822, 2 November 2001.

makes it quite unlikely the Parliament will amend these laws to strengthen the rights of employees to be represented by trade unions over the next three years. However, in my view, the present is an opportune time to explore in what ways our laws may be altered to strengthen collective bargaining by trade unions. It may well be that one or more of Australia's six States—all now being governed by Australian Labor Party governments—may amend those laws by enacting a balanced regime where employees are able to exercise the right to have their trade union represent them in collective bargaining.

In its 1998 Declaration on Fundamental Principles and Rights at Work, the International Labour Organization (International Labour Organization 1998) re-stated four fundamental rights at work, which should be respected and promoted by all member States (including Australia). Three of these rights concern the abolition of forced labour, child labour and discrimination in employment. However, the first right upholds "freedom of association and the effective recognition of the right to collective bargaining" (International Labour Organization 1998). This right is embodied in the International Labour Organization Convention 87 on freedom of association[35] and also in its Convention 98 on the right to organize and bargain collectively,[36] which have been ratified by Australia.

The voluntary bargaining laws in the Workplace Relations Act 1996 fail to uphold freedom of association and the effective recognition of the right to collective bargaining because no mechanisms exist to require employers to recognize and to bargain in good faith with representative trade unions. Accordingly, these laws are contrary to the jurisprudence interpreting Convention 87 on the right to organize and bargain collectively. In my view, they are also contrary to the collective bargaining right contained in the International Labour Organization's 1998 declaration on fundamental principles and rights at work. As a first step, the federal Commission should again be given powers to order employers and trade unions to bargain in good faith.[37] However, the *Asahi* decision makes it clear that without a trade union recognition procedure, these powers are necessarily limited in a legal regime that also permits employers to choose to make non-union agreements and statutory workplace agreements.

35. *Freedom of Association and Protection of the Right to Organise Convention*, International Labour Organisation, Convention No. 87, 1948.

36. *Right to Organise and Collective Bargaining Convention*, International Labour Organisation, Convention No. 98, 1949.

37. On 26 June 2000, the then leader of the opposition, Mr Kim Beazley, introduced into the Commonwealth Parliament the Workplace Relations Amendment Bill 2000, Bill No. 00121, which sought to give the federal Commission power to make bargaining in good faith orders. See proposed ss 170MKA–170MKC.

A second and equally important step is to enact a trade union recognition mechanism that fits Australia's history of labour regulation and its current mix of labour laws which, to varying degrees, permit the operation of arbitral collective bargaining and individual contract mechanisms.

In my judgment, it would be inadvisable for Australia to engraft upon its laws the rigid North American model of Trade union recognition. Under this procedure, a trade union must establish majority status in a bargaining unit whereupon it becomes the sole bargaining agent of the workers and the employer is required to recognize and bargain with it. In the United States and in some Canadian provinces, majority status is established through an election and in other Canadian jurisdictions by proving membership in the union by a majority of employees through the signature of membership cards (Gould 1998; Summers 1998; Adams 2001; Carter et al. 2002). This mechanism of single and exclusive union representation cuts across Australian traditions of representative national unions and appears ill-suited in an era characterized by the increasing fragmentation of large workplaces.

In 1999, the Tony Blair Labor Party Government of Great Britain in furtherance of its policy of creating partnerships at work (*Fairness at Work* 1998: Ch. 4; Forsyth 1999), enacted a more flexible trade union mechanism modelled in part upon the recognition mechanisms in the United States and Canada (Oliver 1998; Shaw 2001). The legislation promotes voluntary recognition of one or more trade unions by an employer,[38] but where this is not achieved, the Central Arbitration Committee may assist the trade union and the employer to agree upon voluntary recognition, which may occur even where trade union members do not make up a majority of the workforce. This differs from the position in the United States and Canada where it is contrary to the collective bargaining laws for an employer to recognize and bargain with a trade union that does not have majority support. Failing an agreement, the Central Arbitration Committee may grant recognition in either of two ways, First, a trade union will be granted recognition where it can prove that a majority of the workforce are members. Second, recognition will be ordered where the trade union receives majority support in a secret ballot election where at least 40% of the eligible employees cast votes.

The recently enacted Employment Relations Act 2000 of the Helen Clarke Labor Party government in New Zealand promotes collective bargaining by requiring employers to bargain in good faith with registered trade unions. No trade union recognition procedure operates because the legislation takes a different tack. Trade unions are not empowered to

38. Employment Relations Act 1999 (UK) schedule 4.

conclude collective agreements for all of the employees in an employing undertaking: instead, any collective agreements negotiated will only bind an employer with respect to present and future members of the union.[39] The advantage of this mechanism appears to be that trade union members are able to insist upon their trade union bargaining on their behalf. However, a disadvantage is that any collective agreement concluded will only cover union members unless the employer extends its terms to the entire workforce.

In my judgment, the rights of Australian employees to be represented by trade unions in collective bargaining should be protected by a trade union recognition procedure which, like its British counterpart, encourages voluntary trade union recognition. The State and federal Commissions are well equipped to facilitate such negotiations. Where voluntary recognition does not occur, then some form of recognition mechanism is obviously warranted. Perhaps thought could be given to allowing trade unions automatic recognition where they would be permitted to bargain only on behalf of their members in the employing undertaking as is the case in New Zealand. However, it would also be appropriate to permit the federal and State Commissions to determine whether one or more unions had sufficient support in an undertaking, either via membership records or through the holding of ballots of the employees of the undertaking. If this type of mechanism was coupled with powers to make binding good faith bargaining orders, Australian collective bargaining law would uphold the right of employees to choose to be collectively represented by trade unions in the determination of wages and terms and conditions of employment.

CONCLUSION

The burden of this article has been to examine the neo-liberal bargaining laws enacted over the last decade in Australia, especially the federal bargaining laws of 1993 and 1996. Responding to economic pressures associated with globalization, these laws partially replaced Australia's mechanisms of compulsory conciliation and arbitration. However, it was argued that they fail to uphold the right of Australian employees to be represented by trade unions for the purpose of collective bargaining with their employers. In the case of the 1993 bargaining laws of the Keating Government, the lack of sufficient safeguards for trade union bargaining were highlighted. The 1996 Howard Government's neo-liberal bargaining laws made it more difficult again for trade unions to engage in collective bargaining. The freedom of association laws were found wanting in the BHP

39. Employment Relations Act 2000 (NZ) s. 56.

Iron Ore litigation because they failed to protect the collective bargaining aspirations of trade union members.

In accordance with determinations of the International Labour Organization, Australian employees should be given the right to be represented by trade unions when engaging in collective bargaining. I have argued that a combination of bargaining in good faith laws and trade union recognition procedures suitable for Australian conditions will enhance and protect the right of Australian employees to be represented by trade unions when collectively determining their wages and other terms and conditions of employment.

Australia is an interesting case study of the manner in which the pressures of economic globalization, coupled with information technologies, have played a part in altering labour relations regimes by tipping the balance away from industry regulation, and towards the determination of wages, either by union and non-union agreement-making at the level of the employing undertaking or through unilateral employer control via the contract of employment. Unlike the comparable Common Law federations of the United States and Canada, whose labour laws did not greatly inhibit a shift to the setting of wages and terms and conditions of employment on an individual basis in their private sectors, Australia was in a different position. Its federal and State mechanisms of compulsory conciliation and arbitration, which largely operated on an industry basis, did inhibit the setting of wages and work rules at the level of the employing undertaking. When Australia deregulated its economy in the 1980s and brought itself more fully into the globalized economy, socio-economic and political pressures built up leading to the dismantling, albeit to varying degrees, of Australia's federal and State systems of conciliation and arbitration in favour of collective bargaining and unilateral employer control at the level of the employing undertaking. Rather sadly in my view, the 1993 federal level voluntary bargaining laws failed to adequately safeguard the position of trade unions. The great irony is that these were enacted by the Keating Australian Labor Party government with the support of the Australian Council of Trade Unions as a response to economic and business pressures and to the neo-liberal amendments to some of the State labour law mechanisms.

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Justice at Work: Industrial Citizenship and the Corporatization of Australian Labour Law[1]

Ron McCallum
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Distinguished guests, ladies and gentlemen. It is indeed a great honour to have been asked to deliver the 2005 Kingsley Laffer Memorial Lecture here at the University of Sydney. Kingsley Laffer was a pioneer of Australian industrial relations teaching and scholarship. He joined the University of Sydney in 1944 and for the next three decades he championed the discipline of Australian industrial relations. In my view, Kingsley's most enduring achievement was his foundation editorship of the *Journal of Industrial Relations* that lasted for some 18 years. This journal that was cradled here at the University of Sydney, is undoubtedly Australia's premier industrial relations review and is read throughout the world. We all owe him an enormous debt that I hope I and the other 12 givers of this annual lecture that bears his name can repay through the distillation of our research and scholarship.[2]

Although I am by no means a labour law pioneer, for the last 30 or so years, the primary tasks in my working life have been to further teaching and research in the discipline of labour law. I chose the path of a teacher because the legal rules which govern our rights and obligations as workers and employers are of central importance to Australian society. I regard knowledge of these rules as an indispensable aspect of legal training in our nation. As a tertiary teacher, I have always strongly held the conviction that dialogue between teacher and

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student is the best way to transmit not simply knowledge of our labour laws, but of greater importance to explain to students the spirit of these laws. All of our laws and especially our indigenous labour laws possess a spirit that is the result of their formulation and application throughout Australian workplaces. For most adult Australians, the performance of paid work, whether as employees, consultants or contractors, hopefully gives us fulfilment, a broad social network, and remuneration to support ourselves and our families. In my view, the purpose of labour law in a democratic state is to ensure that the rights and obligations placed on workers and employers mandate just and fair outcomes with respect to remuneration, security of employment, leave, training, occupational health and safety and other terms and conditions of employment. This includes ensuring that workers and employers have the right to join and to participate in the activities of free trade unions and employer associations including engaging in collective bargaining, and that they refrain from unfair, unjust, arbitrary and discriminatory behaviour.

On Friday 1st July this year, for the first time in more than two decades, the Australian Government will have control of both houses of the Australian Parliament. Since 1980, no Government has had a majority in the Senate, that is, the upper house of the Australian Parliament. Over the last 25 years, in order to secure the passage of legislation, especially when it is contentious, governments of all complexions have had to negotiate with the minor parties and with independent Senators. For example, when the Howard Government introduced its workplace relations changes in May 1996,[3] it was required to water down many of its provisions because of the demands of the Australian Democrat Senators. More especially over the last five years, many of the Howard Government's labour law bills have failed to be enacted into law because the government and the Senate were unable to compromise on their positions. However, after the 1st July this year, the Howard Government will have control of both houses of the Parliament and will be enable to enact whatever changes it wishes to make to federal labour law subject only to the constraints of the Australian Constitution.

As yet, the Howard Government's 2005 labour law programme has not been fully unveiled. However, it does appear that the Government wishes to simplify collective and individual agreement-making, to make it more difficult for trade unions to take lawful industrial action through the introduction of secret ballots, to restrict the rights of trade union officials to enter workplaces, to further strip back federal awards to a narrow core of minimum rights, to immunize small businesses from the unfair dismissal laws, to free small businesses from the requirement to make redundancy payments, to more tightly regulate industrial relations in the construction industry, to develop new processes for establishing a national minimum wage, to enable private mediators to resolve workplace disputes and to create one national labour law system for our nation by the year 2010.[4] While it is my surmisation that not all of these proposed changes will find their way onto the federal statute book, nevertheless, significant changes to our labour laws will occur certainly by the end of 2005. Now, I suggest, is the

time to take stock and to examine our federal labour laws to see if they meet the standards of justice and fairness which are appropriate to our democratic and market economy nation.

This evening, I shall undertake this task in four stages. First, I shall unpack some of the writings on industrial citizenship to determine what are the appropriate rights and obligations that labour law should bestow on Australian citizens at work whom I shall call industrial citizens. Second, our labour laws do not operate in an historical or sociological vacuum. To determine how our laws have faired with respect to justice and fairness, an historical analysis of their operation over more than 100 years will be undertaken. Third, I shall argue that labour law changes which do not meet the standards of justice and fairness will be found wanting by Australian industrial citizens and their families. Finally, and this is of crucial importance, I shall assert that the creation of one national labour law system through the use of the corporations' power will inevitably lead to the corporatization of Australian labour law to the detriment of Australian industrial citizens. This is because such an approach will inevitably mean that labour law will become little more than a species of corporations' law and this will impact adversely upon Australian industrial citizens.

1. Industrial Citizenship: Three Portraits

Most people are familiar with the political rights and obligations of Australian citizens. However, in our social dialogue little discussion has taken place over the actual and aspirational rights and duties of Australian citizens at work, that is, of Australian industrial citizens. There is a growing body of writing on industrial citizenship, however, time will only permit me to unpack the ideas surrounding industrial citizenship by sketching three portraits of industrial citizenship scholarship. I shall commence with writings of the 1890s, then from the 1930s and finally from our present time. First, I shall explore the writings of the husband and wife team of Sidney and Beatrice Webb whose seminal scholarship was published in the 1890s. Second, the political scientist Harold Laski wrote eloquently about industrial citizenship in the 1930s. Finally, Professor Hugh Collins of the London School of Economics has written a blueprint of industrial citizenship for Tony Blair's Britain.

Sidney and Beatrice Webb were English social reformers who fought for the rights and aspirations of working people. Their scholarship, which was empirical in nature, heralded the beginnings of modern industrial relations research. They left the shelter of the library and examined trade unions in practice. In the last decade of the 19th century, they wrote two seminal volumes, *A History of Trade Unionism* in 1894 (Webb and Webb, 1894), and in 1897, *Industrial Democracy* (Webb and Webb, 1897). They saw the phenomenon of trade unionism as a necessary response to the industrial revolution with its accretion of capital. For the Webbs, the vital role of trade unions was to protect their members by engaging in collective bargaining. The function of the State was to assist this process through the enactment of protective industrial legislation

covering minimum wages and maximum hours on an industry basis, together with occupational health and safety protection and adequate compensation for workplace death and/or injury and disease.

Sidney and Beatrice Webb praised the democratic structure of unions and applauded the manner in which collective bargaining indirectly gave worker members an input into the collective bargaining process. Although they did not use the term 'industrial citizen', for the Webbs, the male trade union artisan was an industrial citizen engaged in furthering his employment rights for the benefit of himself and his family.

Harold Laski was an English political scientist who wrote about industrial citizenship in the 1930s and his writings were coloured by the great depression of that decade. He set forth his ideas in his book, *A Grammar of Politics* which was published in several editions in the 1930s (Laski, 1934). Laski saw the high unemployment of the 1930s as a failure of capitalism and he saw state intervention as a means of controlling the excesses which unchecked capitalism brings forth. For Laski, it was up to the state to guarantee minimum wages and maximum hours of British citizen workers (Laski, 1934: 106–112). This would enable workers to reach a standard of living '... [w]ithout which creative citizenship is impossible' (Laski, 1934: 107). Maximum hours would also liberate citizen workers from endless toil. While these labour laws represented a useful beginning, Laski wished to prevent the ownership of capital from degenerating into a type of dictatorship.

He argued that industrial dictatorship could be prevented through the establishment of participatory mechanisms that would compel dialogue between the owners of capital and their employees. Through the creation of participatory institutions where worker representation would be mandatory, the excesses of the owners of capital would be ameliorated by the voices of working women and men. In other words, Laski regarded industrial democracy as a right of industrial citizens.

Minimum wage and maximum hours legislation and provisions mandating occupational health and safety are supported by most labour law scholars and practitioners. However, the concept of industrial democracy is still the subject of vigorous debate in those market economy countries like Australia who adhere to the Common Law. Industrial democracy was a matter of vital importance to Sidney and Beatrice Webb and to Harold Laski, and these writers do have their present day adherents. Britain's Keith Ewing follows this socialist tradition with his approach to industrial citizenship (Ewing, 1993, 1995 and see also Ewing, 1996), and in his early writings Hugh Collins sees industrial democracy as an aspect of industrial citizenship (Collins, 1987). The American scholar Clyde Summers and his adherents have long argued for American workers to be enabled to engage in decision-making with their employers through forms of co-determination via works councils and committees, upholding in our time the democratic aspects of industrial citizenship (Summers, 1979). This democratic approach also resonates in my own work (McCallum, 1997, 1998; McCallum and Patmore, 2002) and in the scholarship of other Australian writers who have

advocated the establishment of works councils and other consultative bodies in Australian workplaces (Gollan, Markey and Ross, 2002; Gollan and Patmore, 2003). With the decline in trade union membership which will inevitably lead to a decline in trade union collective bargaining, I have long argued for the establishment of works councils as a means of bestowing upon industrial citizens rights to participate in rule making and in rule interpreting in their employing undertakings (McCallum, 1997, 1998; McCallum and Patmore, 2002).

The protection of employees from unfair, arbitrary and discriminatory terminations is a more recent development upon which neither the Webbs nor Laski made detailed comments. However, both Hugh Collins (Collins, 1986) and Keith Ewing (Ewing, 1993) argue that industrial citizens should have the right to be protected from unfair and discriminatory conduct even where it falls short of termination. Most labour law scholars in the Common Law world would be of the view that an indispensable right of industrial citizens is to obtain legal redress for workplace conduct that was unfair, arbitrary and/or discriminatory, even where such conduct fell short of termination of employment.

The third portrait is from the present and it concerns the scholarship of Professor Hugh Collins from the London School of Economics. In his recent book titled *Employment Law* published in 2003 (Collins, 2003, and see also Collins, 2001), Collins adopts a broader approach to citizenship and especially to industrial citizenship. This approach fits well with the objectives of Prime Minister Tony Blair's 'New Labour' Government's employment and social welfare strategies (Collins, 2002; Giddens, 1998). In this book, Collins examines the many actual and anticipated changes in the law that have resulted from the accession of the Blair government in 1997. In particular, he argues that the policy and legal changes in areas like education, social welfare and labour law fit within the emerging approach to social welfare and labour relations of the European Union as embodied in the *Charter of Fundamental Rights of the European Union* 2000 (Collins, 2003: 25). He argues that these laws are governed by the three themes of social inclusion, competitiveness and citizenship (Collins, 2003: 21). Social inclusion covers those persons who are unable to fully participate in society because they are unemployed and lack the means to obtain work. Work is seen as a central aspect of citizenship in a society that is seeking to enhance competitiveness. Social inclusion, that is obtaining work for adult citizens, can be achieved through the enactment of laws governing taxation, education, training and social welfare. Labour law can play its part by regulating employment terminations and by prohibiting those based upon discriminatory and other unlawful grounds (Collins, 2003: 22).

The second theme that Collins examines in this book is that of competitiveness. In his view, competitiveness can be achieved through systems of management and flexible and highly-trained employees. For this flexibility to operate successfully, however, industrial citizen employees require guarantees of fair treatment. In the view of Collins, labour law can promote this type of fair treatment in a number of ways. First and foremost, there is the collective

bargaining that has played a significant role in British labour relations. Secondly and no less importantly, consultative committees and even works councils can play their part in ensuring employee participation in decision-making as a means of ensuring competitiveness (Collins, 2003: 23–4).

The final theme that Collins examines is citizenship (see Collins, 2003: part IV). Collins asserts that citizenship, and especially industrial citizenship, involves a series of rights and responsibilities. Citizens have the right to education, training and where appropriate social welfare relief, but they also possess the responsibility to equip themselves for employment in a competitive society.

Collins adds that not only '. . . traditional civil liberties should be protected against the State but also that the State owes its citizens a duty to secure those liberties in other contexts such as the workplace' (Collins, 2003: 24). In the view of Collins, these new liberties include 'rights to privacy, protection of whistle blowers, health and safety and even fair pay' (Collins, 2003: 25). The citizenship vision of Hugh Collins also recognizes the changes in the labour force where employees, contractors and consultants all participate in remunerated work in the competitive economy.

Undoubtedly, the work of Hugh Collins is the most interesting example of a current attempt to develop a type of industrial citizenship for this present century and Australian policy-makers would do well to carefully consider this approach. For him, economic competitiveness goes hand in hand with justice and fairness in the workplace. As well as establishing minimum wages and conditions of employment, modern and competitive industrial citizenship also requires the enactment of measures to protect worker privacy, worker safety, arbitrary, capricious and discriminatory employer and employee conduct and even protection for whistle blowers. However, competitive workplaces can be achieved only through employer and employee dialogue and cooperation. This can occur through collective bargaining and also via consultative processes including the establishment of works councils and other consultative bodies.

2. Justice and Fairness in Australian Labour Law: The Last 100 Years

As is well-known, the origins of 20th century Australian labour law can be traced back to the significant labour disputation in the early 1890s. In order to reduce industrial disruptions, the Australian colonial governments sought to minimize labour disputation through the creation of machinery to determine fair and reasonable wages and terms and conditions of employment. In the years straddling the turn of the 19th and 20th centuries, a number of Australian colonial governments (and after 1901 they became States) and the Government of New Zealand experimented with legislative schemes to bring about industrial peace either via tripartite boards known as wages boards or through the establishment of labour courts possessing powers of compulsory conciliation and arbitration to settle labour disputes.

In the final decade of the 19th century, Australians were debating the shape of their forthcoming federal compact that on the 1st January 1901 became the *Constitution of the Commonwealth of Australia*. At the 1898 convention held in Melbourne, Henry Bournes Higgins was successful in having placed into the Australian Constitution a compulsory conciliation and arbitration power which is now known as the labour power (Constitutional Debates, 1898: 180, and for further detail see Kirby, 2004: 232–8). The labour power is now contained in section 51 (xxxv) of the Australian Constitution which gives the Australian Parliament power to make laws with respect to '(xxxv) Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.

Interestingly, while proponents like Kingston and Higgins were concerned to bring about industrial peace especially after the labour turmoil of the 1890s, they also wanted to ensure that workers received fair outcomes if they submitted themselves to compulsory arbitration. For them, industrial peace could be achieved only if employees could receive adequate remuneration and fair terms and conditions of employment and they asserted labour courts possessing compulsory powers of conciliation and arbitration could bring this about. In the 1898 debates, Kingston said:

> The leading feature of this Constitution is that the Federal Parliament should have power to legislate for the 'peace, order, and good government of the Commonwealth.' By what means are the peace and order of the various colonies most disturbed, and their good government threatened, at the present time? By strikes and lock-outs. Shall we not then be wanting in our duty if we do not give to the Federal Parliament power to legislate in such a way as will prevent strikes and lockouts, and enable industrial questions of the greatest difficulty to be amicably settled between the parties, upon considerations of right and wrong rather than because of the relative strength of the disputants? (Constitutional Debates, 1898: 186)

Not only in an endeavour to create industrial peace, but also to ensure justice and fair dealing between master and worker, the federal and most State governments chose in the early years of the 20th century to establish labour courts (they are now styled industrial relations commissions) that were able to settle labour disputes by conciliation. More importantly, where conciliation failed, the labour courts were empowered to utilize final and binding interest arbitration to impose fair and reasonable conditions of employment upon the employer and employee disputants.

The Australian federal Government was able to enact compulsory conciliation and arbitration legislation because of the labour power that is contained in section 51(xxxv) of the Australian Constitution. In 1904, the federal Parliament utilized this constitutional power and enacted legislation that created a labour court armed with powers of compulsory conciliation and arbitration.[5] What Australian citizens sought from their federal Government was conciliation and arbitration machinery to bring about industrial peace by ensuring fair terms and conditions of employment for Australian workers.

While he did not use the term 'industrial citizenship', Henry Bournes

Higgins (the second President of the federal labour court from 1907 to 1921), perceived his mission as one of ensuring fair and reasonable outcomes for Australian workers. He first published a series of essays in the *Harvard Law Review* (Higgins, 1915, 1919, 1920) and in 1922 he republished them with added material in a book of essays that he titled *A New Province for Law and Order* (Higgins, 1922) because he believed that his brand of compulsory conciliation and arbitration had brought a new form of law to Australian workplaces that would be the birthright of Australian industrial citizens.

In *A New Province for Law and Order*, Higgins explained his view of the therapeutic aspects of compulsory conciliation and arbitration in the following words. He wrote:

> [T]he process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public. (Higgins, 1922: 2)

For Higgins, it was in the interests of the public for the labour court to ensure that Australian industrial citizens received sufficient wages to sustain themselves and their families.

Australia's industrial citizenship which sprang from compulsory conciliation and arbitration primarily focused upon the full-time breadwinning male employee, and saw the wage increases which were given to workers as flowing down to Australian families. Justice Higgins made this clear in his famous 1907 Harvester decision,[6] where he specified a minimum wage for an unskilled man which would enable him to support a wife and three children. Interestingly, the Harvester Man of Henry Bournes Higgins who supported his family resembled the male artisan who was so central to the thinking of Sidney and Beatrice Webb. Throughout the last 100 years, the setting of wage rates has been the pre-eminent function of Australia's industrial relations tribunals. In fact, throughout the 20th century, compulsory conciliation and arbitration was so successful in distributing productivity gains right across Australia, through arbitrated general increases in wage rates, that it remained the cornerstone of Australian labour relations policy up until 1992 (for the history and the role of the labour courts and tribunals in fixing wages, especially from 1901 to 1950, see Eggleston, 1983; Hancock, 1979a; Hancock, 1979b; Hancock and Richardson, 2004). Even as late as 1990, 80 percent of Australian employees had their wage rates specified or underpinned by the awards promulgated by Australia's network of industrial relations commissions (Australian Bureau of Statistics, 1990). The 1993 and 1996 changes to federal labour law relegated awards to the status of a safety net (Pittard, 1994, 1997), however, the Australian Industrial Relations Commission made it clear in its 1997 Living Wage Case[7] that it would still continue to prescribe minimum wage rates for all of the employees who were covered by federal awards.

There has always been a tension in the fixing of wages between the needs of employees and their dependants on the one hand and the capacity of the economy to absorb these increases on the other. Despite the pressures of economic globalization, the Australian Industrial Relations Commission has continued to hand down decisions specifying minimum wage rates[8] to the enormous benefit of employees at the lower end of the labour market. In fact, an overriding characteristic of our mechanisms of compulsory conciliation and arbitration has been the capacity of our tribunals to ensure through the precepts of fairness and justice, a reasonable standard of living to less fortunate employees. Of course our laws governing both taxation and social security have also played their roles in maintaining a decent standard of living for most Australian industrial citizens.

The conciliation and arbitration systems, especially in the first half of the 20th century, have been aptly described as full-time male breadwinning regimes of industrial citizenship, because they focused upon the role of men as workers and as the wage earners for their families. This meant that women faired less well (Bennett, 1988; Hunter, 1988; Whitehouse, 2004) than did men. In the 1912 *Fruit Pickers Case*,[9] for example, Justice Higgins asserted that as women were not generally responsible to maintain a family they should only be paid 54 percent of the basic wage. However, where female labour was in competition with male labour, then women and men should receive the same wage rate so that women would not undercut men and force men out of employment. It can be seen then that for the first six decades of the 20th century, leaving aside the two world wars, the primary role of women was as homemakers and mothers, and when they undertook employment, the labour courts and commissions were keen to ensure that they did not undercut the terms and conditions bestowed on full-time male workers. The *Equal Pay Cases* of 1969[10] and 1972[11] sought to grant women equal pay for work of equal or comparable value. Space does not permit a detailed discussion on the manner in which Australian industrial relations tribunals have sought to deal with female wage rates in recent times, however, at the State tribunal level, further work has been done to narrow the male–female wage gap. For example, in its *Equal Remuneration Case*[12] that was decided in 2000, the Industrial Relations Commission of the State of New South Wales has established an equal remuneration principle,[13] which is designed to grant pay equity to female workers whose occupations have suffered long-standing under-valuation. Interestingly, the Full Bench of the New South Wales Commission made it clear that in establishing this principle, it was informed by human rights values emanating from International Labour Organization conventions and other international covenants and instruments. In the *State Librarians' Case* that was decided in March 2002,[14] State librarians had their wages increased under the equal remuneration principle because this female dominated profession had suffered long-term under-valuation. However, a recent report to the Government of the State of Victoria by the Victorian pay equity working party shows that despite these measures women still earn on average $150 less than men and that one-third of working mothers are in casual employment (Victorian Pay Equity Working Party, 2005).

In recounting the role of the industrial relations tribunals in fashioning

Australian industrial citizenship, it is important to appreciate that Aboriginal Australians faired even worse than did women (Whitehouse, 2004). The Commonwealth Court of Conciliation and Arbitration held in a number of early cases that it was not necessary to pay aboriginal rural workers the same wage rates as their white counterparts.[15] It must be appreciated that it was not until 1967 that native Australians received full political citizenship, and that it was not until the late 1960s that aboriginal pastoral workers obtained the same wages and benefits as did white male pastoral workers.[16]

In the 1990s, the federal and State governments, by varying degrees, shifted their labour regulation from conciliation and arbitration to collective and individual bargaining. This meant that the powers of the Australian industrial tribunals were truncated. For example, the Australian Industrial Relations Commission lost its power to hand down arbitrated market rates awards, and is now confined to handing down minimum rates awards which are confined to a safety net of some 20 allowable award matters covering wages, hours of work, redundancy pay, various forms of leave etc.[17] Yet, at the present time, the network of industrial relations tribunals perform two significant functions. First, they certify collective agreements, and second, they continue to play a role in determining and in updating award-based safety nets of terms and conditions of employment known as community standards.

Australia's network of industrial relations tribunals are required to certify collective agreements between trade unions and employers, or between employers and their workers in order that these collective agreements may become legally enforceable. At the federal level, for example, when certifying a collective agreement the Australian Industrial Relations Commission is required, amongst other matters, to determine that the collective agreement does not impermissibly undercut the relevant award safety net covering the employees of the undertaking (for details see Pittard, 1997). In no other industrialized and market economy labour law system of which I am aware, is the approval of an industrial relations body required before a collective agreement between a trade union and an employer may come into operation. In my view, the Australian tribunals have been given this certification role because the concept of industrial fairness for which they have stood for a century is regarded by the Australian community as a necessary bulwark against unfair collective bargaining processes, especially when employers are negotiating directly with their employees.

The second function of Australia's industrial relations tribunals is to assist Australian industrial citizens to reshape their employment obligations through the establishment and updating of safety nets of community standards. Time will only permit me to focus upon the work of the Australian Industrial Relations Commission, although it must be appreciated that the State tribunals have played significant and innovative roles in this field. The area of leave for family responsibilities is a pertinent example of the fashioning and updating of community standards of employment. In 1979, the Australian Conciliation and Arbitration Commission (as it was then styled) granted 12 months unpaid

maternity leave to a mother on the birth of a child.[18] In 1990, these provisions were varied by the parental leave test case[19] which allowed couples to choose whether the man or the woman would be the recipient of the 12 months unpaid leave by virtue of her or him being the primary caregiver of the child. The clauses giving the parents of adopted children similar rights were incorporated into this standard parental leave award clause.

In May 2001, the Commission handed down its casual employees parental leave test case[20] in which the parental leave standard was altered in the following manner. Casual employees who were employed on a regular or systematic basis for at least 12 months, and who, but for the pregnancy, would have an expectation of further employment, were granted 12 months unpaid parental leave. In fact, this simply meant that they were given the right to reapply for this type of ongoing casual employment at the conclusion of their 12 months of unpaid parental leave. These parental leave measures have become a community standard and have now been enacted into law and are to be found in a number of the state labour relations statutes. In the *Family Leave Test Case* of 1994,[21] the Australian Industrial Relations Commission gave employees the capacity to access periods of sick and/or annual leave to take care of family members, in particular of children and of elderly parents. Subsequently these provisions have been incorporated in awards and in collective agreements and are known as personal carer leave provisions.[22]

Finally, the network of industrial relations tribunals have also created community standards with respect to redundancy pay, superannuation and casual employment. In its 1984 *Termination, Change and Redundancy case*,[23] the federal Commission obliged employers to pay redundancy payments, known as severance payments, to employees who were made redundant, however, small businesses were exempt from this requirement. In its March 2004 Redundancy Case,[24] however, the Commission increased the amount of severance payments and the small business exemption was removed in the following manner. Where employers who employ less than 15 people make employees redundant, they will be required to pay up to eight weeks of severance pay depending upon the length of service of the employee. Access by most workers to superannuation schemes was set in train by the Australian Conciliation and Arbitration Commission in 1986,[25] and now superannuation for most employees is governed by collective agreements, some awards and by statutes (Creighton and Stewart, 2005: 347–52). The industrial relations tribunals are conscious of the plight of long-term casual employees, and they are endeavouring to lessen this plight by guaranteeing them minimum standards including the right to convert to full-time positions (see Owens, 2002). However, tribunals are not parliaments, they are not legislators and they cannot bestow monetary benefits to assist employees at the bottom of the labour market. Although they can only play a limited role in assisting Australian industrial citizens in their working lives, even since the partial deregulation of Australian labour law they have operated and updated a dynamic safety net of terms and conditions of employment. Finally, what is striking about this Australian safety net is that

it has enabled governments to disengage from significant labour relations issues. For example, the safety net provisions on unpaid parental leave and redundancy payments have enabled Australian governments to largely limit their responsibilities to social security measures, and to disengage from their moral responsibilities in these significant matters which impact upon the lives of a majority of Australian industrial citizens.

Of course, the federal and State parliaments have played significant roles, especially over the last 30 years, but their approaches have been the traditional ones of enacting remedial statutes which are regarded as both appropriate and beneficial having regard to the major changes in the social attitudes of Australian industrial citizens. The parliaments have enacted favourable federal and State labour legislation including modern occupational health and safety statutes,[26] measures prohibiting discrimination in the workplace,[27] and provisions granting employees remedies for unfair, discriminatory and/or unlawful dismissals.[28]

Although this historical and sociological analysis of the development of our labour laws has been brief, it does show that our labour relations regimes have always focused upon justice and fairness at work. These precepts of fairness and justice, I suggest, sprang from the conciliation and arbitration origins of our mechanisms. Yet, despite the labour law deregulation of the last 15 years, the collectivist aspects of our system still adhere to this fairness and justice precept.

It is essential to appreciate three aspects of the operation of this fairness and justice precept in our labour laws. First, as I have demonstrated the conciliation and arbitration systems did, for the first half of the 20th century, pay far less attention to the interests of women and native Australians than was warranted, even in accordance with the standards of those times. Second, and of no less importance, there was always a healthy tension between fairness to employees and employers on the one hand with, on the other hand, the recognition that favourable employee outcomes had to be tempered by the economic capacity of the nation to absorb them. These tensions between economic capacity and fairness and justice can be seen clearly in the famous 1907 *Harvester* decision of Justice Henry Bournes Higgins.[29] In specifying a minimum wage for a worker to support his dependants, Higgins was mindful of the economic consequences of his decision. In fact, a central element of wage fixation in Australia has been this tension between the capacity of the economy and the fairness and justice precept.

Finally, the precept of fairness and justice became so ingrained in the Australian community that when conciliation and arbitration was jettisoned in favour of collective bargaining, the industrial relations tribunals were given powers of certification of collective agreements as a means of maintaining worker confidence in this new collectivist mechanism of union and non-union bargaining at the level of the undertaking.

3. Justice and Fairness at Work After July 2005

There is no doubt in my mind that the primary reason why our federal and State labour laws were partially deregulated in the 1990s was owing to the impact of economic globalization. In truth, the expression 'economic globalization' simply refers to the transplantation of the principles of unbridled competition that operate in the international market place, to the local economic institutions of industrialized market economic countries like Australia. Of course, the spread of information technology coupled with the ascendancy of neo-liberal ideology added to these globalization pressures. From the mid-1980s onwards, our labour relations mechanisms were required to pay more attention to economic market forces than had previously been the case.

As I have earlier recounted, the Australian government is currently planning further changes to our labour laws and after the 1st July 2005 their majorities in both Houses of the Australian Parliament will allow them to shape our federal labour laws in accordance with their views, subject only to the strictures of the Australian constitution. As I recounted at the beginning of this article, the federal government's change proposals have not been fully revealed at this time. However, my fear is that if implemented, several of these proposed alterations will lead to a displacement of fairness and justice at work from centre stage by the economic imperatives of free market competition to the detriment of Australian industrial citizens. Time will only permit me to comment upon several of the more important proposed changes which have been foreshadowed either in the form of bills which already have been introduced into the Australian Parliament, or which appear to be contemplated as workable proposals by the Australian Government. My comments will be confined to proposals concerning the setting of the minimum or living wage, proposals to further contract the federal award-based safety net, proposals to immunize small businesses from the requirements to make redundancy or severance payments, proposals to exempt small businesses from the federal unfair dismissal laws, and proposals to further limit the right of employees to undertake protected industrial action when engaging in collective bargaining.

The central feature of our labour laws over the last century has been wage fixation. In particular, since the partial deregulation of our labour laws in the 1990s, the Industrial Relations Tribunals have primarily concerned themselves with the living or minimum wage appropriate for Australian industrial citizens. What stands out in our nation unlike a number of other market economy countries, is that our minimum wage not only gives the most unskilled employees a reasonable level of income and dignity, but the manner of its setting by our industrial relations tribunals has long standing community acceptance. Of course, minimum wages cannot be viewed in isolation from our laws governing taxation and social security payments. It is open for the Australian parliament to instruct the Australian Industrial Relations Commission with respect to ascertaining the minimum wage, and over the years the parliament has specified detailed criteria for our federal tribunal. However, I would caution

the government from totally removing the power to set the minimum or living wage from the Australian Industrial Relations Commission and giving it instead to some form of recommendatory body. I am sure that the government has examined the work of the British Low Pay Commission that was established in 1998 to provide a minimum wage setting process for the United Kingdom (Simpson, 1999a, 1999b). Interestingly, the Low Pay Commission not only recommends a minimum wage for British employees, but this minimum wage is also applicable to labour-only independent contractors who are not running businesses on their own account. The removal of the Commission's power to set a minimum or living wage would I suggest, have three consequences.

First, this type of removal would be a body blow to the Australian Industrial Relations Commission which would I believe eventually lead to its demise. Second, if the government replaced the Commission with a body having recommendatory powers, the government would be required to decide in every instance whether or not to accede to such recommendations. I venture to think that the power to determine a minimum wage would be a two-edged sword for any government that especially in the early years of such a system would face considerable lobbying from all sides. Finally, and perhaps of most importance, the removal of a minimum wage setting power would in my view destroy the carefully built up community consensus over the fixing of wages for those employees on the lower rungs of the labour market.

Under federal labour law, the Australian Industrial Relations Commission has established an award-based safety net of minimum terms and conditions of employment, which the Howard Government narrowed in late 1996. However, the Government has stated that at the very least it will further shrink this safety net. As I have shown above, the award-based safety net is not a static set of terms and conditions of employment: rather it is a dynamic structure that can be and is updated when community standards alter. In my view, a case has not been made out for a further significant contraction of this safety net upon which so many employees are reliant for their actual terms and conditions of employment. If one of the reasons behind the suggestion to further shrink the safety net is to lessen the capacity of the Australian Industrial Relations Commission to continue its dynamic process of updating employee terms and conditions of employment, this would be to the detriment of Australian industrial citizens. Perhaps it may be the case that the contraction of the safety net is coupled with proposals to lessen the capacity of the Australian Industrial Relations Commission to determine whether collective agreements have undercut these award protections through its 'no disadvantage' test. I would, however, urge the Government to retain the capacity of the Commission to determine the fairness of collectively agreed outcomes, especially when employees are given a proposed collective agreement by their employer without the involvement of a trade union. If the Commission lost its wage fixing powers and if the safety net was substantially contracted, then in my judgement these measures would lead to a diminution of fairness in the operation of our labour laws.

The government has already introduced legislation[30] to overturn the 2004 decision of the Australian Industrial Relations Commission to grant up to eight weeks redundancy pay to employees of small businesses who are made redundant where their employer employs less than 15 employees.[31] The arguments here are more finely balanced, especially having regard to the pressures placed upon small businesses. Yet, the reasoning of the Commission showed a careful approach whereby the extension of redundancy payments to employees of small businesses was recognized as a necessary measure in a time of business restructuring and downsizing. However, if this reversal does take place, then I suggest that the plight of small business employees being made redundant must be ameliorated in other ways such as through increased government social security assistance.

The Government has already introduced a bill to take away the unfair dismissal rights from terminated workers whose employers have less than 20 employees.[32] I have been surprised by the tenacity of the Australian Government that has for a number of years sought to enact this small business exemption. Given the current flexibilities of the federal unfair dismissal regime where employers are able to employ persons on contracts for specified periods of time or for specified tasks, or persons on periods of probation or on qualifying periods, or persons as casual employees for less than 12 months, or persons on traineeship agreements or approved traineeships without the fear of unfair dismissal litigation,[33] it does seem to me that this extra significant exclusion is unnecessary and inappropriate. If enacted into law after July 2005, this exemption will further distance our federal unfair dismissal laws from the precepts of justice and fairness at work which should be the rights of Australian industrial citizens.

Finally, it does appear that the Government is giving consideration to lessening the capacity of employees to take protected industrial action by requiring pre-strike secret ballots and mandatory cooling off periods.[34] Already, the capacity of employees and their trade unions to take lawful strike activities is hedged around by a tight circle of legal provisions. If the capacity of employees to bargain collectively is further weakened by making strike activity virtually impossible, workers and their trade unions will, in time, opt out of this bargaining mechanism and turn to Common Law collective agreements backed up by their own industrial muscle. Again, though strikes are inconvenient and have economic effects, they are a necessary element of a free workforce engaging in collective bargaining with their employing undertakings.

You will recall that one theme of industrial citizenship scholarship from the Webbs right through to Hugh Collins is that of employee participation in the making and the interpretation of work rules at the employing undertaking. For Collins, the establishment of collective bargaining between trade unions and employers together with consultative mechanisms engenders employer and employee dialogue that enhances overall competitiveness throughout the economy. With respect to Australian labour law, however, employee participation and consultative measures are generally sadly lacking. When conciliation and arbitration tribunals determined market rates awards, it could

be argued that this was an indirect method of employee participation because the Tribunals had regard to the submissions made by trade unions whose leaders were democratically elected by their membership. However, since conciliation and arbitration at the federal level has been largely confined to the setting of a minimum safety net of terms and conditions of employment, it no longer fulfils this role. Collective bargaining between trade unions and employers is an accepted and well-tried method of employee participation throughout the industrialized world, and in Australia this type of bargaining fulfils this function. However, in relation to non-union bargaining, that is where the employer puts forward a collective agreement for employee approval, it does not amount to employee involvement in the accepted sense. It would be possible under federal law to provide that where an employer negotiates directly with its employees, the workforce must be entitled to participate in the bargaining process via a duly elected works committee or similar body. Neither the government nor the Australian Labor Party are interested in going down this track. It is also the case that in its rush to build an individualized workforce via common law contracts of employment and Australian workplace agreements, the current federal government has no interest in establishing consultative mechanisms for the purposes of sharing information and ideas between employees and employers. For its part, the Australian Labor Party has not embraced the establishment of such consultative mechanisms. I can only conclude that in the area of employee participation, Australian labour law is sadly lacking and is out of step with current arrangements operating throughout the majority of market economy countries, as embodied in the directives and laws of the European Union.

4. The Corporatization of a National Labour Law Regime

Given the increased integration of the Australian economy, together with the relatively small size of our workforce, the establishment of a single national labour law system for Australia is a worthwhile goal (Williams, 2003). In October 2000, Peter Reith who was then federal Minister for Workplace Relations and Small Business once again re-opened this debate by releasing a series of discussion papers under the catchy title 'Breaking the Gridlock' which argued for the establishment of one national labour law system (Reith, 2000). The issues for me are not whether we should have one set of national labour laws, but rather what type of system should we put in place and what are the appropriate political and legal means of achieving this end. Given the century of federal and State labour laws which have been developed in our nation, it does appear to me that a cooperative approach by all governments is the appropriate manner of working towards a unitary labour law mechanism.

As I understand the state of play, the Australian Government is considering legislating in a step-by-step approach to create a single national labour law system. Some in the Government believe that this can be achieved by utilizing the corporations' power which is contained in section 51(xx) of the Australian

Constitution. Under this head of power, the Australian Parliament may legislate with respect to 'Foreign, trading and financial corporations formed within the limits of the Commonwealth' which covers most incorporated bodies in our nation. In 2002[35] and again in 2003,[36] the Australian Government took the first step along this path by introducing bills into the federal Parliament where through utilizing its legislative powers over corporations, federal unfair dismissal law would become the exclusive mechanism for challenging unfair terminations for all employees of incorporated employers. In other words, where State unfair dismissal laws had previously applied to these employers, henceforth it would be supplanted by the federal termination laws by virtue of the corporations' power.

Much has been written on the manner in which the corporations' power may be used to establish a labour law mechanism that would cover approximately four fifths of the Australian workforce (Creighton and Stewart, 2005: 105–108; Ford, 1997; Pittard and Naughton, 2003: 522–40; Stewart, 2001; Williams, 1998: 104–125; Williams, 2003). More than 20 years ago, Dr Graham Smith and I argued that the corporations' power could supplement the labour power in order to enable federally registered trade unions to engage in collective bargaining (Smith and McCallum, 1984). I fully comprehend how the corporations' power together with other powers like the trade and commerce power[37] may fill in the gaps left because of the High Court's somewhat narrow approach to interpreting the words 'prevention' and 'conciliation' in the first phrase of the labour power which speaks of 'conciliation and arbitration for the prevention and settlement of industrial disputes' etc. My deep concern with the current approach of the Australian Government is that it will use the corporations' power not as a supplementary power, but as the primary and central power upon which it can enact a national labour law mechanism that will be applicable to most Australian industrial citizens. Let me explain my concerns in the following way.

In his 1997 book titled *From Subject to Citizen, Australian Citizenship in the Twentieth Century* (Davidson, 1997), Alistair Davidson gave me new insights into the placing of the labour power into the Australian Constitution. He wrote that,

> [t]he real triumph of the founding fathers was the adoption of section 51(xxxv) of the new Constitution, giving the Commonwealth power over industrial disputes extending beyond any one state. This effectively put the major issue of social rights on a national scale – the relations between capital and labour – into the hands of a court. (Davidson, 1997: 56)

For Davidson, the labour power can be viewed as an industrial citizen's constitutional charter as it ensured that whenever the federal Parliament used this constitutional provision, it would be confined to utilizing independent machinery to settle labour disputes by conciliation and arbitration. Furthermore, to be valid enactments, the laws establishing courts and tribunals with respect to conciliation and arbitration had to focus upon the rights and obligations of employees and employers and their respective organizations. In other words,

the hallmarks of the labour power are independent machinery possessing broad powers of conciliation and arbitration for the benefit of employees, employers, trade unions and employer associations.

The focus of the corporations power is very different indeed. Let me illustrate this difference by examining the 2001 Federal Court of Australia decision of *Quickenden v O'Connor*.[38] In this case, the Federal Court held that the corporations' power applied to Universities incorporated under State statutes. Accordingly, they were able to validly enter into collective agreements with trade unions under federal labour law.[39] In the course of their joint reasons, Black and French examined the curial decisions on the reach and scope of the corporations power. Their Honours concluded that,

> . . . [A] law is a valid exercise of the power under s 51(xx) [the corporations power] if it confers rights or powers or imposes duties or liabilities peculiarly on such corporations or those who deal with them or engage in conduct effecting them in connection with those dealings or that conduct. It may be accepted that a law of general application which happens to apply to constitutional corporations among others is not a law with respect to such corporations for the purposes of s 51(xx).[40]

Put briefly, to be a valid law pursuant to the corporations' power, the law must relate to the rights, duties, conduct and obligations of corporations and to those persons or bodies who either deal with corporations, or who engage in conduct with corporations. Thus for a labour law to be validly enacted under the corporations' power, it must focus upon the rights and obligations of corporations and on the rights and obligations of those who deal with them such as their employees.

I can best explain the differing focuses of labour laws enacted in reliance upon the labour power and the corporations' power with the following example. Suppose that section 51 of the Australian Constitution contained a paragraph enabling the Australian Parliament to enact laws with respect to men. Suppose further that in reliance on this head of power the Parliament enacted laws enabling men to enter into or to dissolve marriages with women. Such laws could be upheld, I suggest, because they would relate to the rights, duties and obligations of men, and to the rights, duties and obligations of women who would engage in conduct with men in their marriages with men. In such a situation, women and men would cry out about the imbalance of such laws that treated women as little more than appendages of men. Similarly, I suggest that if the corporations' power is utilized as the primary head of power under which national labour laws are enacted, eventually we would perceive an imbalance in our labour laws. In time, our labour laws would become a sub-set of corporations' law and employees would be regarded as little more than actors in the economic enhancement of corporations. For our labour laws to pass the test of 'justice and fairness at work', they must focus equally upon the rights, duties and obligations of employees and of employers. This is why the Australian Constitution envisages that the primary heads of power to be utilized in enacting labour laws, family laws and corporations' laws will be the

labour power, the marriage, divorce and custody powers[41] and the corporations' power.

I conclude this article with a warning to the current Australian Government. In 1993, the Keating Australian Labor Party Government utilized the mantra of the external affairs power to create a national labour law system which would override significant aspects of the labour laws of the States most of which were governed by Liberal Party and National Party governments. Section 51(xxix) of the Australian Constitution enables the Australian Parliament to make laws with respect to 'external affairs', that is it may fashion laws to fulfil obligations in international instruments to which the Australian Government is a party (for details see Crock, 1984). As the centrepiece of its national approach the Parliament enacted a series of laws granting employees remedies for unfair and/or for unlawful terminations. By virtue of the external affairs power these termination laws possessed the capacity to apply to most employers and employees in Australia.[42] However, the Keating Government over-reached itself by utilizing an inappropriate international instrument to achieve this purpose. It relied upon the International Labour Organization's 1982 Termination of Employment Convention.[43] However, this Convention did not say one word about granting remedies for unfair dismissals. Rather, it was a convention designed to encourage employment retention by limiting the rights of undertakings to make employees redundant through plant closures and/or outsourcing of functions during times of economic downturns. This is why these unfair termination laws that were mainly based on this convention were a wholly unsuitable vehicle to deal with unfair terminations in the Australia of the 1990s. Instead of primarily focusing upon granting remedies for unfair terminations, these laws lessened the capacity of employers to terminate labour in appropriate circumstances (McCallum, 1998: 47–53). Although these termination laws were upheld by the High Court of Australia,[44] albeit with a few qualifications, the dissatisfaction with these unsuitable laws was, I suggest, a significant factor in the Keating Government's defeat in the 1996 federal election.

If the current federal Government believes that through utilizing the mantra of the corporations' power it is able to enact a set of national labour laws and ride roughshod over the States, it may end up learning a few unpalatable lessons. Not only may such laws be seen as inappropriate by Australia's industrial citizens, but in order to ensure a balance in our federal compact the High Court may be obliged to draw a line in the sand and limit the relentless advance of the corporations' power.

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Notes

1 This article originally appeared as the Kingsley Laffer Memorial Lecture Monday 11th April 2005, University of Sydney. I dedicate this lecture to my late friend, guide and mentor Mr Edward Keith Doery, 12th March 1927–28th February 2005. For more than 30 years, Keith Doery never wavered in his support of my developing academic career. By example, he taught me always to strive for excellence in my relationships with others, and in my labour law teaching and scholarship.

2 For earlier outstanding Kingsley Laffer lectures that have been published in the Journal of Industrial Relations, see Shaw (1997), Kirby (2002) and Lansbury (2004).

3 *Workplace Relations and Other Legislation (Amendment) Bill* 1996.

4 See *Workplace Relations Amendment (Agreement Validation) Bill* 2004; *Workplace Relations Amendment (Fair Dismissal Reform) Bill* 2004; *Workplace Relations Amendment (Right of Entry) Bill* 2004; *Workplace Relations Amendment (Small Business Employment Protection) Bill* 2004; *Building and Construction Industry Improvement Bill* 2005; *Workplace Relations Amendment (Better Bargaining) Bill* 2005; and *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill* 2005; and see also Andrews (2005).

5 *Commonwealth Conciliation and Arbitration Act* 1904 (Cth).

6 *Ex Parte H V McKay* (1907) 2 CAR 1.

7 *Safety Net Review – Wages – April 1997* (the *Living Wage Case*) (1997) 71 IR 1.

8 See, for example, *Safety Net Review – Wages – May 2004* (2004) 129 IR 389.

9 *Rural Workers Union v Mildura Branch of Australian Dried Fruits Association* (1912) 6 CAR 61.

10 *Equal Pay Case 1969* (1969) 127 CAR 1142.

11 *National Wage and Equal Pay Case* 1972 (1972) 147 CAR 172.

12 *Re Equal Remuneration Principle* (2000) 97 IR 177.

13 The Queensland and Tasmanian Commissions have also established Equal Remuneration principles.

14 *Re Crown Librarians Library Officers and Archivists Award Proceedings, Applications under the equal remuneration principle* (2002) 111 IR 48.

15 See, for example, *Graziers' Association of New South Wales v Australian Workers' Union* (1932) 31 CAR 710; and *Australian Workers' Union v Abbey* (1944) 53 CAR 212.

16 *Re Cattle Industry (Northern Territory) Award* (1966) 113 CAR 651.

17 *Workplace Relations Act* 1996 (Cth) section 89A.

18 *Maternity Leave Test Case* (1979) 218 CAR 121.

19 *Parental Leave Test Case* (1990) 36 IR 1.

20 *Casual Employees Parental Leave Test Case*, Australian Industrial Relations Commission, PR904631, 31 May 2001.

21 *Family Leave Test Case* (1994) 57 IR 2121.

22 *Personal-Carer's Leave Test Case Stage Two* (1995) 62 IR 48.

23 *Termination, Change and Redundancy Case* (1984) 8 IR 34, and see also *Termination, Change and Redundancy Supplementary Decision* (1985) 9 IR 115.

24 *Redundancy Case* (2004) 129 IR 155, and see also *Redundancy Case Supplementary Decision* (2004) 134 IR 57.

25 *National Wage Case* 26 June 1986 (1986) 301 CAR 611

26 See, for example, *Occupational Health and Safety Act* 2004 (Vic); and *Occupational Health and Safety Act* 2000 (NSW).

27 See, for example, *Sex Discrimination Act* 1984 (Cth); and *Anti-Discrimination Act* 1977 (NSW).

28 See, for example, *Workplace Relations Act* 1996 (Cth) Part VIA Division 3; and *Industrial Relations Act* 1996 (NSW) sections 83–90.

29 *Ex Parte H V McKay* (1907) 2 CAR 1.

30 *Workplace Relations Amendment (Small Business Protection) Bill* 2004.

31 *Redundancy Case* (2004) 129 IR 155, and see also *Redundancy Case Supplementary Decision* (2004) 134 IR 57.

32 *Workplace Relations Amendment (Fair Dismissal Reform) Bill* 2004.

33 For details of these exemptions see *Workplace Relations Act* 1996 (Cth) sections 170CBA and 170CE(5A)-(5B).

34 Mandatory pre-strike secret ballots and cooling off periods first surfaced in the Governments *Workplace Relations (More Jobs Better Pay) Amendment Bill* 1999. The *Building and Construction Industry Improvement Bill* 2005 contains these measures that are restricted to the construction industry. Thirty years ago, I examined the use of secret ballots in Australia: McCallum (1976).

35 *Workplace Relations Amendment (Termination of Employment) Bill* 2002.

36 *Workplace Relations Amendment (Termination of Employment) Bill (No 2)* 2002 which received its second reading on 6 November 2003.

37 The trade and commerce power is to be found in section 51(i) of the Australian *Constitution*.

38 *Quickenden v O'Connor and Ors* (2001) 109 FCR 243.

39 *Workplace Relations Act* 1996 (Cth) Part VIB Divisions 2 and 4.

40 (2001) 109 FCR 243, 257.

41 Section 51(xxi) gives the Australian Parliament power to enact laws with respect to 'Marriage'; while section 51(xxii) enables the Parliament to enact laws with respect to 'Divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants'.

42 See, *Industrial Relations Act* 1988 (Cth) Part VIA Division 3, now repealed.

43 *Termination of Employment Convention, International Labour Organisation Convention* 158, 1982.

44 *Victoria v Commonwealth of Australia* (1996) 187 CLR416.

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