



The University of Sydney

AUSTRALIAN CENTRE FOR INDUSTRIAL RELATIONS
RESEARCH AND TEACHING (ACIRRT)

**A NEW PROVINCE FOR LEGALISM:
LEGAL ISSUES AND THE DEREGULATION
OF INDUSTRIAL RELATIONS**

edited by Paul Ronfeldt and Ron McCallum



MONOGRAPH No. 9

A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations

Proceedings from a Conference
held in Sydney
April 30th 1993

**Organised by ACIRRT &
the Committee for Postgraduate Studies, Faculty of Law**
University of Sydney

ACIRRT Monograph No. 9

Published June 1993

by

Australian Centre for Industrial Relations Research and Teaching (ACIRRT)
University of Sydney
NSW 2006
Australia

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ISBN 0 86758 782 2

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Foreword

Justice P R A Gray

This is a conference about deregulation. At least that is what its title tells us. In truth, what we will be considering is regulation.

A system of industrial relations which requires that negotiations be conducted in a particular framework is a regulated system, whatever that framework may be. To leave employment to the common law of contracts and torts is to regulate it, just as surely as it is regulated by any statutory system.

The debate is clearly about the manner and the degree of regulation, not about whether there should be regulation at all.

I sometimes imagine travelling in time to be present at the constitutional conventions a century or so ago. Just suppose that we could use our hindsight to advise the parents of federation where they should not go wrong. If we were to have a voice in the debates in which s.51 (xxxv) was sewn together, no doubt there would be many anxious to advise that it should have been in a very different form. From our 1990's perspective, some would even advise that s.51(xxxv) should enable the federal parliament to pass laws with respect to "the deregulation of the labour market".

If this fantasy had been achieved, no doubt by now we should have 90 years of High Court authority, explaining to us just what is and what is not a law with respect to the deregulation of the labour market. Would our industrial constitutional law have been any less complex as a result? Would our lawyers have been any poorer?

This exercise in supposition illustrates that we are all affected by fashion. Just as deregulation of the labour market represents the prevailing school of thought in economics and politics today, so conciliation and arbitration had currency a hundred years ago. Indeed, an examination of the debates at the constitutional conventions would show that the enthusiasts for conciliation and arbitration prevailed against the advocates of the sanctity of contract. It was a new and exciting theory, which was seen by those who adopted it as having all the answers. Not only would it produce socially acceptable outcomes by way of benefits to employees, it would also eliminate the inconvenience and suffering associated with industrial action.

Of course, those advocates of conciliation and arbitration were wrong. The system did not have all the answers. It did not eliminate industrial action.

Conciliation and arbitration did, however, prove itself to be remarkably flexible in producing a range of outcomes over the last 90 years. I would not be able to list them all, but they include the basic wage, quarterly cost of living adjustments, margins for skill and the notion of comparative wage justice, the national wage, indexation and the era of the accords, passing through award restructuring to enterprise bargaining. It is interesting to note that these outcomes have generally been in accordance with the fashionable economic theories of their times. That conciliation and arbitration as a system has been elastic enough to accommodate those theories has been a remarkable achievement. It should not be thought that the achievement is limited to the production of wages outcomes. Awards contain a vast range of employment conditions, many tailored to the needs of particular industries or enterprises. The form and content of awards are limited only where the imagination is lacking. It has often surprised me that trade union officials who complain about the inadequacy of state workers' compensation legislation, or about the common law liability of unions for industrial action taken by their members, have not even attempted to rectify their grievances by appropriate award provisions.

The outcomes produced by conciliation and arbitration can be as rigid or as flexible, as centralised or as diffused as the participants in the system desire to make them. It is legitimate to wonder whether "deregulation of the labour market" would have been so accommodating.

Another interesting aspect of conciliation and arbitration is the way in which it has become a major part of the Australian psyche. State parliaments, without constitutional limitation on their legislative powers, have nonetheless chosen the conciliation and arbitration model as the central feature of their industrial relations systems. Even in recent times, when some states have claimed to break away from that mould, their legislation has retained some elements of it. There are even vestiges in the current Victorian legislation. It is significant that state parliaments, which could have legislated directly to establish wage levels and terms and conditions of employment, by and large have not done so.

There is dissatisfaction among some people with the outcomes which have been produced by the conciliation and arbitration system. They are considered not to be in accordance with the fashionable economic theory of the time, which is that wages and conditions of employment should vary from one enterprise to another, and even among employees within particular enterprises. This dissatisfaction with outcomes has prompted a search for new procedures, which would be expected to produce the desired outcomes. Constitutional limitations have led to a search for federal legislative powers which would sustain such procedures.

It seems fairly clear that the Commonwealth parliament can legislate with respect to all of the activities of corporations which fall within s.51(xx) of the constitution. It seems equally clear that the external affairs power will support legislation implementing international conventions to which Australia is a party. The decision of the High Court upholding the training guarantee levy suggests that *Barger's* case is no longer good law and that the taxation power might be used to impose special taxes on those who do not conform to some specified conditions.

Each of these constitutional heads of power tempts the federal parliament to legislate directly with respect to terms and conditions of employment, even if only as a so called "safety net". The possibility arises of wages and conditions of employment becoming political issues in elections. If this seems far-fetched, consider the legislation which exists with respect to universal superannuation. Consider also how political parties vie with each other to reduce income tax rates, in effect promising pay rises at the expense of revenue. The accords can also be seen as a method of winning votes by promising particular outcomes with respect to wages.

In the debate about the manner and degree of regulation of industrial relations, the distinction between procedures and outcomes should be borne in mind. We should question whether, in order to produce a particular outcome, it is necessary to make drastic changes to the procedure. We should bear in mind that fashions change. In economics and politics, there are even fewer truisms than in most other fields of study. A new procedure, like the old one, might prove not to have all of the answers after all.

Two great principles underlie our system of democracy and of justice. The first is that the wisdom of many people is to be preferred to the wisdom of any one person. The second is that people generally will tolerate an outcome which is distasteful to them if they have had a real opportunity to influence it. The fixing of wages and conditions of employment should not be the prerogative of any individual or interest group. The more minds that can be brought to bear on the subject, the better.

Whatever outcomes are to be achieved in industrial relations, the procedure by which they are to be achieved must be fair.

1. Introduction: The New Province for Legalism

Paul Ronfeldt

The papers published in this monograph were first presented to a conference organised as a forum to discuss various legal problems arising out of what some have described as the "deregulation" of Australian industrial relations. The concept of deregulating industrial relations has been used by the libertarian right to describe their policy of removing or severely restricting the role of arbitral tribunals in determining wages and conditions of work. However, as it has been previously observed, the current movement towards enterprise-level bargaining, in its various forms is more accurately described as the "reregulation" of Australia's industrial relations system rather than its deregulation. The transformation of the industrial relation system in this way actually involves the creation of a substantial number of new laws. The weight of regulation has remained the same or, as in some cases, has increased substantially.¹

The purpose of the conference was not to debate the political character of these new laws or to speculate about the labour market and industrial relations outcomes that might flow from them. Instead, the papers presented involved legal issues such as those of constitutional capacity, legislative interpretation and the interaction of legislation with the common law. Such questions have traditionally been seen as the province of lawyers. However, they should be considered important to any person who wishes to understand the implications of recent changes to our system of industrial relations. Legislation has been seen by Governments as a major "tool" to effect "better" industrial relations and, it follows, that an understanding of the nature of industrial law is required by those participating in or observing these changes.

1 Dabscheck B., "Jobsback: The Coalition's Plan to Regulate Industrial Relations", *Economic and Labour Relations Review*, Vol.4, No.1, June 1993, p.20; Buchanan J. and Callus R., "Efficiency and Equity At Work: The Need For Labour Market Regulation in Australia", ACIRRT Working Paper No.26, April 1993. As an illustration of how "deregulation" is associated with more law compare the lengthy and rather obscure certified agreements provisions of Division 3A of the current *Industrial Relations Act 1988* (Cth), with the relatively simple and brief provisions in ss.115-117 which this Division replaced; see below.

Before introducing the papers contained in this monograph, it is worth briefly surveying the types of legislative innovations that have occurred in recent times.

LABOUR LAW AND THE PUSH FOR LABOUR FLEXIBILITY

This monograph comes in the midst of an unprecedented revision of federal and state industrial laws. During the course of the 1980s a debate has raged within academe, government, the labour movement and employer organisations about the best means to regulate industrial relations within this country. This debate has involved an examination of the influence of arbitral tribunals and award regulation of employment on the national economy, on the organisation of work and the international competitiveness of Australian industry.

A staple of this debate has been the apparent imperative to encourage greater labour flexibility. It is argued that a firm operating within a competitive environment must be flexible. That is, the firm must be able to quickly adapt to changes in the business cycle, to technological changes, movements in consumer demand, and to keep pace with improvements in the cost structure of its competitors. A common assertion has been that enhanced labour flexibility is a necessary precondition for making Australian firms more "flexible" and thereby more internationally competitive. It is argued that firms must change the way that work is organised, they must change the way that they communicate with their workforce and, where appropriate, alter the conditions under which they employ people, to make their operations generally more adaptive to external change.

Without entering the flexibility debate or the more specific controversies concerning the link between business flexibility and labour flexibility or the deleterious social effects of labour flexibility,¹ it is apparent that calls for greater labour flexibility imposes great challenges to Australian industrial law. Many proponents of labour flexibility have questioned the role of industrial tribunals and the efficiency of prevailing employment rights created by awards and legislation. It is argued that the process of determining industrial disputes, particularly those concerning the payment of wages or the setting of standard hours of work, at a national, industry or occupational level does not allow firms to create their own flexible working arrangements. The standardisation of award terms across an industry or occupation is considered an anathema to enterprise flexibility. Firms, or in the language of the recent debate, "enterprises", must, as a matter of public policy, be encouraged to negotiate terms and conditions of employment at the "workplace" level. Decentralised bargaining of this kind, it is predicted, will result in work rules and employment conditions which better reflect the needs of employers and employees within each firm.

Proposals for enterprise bargaining have been associated with calls to amend or more radically transform the legislative basis for the conduct of industrial relations. Recent changes to the *Industrial Relations Act 1988* (Cth) and to the industrial relations laws of the States involve a range of legislative innovations with the

1 see especially, Pollert A., "Flexible Firm: Fixation or Fact?", *Work, Employment and Society*, 1988, 2(3), pp.281-317; Bray M. and Taylor V., *The Other Side of Flexibility: Unions and Marginal Workers in Australia*, 1991, ACIRRT Monograph No.3.

common goal of facilitating and encouraging a move to workplace bargaining. In consequence, these laws have also sought to transform (minimise) the role of industrial tribunals and the awards they administer.

In recent years, four distinct approaches have been followed to encourage the devolution of industrial relations to the workplace, to develop more extensive bargaining between employers and employees and, purportedly, to provide greater potential for flexible employment arrangements. The first of these approaches have developed within existing industrial laws as a result of the wages policies agreed between the ACTU and the Commonwealth Government and implemented by the federal and State industrial tribunals. The other three have involved changes to industrial laws by federal and State governments wishing to accelerate the movement to workplace bargaining and the concomitant diminution in the influence of industrial tribunals.

Managed Decentralism

The first approach emerged in 1987 with the introduction by the then Australian Conciliation and Arbitration Commission of the Restructuring and Efficiency Principle.² This principle introduced a movement away from centralised wage fixation which, excluding the 1981-82 decentralised wages round, had been the major determinant of wages increases since 1975. In place of a uniform national wage increase, the Commission created a two tiered wages structure. The first tier was made up of a uniform national increase of \$10 per week. In addition to this, unions and employers were allowed to negotiate up to a further 4 per cent increase in return for measures to "improve efficiency in both the public and private sectors".³ In its decision, the Australian Conciliation and Arbitration Commission suggested that such measures should include the removal of restrictive work and management practices, the introduction or extension of multi-skilling and broad-banding and the reduction of demarcation barriers. In 1988 the Commission, following a revue of bargaining under the Restructuring and Efficiency Principle instituted a revised set of conditions to guide labour market reforms. These conditions were termed the Structural Efficiency Principle. As with the Second Tier decision, the Commission made the receipt of part of the national wage increase contingent upon parties taking steps to restructure their awards and working arrangements. This new principle extended the objects of the 1987 decision to include:

- establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;
- eliminating impediments to multi-skilling and broadening the range of tasks which a worker may be required to perform;
- creating appropriate relativities between different categories of workers within the award and at the enterprise level;

2 Australian Conciliation and Arbitration Commission, *National Wage Case Decision*, March 1987, Print G6800.

3 *ibid.*, p.13.

- ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry;
- including properly fixed minimum rates for classifications in awards, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;
- up dating and/or rationalising the list of respondents to awards;
- addressing any cases where award provisions discriminate against sections of the work-force.⁴

Although neither the Second Tier nor the Award Restructuring principles required that negotiations be devolved to a workplace level, a great many of these industry-wide restructuring agreements involved negotiating the implementation of changes at a workplace level.⁵ The distinguishing feature of this approach, which has been described by McDonald and Rimmer as "managed decentralism" has been the maintenance of a role for industrial tribunals.⁶ That role has been twofold. It has involved the Commission acting in a prescriptive capacity, by setting ceilings for national increases, by arbitrating work value wage increase resulting from the revised classifications structure of "restructured awards" and by intervening in other cases where the Commission considered that the changes negotiated to awards were inconsistent with the objects of the Structural Efficiency Principle. In addition, the Commission's role has been facilitative of award restructuring, by intervening during bargaining impasses and by withholding award wage increases where the parties had failed to make sufficient progress during award restructuring negotiations. From a legal point of view, what is significant is that the change in direction of industrial regulation, the shift away from centralised wage fixation towards a nation wide initiative to restructure awards to facilitate increased flexibility was achieved without any change to the statutes governing industrial relations. This development illustrates that substantial procedural flexibility has always been available within the system of compulsory conciliation and arbitration. It also underscores the significant contribution that tribunals can provide by guiding and, in some cases, compelling unions and employers towards labour market reform.⁷

In October 1991, the Australian Industrial Relations Commission took a further step towards decentralism when it established the Enterprise Bargaining Principle.⁸ The decision came after much criticism of the Commission's earlier delaying of enterprise bargaining in its April 1991 decision.⁹ This decision was made amidst calls from the

4 Australian Industrial Relations Commission, National Wage Decision, August 1988, Print H4000, p.6.

5 Rimmer M. and Zappala J., "Labour Flexibility and the Second Tier", *Australian Bulletin of Labour*, vol.14, no.4, 1988; Deery S. and Plowman D., *Australian Industrial Relations*, 3rd. Ed., 1991, 437-432.

6 McDonald T. and Rimmer M. "Award Restructuring and Wages Policy, *Growth*, vol.37, 1989, CEDA, pp.111-34.

7 Stewart A, "Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation", (1992) 5 *AJLL*, pp. 101-134; Buchanan J. and Callus R., 1993, Op Cit, at 17.

8 AIRC, National Wage Case, 30 October 1991, Print K0300.

9 Most notably, the rejection of the AIRC's decision by the ACTU Special Unions Conference, in May 1991, see Davis E. M., "Throwing Down the Gauntlet: ACTU Special Unions Conference, May 1991", *The Economic and Labour Relations Review*, Vol.2, no.1, June 1991.

Government, the ACTU, and major employer groups to allow wage negotiations based on trade offs consistent with the Structural Efficiency Principle. The Commission provided that it would allow the parties to register certified agreements or consent awards, under Sections 115-117 or 112 respectively provided that they were made between an individual enterprise or public sector agency business unit and a single bargaining unit representing unions with members affected by the agreement.¹⁰

This decision represented a significant further move to a decentralised system of wage fixation. The new regulatory system allowed parties the "flexibility" to alter award-based terms and conditions and encouraged the formation of enterprise-specific bargaining units. Despite this, the ACTU and employer groups continued their pressure for more significant reforms. Amongst their objections was the Commission's discretion to refuse to certify an agreement if it was considered to be against the public interest and the requirement that agreements falling outside national wage case principles be approved by a full bench.

Certified Workplace Agreements

In July 1992, the Commonwealth responded to these criticisms by amending the *Industrial Relations Act* 1988 (Cth), to abolish sections 115-117 certified agreements and section 112 consent awards.¹¹ In their place, Division 3A was inserted into the principal Act.¹² The objects of this division were stated as "(a) to facilitate the making and certifying of agreements; and (b) to encourage their use in the prevention and settlement of industrial disputes."¹³ The new provisions, as with their predecessors in ss.115-117 allow parties to an industrial dispute to place the terms of their agreement in the form of a memorandum and then register that agreement with the Australian Industrial Relations Commission. The terms of this agreement then override any inconsistent award terms.

The major change involved with this new division, which came into effect on 23 July 1993, was to introduce specialised arrangements for the making, certification and variation of agreements covering a "single business", a part of a single business or a single place of work.¹⁴ Where such an agreement is negotiated between an employer and every union with members employed in that business, who are party to an award binding that employer, the Commission has been left with little discretion

10 AIRC, National Wage Case, 30 October 1991, Print K0300. pp.4-7.

11 *Industrial Relations Legislation Amendment Act* (No.1) 1992 (Cth)

12 *The Industrial Relations Legislation Amendment Act* (No.1) 1992 (Cth) also varied s.111(1)(b) of the principal Act to preserve Commission's power to deal with a dispute by creating a consent award.

13 *Industrial Relations Act* 1988 (Cth), s.134A(1). Interestingly, the certified agreements provisions that have recently been inserted into the Queensland *Industrial Relations Act* 1990 (Qld) (see below) set out their objects as "...to assist the making and certifying of agreements that will facilitate labour market reform by encouraging-(a) single bargaining units; and (b) workplace bargaining that is directed at increased productivity; and (c) continuous improvement in the workplace; and (d) the achievement in the workplace of - (i) best practice; and(ii) increased work satisfaction; and (iii) career opportunities [s.10.3A(1)]."

14 A "single business" is defined in s 134B(2) as a business carried on by a single employer, a business carried on by 2 or more employers as a joint venture, a single project or undertaking, an activity, body, association, office or other entity undertaken or established by the Commonwealth, a State or a Territory.

to refuse the certification of the agreement. The Division requires that the Commission "must" certify the agreement provided that certain conditions are satisfied:

1. That the agreement contains dispute settlement procedures;
2. That the agreement specifies a term of operation;
3. That the unions involved consulted with their members affected by the proposed agreement;
4. That the unions informed their members affected by the proposed agreement of their intention to apply for certification;
5. That the unions inform the commission of the outcomes of the consultations with their members and;
6. Most notably, that agreement must **not disadvantage** the employees who are covered by the agreement.¹⁵

The Division provides that an agreement should only be taken to have "disadvantaged" employees where it will result in the reduction of entitlements or protections that have been established under an award or a law of the Commonwealth, State or Territory **and** that such a reduction, taken in the context of the agreement as a whole, is "contrary to the public interest."¹⁶ Given that the stated objects of this new Division is to encourage the making of certified agreements and that the 1991 Enterprise Bargaining Principle expressly encouraged parties to make trade-offs that would enhance flexibility and productivity there will be many cases where a diminution of established employment rights are accepted as **not** disadvantaging employees. The only real opportunity the Commission has to review these agreements according to the public interest is where the Minister for Industrial Relations chooses to intervene in a matter. The Division provides for intervention by the Minister in the case of "single business" agreements for the first eighteen months of the Division's operation. The Minister may only intervene, and the Commission may only then refuse certification, if it is considered that certification of the agreement is likely to *seriously jeopardise* the public interest.

In the case of agreements which are not limited to a "single business" the Division does allow the Commission to refuse certification on the grounds that the agreement is contrary to the public interest. However, unlike the provisions of s.115 or s.112, an agreement which is inconsistent with national wage principles or any other matter which previously had to be handled by a Full Bench, need not be reviewed by a Full Bench prior to certification.¹⁷

15 *Industrial Relations Act 1988* (Cth), s.134E(1)

16 *Industrial Relations Act 1988* (Cth), s.134E(2)

17 ss.134A(3) and 134F(b). cf. s115(6) (now repealed). It is also notable that section 90 of the *Industrial Relations Act* which requires that the concept of public interest is to be defined with regard to the likely affects of any award or order by the Commission on the level of employment and inflation has been excluded from the operation of this Division 3A.

The result of the changes introduced under Division 3A has been to create a system of enterprise or "single-business" bargaining quite independent from influence of the federal tribunal. In pursuit of a more flexible system of industrial relations, the system of regulation has been altered to encourage workplace agreements and diminish the role of tribunals. By April 1993 over 800 agreements had been certified under the provisions of federal Act.

The Queensland and South Australia parliaments have also amended their industrial relations Acts to introduce certified agreements provisions equivalent to Division 3A. The amendments to the Queensland *Industrial Relations Act* 1990 (Qld) came into effect on December 7 1992, whilst South Australia's *Industrial Relations Act* (SA) 1972, became operative on February 1, 1993.¹⁸ Both sets of laws mirror the provisions of the federal Act. Hence, both the South Australian and Queensland provisions require agreements to be made between a trade union and an employer or a registered employers association¹⁹; a public interest test only applies to agreements involving more than a single business or place of work²⁰; both laws include a requirement that agreements "not disadvantage" employees²¹; and, each provides for ministerial intervention in the case of "single business" agreements for the first 18 months of the provisions operation.²²

Following the re-election of the Keating Government in March 1993, the Prime Minister announced his Government's intention to push the workplace bargaining system even further.²³ Under the new industrial relations "model" announced by the Prime Minister, we will have fewer arbitrated awards, with fewer clauses. These awards would serve only as a "safety-net" with the terms and conditions of work for most employees being determined by the provisions of workplace agreements. According to the Prime Minister, workplace agreements would develop from being "add-ons to awards, as they sometimes are today, to being full substitutes for awards."²⁴ The details of these plans have yet to be concluded. Under the terms of Accord Mk VII, finalised in February 1993, the Commonwealth Government has pledged to legislate using the external affairs power in the Commonwealth Constitution and international conventions to ensure award-based minimum rights in relation to:

- minimum award wages;
- equal pay for work of equal value by men and women;

18 *Industrial Relations Amendment Act* 1992 (Qld), introduced Part 10, Division 1A, ss.10.3A-10.3O into the principal Act; see *Industrial Relations Act* (SA) 1972, ss.113a-113l.

19 *Industrial Relations Act* 1990 (Qld), s.10.3C; *Industrial Relations Act* (SA) 1972, s.113a.

20 *Industrial Relations Act* 1990 (Qld), s.10.3F(b); *Industrial Relations Act* (SA) 1972, s.113d(5)(c)(ii).

21 *Industrial Relations Act* 1990 (Qld), s.10E(2) *Industrial Relations Act* (SA) 1972, s.113d(1), in both cases the concept "not disadvantage employees" is qualified at s.113d(2) in precisely the same terms as the s.134E(2) of the *Industrial Relations Act* 1988 (Cth), see above.

22 *Industrial Relations Act* 1990 (Qld), s.10.3D; *Industrial Relations Act* (SA) 1972, s.113c.

23 Hon P J Keating MP, Speech to the Institute of Directors' Luncheon, Melbourne, 21 April 1993.

24 *ibid.*, p.12.

- protection against unfair dismissals including the requirement for an employer to offer a valid reason for dismissal, severance pay and appeal to an impartial tribunal against unfair dismissal;
- unpaid maternity leave.²⁵

The Accord agreement also provides that the Government will investigate the use of other international conventions to add laws relating to annual leave, maternity leave and hours of work to the guaranteed safety net of employment conditions.

Enterprise Agreements

A third approach towards making the award system more "flexible" has been instituted in New South Wales under the *Industrial Relations Act* (NSW), 1991. Chapter 2, Part 3, Division 2 of this Act provides for the making and registration of enterprise agreements. Like the federal certified workplace agreements, this is a system of opting-out of the award system whereby parties can enter into and register agreements, the terms of which override the terms of any relevant award. However unlike the federal system, the New South Wales Industrial Relations Commission is given absolutely no opportunity to vet the terms of these agreements.²⁶ Instead the Act provides that the Industrial Registrar should register an agreement provided that two conditions are met. First, that the agreement satisfies the following conditions:

1. The terms of agreements include statutory minima relating to wages, hours and sick leave entitlements;²⁷
2. The agreements must contain dispute settlement procedures,²⁸ and
3. The Agreements must be in writing and specify the parties, the enterprise covered, the trades or occupations within that enterprise covered by the agreement and a term between 12 months and 3 years.²⁹

Second, that the Commissioner for Enterprise Agreements, an officer established under the new Act, contacted the parties to the agreement and ensured that they understand the effect of the enterprise agreement on wages and other conditions of employment.³⁰

25 ACTU, *Putting Jobs First: Accord Agreement 1993-1996*.

26 The Act does allow the Industrial Court of New South Wales to declare an agreement to be wholly or partly void where it finds it unfair, harsh or unconscionable or was entered into under duress: see *Industrial Relations Act 1991* (NSW), s.133.

27 *Industrial Relations Act 1991* (NSW), s.122: The minimum conditions of employment under an enterprise agreement are, (i) one weeks paid sick leave (ii) maximum of forty hours per week of ordinary time averaged over 52 weeks (iii) a rate of pay not less than the rate for ordinary hours of employment that would have been applicable under an award, former industrial agreement or other instrument. Persons covered by an enterprise agreement continue to be entitled to the benefits created under the *Annual Holidays Act 1944* (NSW) [four weeks paid leave per annum] and the *Long Service Leave Act 1955* (NSW) [three months paid long service leave every ten years of continuous service].

28 *Industrial Relations Act 1991* (NSW), s.121.

29 *Industrial Relations Act 1991* (NSW), s.121 & 124.

30 *Industrial Relations Act 1991* (NSW), s.127.

Apart from the removal of any role for the State Industrial Relations Commission, the most striking aspect of the 1991 Act is that it provides for enterprise agreements to be negotiated between employers and individual employees or (non-unionised) works committees as well as with trade unions. Agreements involving individuals and works committees must be approved by 65 per cent of the workers affected in a secret ballot.³¹ To date, 140 of these agreements have been registered.

The New South Wales Act also made substantial changes to the operation of the State award system. These changes, along with the creation of the enterprise bargaining provisions were based partially on the recommendations of the Green Paper authored by John Niland.³² The 1991 *Industrial Relations Act*, severely restricted the ability of parties to vary awards during their term. The Commission's power to intervene on its own initiative or on application by a party to an award is limited to the making of new awards or in dealing with what the Act describes as "new matters".³³ These restrictions are designed to institutionalise a distinction between "interest" and "rights" disputes. In consequence, the Act distinguishes between disputes about rights settled by an award or an enterprise agreement and those to do with rights which have not been previously determined. The limitations upon access to compulsory arbitration associated with this distinction has meant that parties to current awards have increasingly accepted the creation of enterprise agreements as the only means to formalise changes to wages and conditions of employment. As a result, these provisions and the State Government's interventions to ensure their recognition, have served as an incentive for employers and unions to use the State's enterprise bargaining provisions rather than award changes.

Recent changes to Tasmania's *Industrial Relations Act* 1984, introduced a scheme for enterprise agreements similar to New South Wales' provisions.³⁴ These amendments create Part IVA of the Act, which came into operation on March 1, 1993. The provisions provide for the making and registration of enterprise agreements between an employer and one or more unions, individual employees or an enterprise based works committee. The Act requires that where an agreement is made with individual employees, at least 60 per cent of the current employees in the class of employment covered by the agreement must be parties to the agreement. Similarly, where the agreement is negotiated with a works committee formed under the provisions of the Act, the agreement must be approved in a secret ballot by at least 60 per cent of workers employed in the classes of employment to which the agreement relates. Following the New South Wales model, Part IVA created the office of Enterprise Commissioner whose function is to ensure that enterprise agreements satisfy the Act's requirements regarding minimum conditions relating to wages, other conditions of employment and other formal requirements.³⁵ However,

31 *Industrial Relations Act* 1991 (NSW), ss.119, 132, 135-142.

32 Niland J., *Transforming Industrial Relations in New South Wales*, 1989.

33 *Industrial Relations Act* 1991 (NSW), ss.191, 201 & 202.

34 *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Act* 1992 (Tas).

35 *Industrial Relations Act* 1984 (Tas), s.61F: sets out the minimum rate of pay under an enterprise agreement as minimum award rate that would otherwise have applied to a particular class of employee and in relation to annual leave, sick leave and parental leave that minimum rate is the lowest amount that applies to "any award"; s.61E: agreements must specify parties to the agreement and the classes of employment to which they relate and include

as with Division 3A in the Commonwealth *Industrial Relations Act*, the Tasmanian Minister for Industrial Relations has the right to intervene to prevent the registration of an agreement by establishing that it would be against the public interest to do so.³⁶

Employment Agreements: Victoria's Employee Relations Act

In December 1992, the newly elected Kennett Government in Victoria introduced perhaps the most dramatic changes to industrial laws in Australia since the introduction of wages boards in that state in 1896.³⁷ The closest modern parallel to these changes is New Zealand's *Employment Contracts Act*, 1990.³⁸ The *Employment Relations Act* 1992 (Vic) abandoned the system of compulsory conciliation and arbitration that had operated under the *Industrial Relations Act* 1979 (Vic). With the commencement of the majority of the Act on 1 March 1993, all Victorian state awards expired. The Act provides that the terms of these expired awards continue in the form of agreements between individual employers and employees until varied by the creation of new employment agreements or an award.

The *Employment Contracts Act* 1992 (Vic) also abolished the Victorian Industrial Relations Commission and replaced it with the Employment Relations Commission. This new body can only exercise powers of arbitration where every employer and every employee affected by the resulting award consent to participate in the award process. As such, the nature and operation of awards under the *Employee Relations Act* are fundamentally different from the model of award regulation which has previously operated in Australian jurisdictions. Indeed, the term award in this context is somewhat of a misnomer, with these arrangements being closer to the notion of a certified agreement.³⁹

The *Employee Relations Act* has been designed to promote "employment agreements" as the preferred means of regulating employment relationships.⁴⁰ These agreements can be *individual agreements*, that is an agreement negotiated between an individual employer one of their employees or *collective agreements* negotiated between an employer or a group of employers and two or more of their employees. The Act provides that these agreements, as with awards, must include specified minimum standards relating to annual leave, sick leave, rates of pay and parental leave.⁴¹ The agreements must be in writing and, in the case of collective agreements must be registered with the Commission. However, unlike certified agreements and enterprise agreements under the federal and NSW Acts, registration does not make these agreements public. The Act does not require any form of inspection of these

grievance procedures; s.61O: agreements must specify a period not exceeding 5 years.

36 *Industrial Relations Act* 1984 (Tas), s.27(1) & 61J(1)(e). The Enterprise Commissioner can also refuse registration where he is satisfied that the agreement was entered into under duress.

37 Factories and Shops Act (Vic), 1896; see, K Hince, "Wages Boards in Victoria", *JIR*, vol.7, no.2, 1965.

38 see essays in M. Bray & N. Haworth, *Economic Restructuring & Industrial Relations in Australia & New Zealand: A Comparative Analysis*, ACIRRT Monograph No.8, 1993.

39 *ALLR*, vol.2, 10,152.

40 *ALLR*, vol.2, 10,151.

41 *Employee Relations Act* 1992 (Vic), ss.14(2), 25(4) & (5), Sch.1, Pt1.

agreements prior to registration.⁴²

It is apparent that the recent Victoria legislation represents the most radical approach to the "deregulation" of Australian industrial relations. Its introduction has been met with a strong response from the Victorian and Australian labour movement. Two State-wide stoppages on November 10, 1992 and March 1, 1993 and a national day of action, called by the ACTU, held on November 30 1992 have protested the Victorian Government's legislation. As Ron McCallum's paper explains, an immediate result of this unpopular legislation has been an exodus of workers formerly covered by State awards into the federal system. The Victorian Act is similar to the model proposed by the Coalition parties in the lead up to the last federal election.⁴³ The Coalition's *Jobsback* policy, involved the abolition of compulsory arbitration, the replacement of current federal awards with individual employment agreements and the continued operation of conciliation and arbitration only with the consent of all persons affected.

In the long term, the Victorian legislation as with the changes introduced into the NSW and federal systems in 1992 is certain to result in changes to important aspects of our system of industrial relations including wages relativities, the alteration of hours, the renegotiation of other conditions of employment and the functions and structure of industrial relations institutions. However, whether these dramatic changes to industrial law result in more significant changes to work organisation and improved economic performance than the reforms possible under previous industrial laws remains to be seen.

OVERVIEW OF THE MONOGRAPH

The papers contained in this monograph examine legal problems arising from the "deregulation" of Australian industrial relations. The issues discussed by the papers involve the role of the contract of employment, the legal prohibitions against industrial action, constitutional restrictions on changing industrial laws, the influence of international conventions on domestic labour law and, the parallels and divergences between current Australian developments and those in the labour law regimes of other countries. As such, the papers deal with those areas of Australian law, other than the new bargaining laws outlined in this introduction, that will impact upon the development of new forms of industrial relations regulation.

The monograph begins with a critique of the contract of employment by Adrian Brooks. Within our legal system, all paid employment involves contractual relations. As such, any discussion of the law regulating employment needs to recognize the influence of judge-made law relating to the operation of contracts generally and, more particularly, the rules developed by Anglo-Australian courts to deal with employment contracts. Adrian Brooks argues in Chapter 2 that the contract of employment is a relic of 19th Century English jurisprudence and ill-

42 See generally, Mitchell R, "Notes on the Employee Relations Australian Centre for Industrial Relations Research and Teaching 1992 (Vic)", Working Paper No.70, Department of Management and Industrial Relations, University of Melbourne.

43 *Jobsback! The Federal Coalition's Industrial Relations Policy*, October 1992.

sited as a basis for regulating modern employment relations. She contends that this fundamental aspect of the law relating to work needs to be recast to keep step with contemporary demands for cooperative workplace relations. Brooks' paper is followed by a comment by Michael Christie (Chapter 3) in which he defends the application of contract law to employment by describing how recent judicial innovations in the area of contract law, if applied to employment relations, would transform the contract of employment whilst retaining the law of contract as the foundation stone of employment law.

The next section of the monograph (Chapters 4, 5 and 6) contains three papers discussing the law relating to industrial action. As argued above, the deregulation of industrial relations has been associated in many respects with additional forms of intervention. An area of particular additional regulation has been that of industrial action. In Chapter 4, Greg McCarry provides a detailed and critical exposition of the laws proscribing various forms of industrial action in the federal *Industrial Relations Act* 1988, the New South Wales *Industrial Relations Act* 1991, the Queensland *Industrial Relations Act* 1990 and the Victorian *Employee Relations Act* 1992. As McCarry describes, much of this law seems inconsistent with the policy of providing a legal framework to promote workplace bargaining. This discussion is followed by papers by Alan Rowe and Jeff Shaw commenting on Greg McCarry's analysis. In Chapter 5, Alan Rowe describes the philosophy behind the provisions in the New South Wales *Industrial Relations Act* 1991 and discusses their operation since the Act commenced operation in March 1991. Jeff Shaw's paper (Chapter 6) refers to the disparate forms of common law and statutory law which exclude a meaningful right to take industrial action and provides a set of principles that could guide law reform in this area.

In Chapter 7 Ron McCallum discusses recent High Court decisions and legislative changes which underpin the growing dominance of federal industrial laws. McCallum stresses the significance of these developments in relation to the efforts of state based trade unions, particularly the Victorian unions, to avoid the impact of State "deregulatory" laws by transferring to the federal award system. In the longer term, these developments will ensure that the current and future federal Governments will be in a much stronger position than they have been historically to determine the direction of industrial relations regulation in Australia generally.

Andrew Stewart's paper (Chapter 8) follows this with an examination of the types of changes to the federal system of industrial law that are possible using the constitutional powers available to the Commonwealth Parliament. The conciliation and arbitration power, expressed in s.51(35) of the Commonwealth Constitution has served as the primary basis for federal industrial law since the creation of the *Conciliation and Arbitration Act* in 1904. The limitations inherent in this power have been instrumental in shaping the mode of labour market and industrial relations regulation pursued by federal governments since 1904. According to Stewart, the moves away from arbitration-based forms of regulation will need to involve reliance upon powers other than the conciliation and arbitration (or "industrial") power such as the corporations power, the external affairs power and the taxation power. Stewart's discussion illustrates the nature of the limitations associated with the use of these alternative powers.

In Chapter 9, Breen Creighton discusses the growing significance of international labour and human rights conventions to Australia's labour laws. The implementation of international conventions by Australia governments, particularly by the Commonwealth using its external affairs powers, is certain to become an important force in shaping Australian industrial laws. The current federal Government has already committed itself in Accord MkVII to using international conventions to guarantee award rights to minimum wages, equal pay, protection against unfair dismissal and unpaid parental leave. As well as discussing these developments, Creighton's paper discusses the prospects for such conventions becoming more widely used by governments, courts, and the industrial relations parties in this country.

The final paper (Chapter 10), by Richard Mitchell, sets recent developments in Australian industrial law in a comparative context. Mitchell traces the emergence of collectivist labour law in Australasia, Asia, North America and Western Europe. He argues that, like Australia, in recent years many of these legal and institutional systems have undergone a transformation in response to macroeconomic crises and the growing internationalisation of world trade. Mitchell argues that in continental Europe the emphasis has been on decentralising bargaining structures and legal changes designed to facilitate the introduction of more flexible working arrangements. Whereas in Britain, North America, New Zealand and in some areas, Australia, a further dimension to these changes has been added with the growing hostility to trade unionism. This hostility has been reflected in changes to industrial law imposing greater restrictions on trade union activity such as increased limitations on industrial action and the withdrawal of union recognition. The comparison of this trend with developments in Europe serves as a timely reminder to those who mistakenly posit the decollectivisation of the labour market as a necessary precondition for creating more economically efficient systems of labour law.

2. The Contract of Employment and Workplace Agreements

Adrian Brooks

THE IMPLICATIONS OF "WORKPLACE AGREEMENTS"

The title given to me for this paper could, at the least, bear one or other of two meanings: it could point to a discussion of how the various models of a decentralised system of industrial relations (the certified agreements model, the NSW model, the Kennett model, the *Jobsback* model, the New Zealand model) will or would cause problems in relation to the employment contracts of persons covered by workplace "agreements" of the various types. Or it could point to a discussion of how the theory that each employee of an enterprise works under an individual contract of employment could cause problems to the operation of enterprise-based, or workplace-based agreements, of whatever model. I believe it is more important to give the title the latter meaning.

That is not to say that there is no scope for a paper which adopts the first possible meaning of my title. It is undeniable that, in one sense, many of the models of a decentralised, workplace agreement-based system will cause problems in relation to some workers' individual contracts of employment. That will be the case where workers "agree" to a workplace agreement which restricts or depresses the conditions to which such workers were previously entitled through the importation into their contracts of the terms of awards. Where an employer achieves an agreement which involves a lower wage for particular work, or requires workers to work longer hours to earn the wage, the agreement "causes a problem" in relation to the workers' employment contracts, because it limits their previous contractual rights. There may also be some problem in assessing the degree to which the terms of agreements under some of the models are incorporated into the contracts of employment of the workers covered by the agreements. The failure of employers to achieve workplace agreements under some of the models may also "cause problems" in relation to the contracts of employment between such employers and their employees, in that it will freeze the terms of the contract at the level of the terms of the award in force when the model came into play. And, under some of the models, there may also be problems - where an employer fails to achieve a workplace

agreement - in determining what happens to matters which were previously terms of the employment contracts in that they were incorporated by reference to the terms of previous non-award agreements for over-award payments etc. Will the contractual force of those collective bargains be statutorily abrogated or not?

All of these matters will be *problems* for the workers concerned as regards their employment contracts, and their rights under those contracts. But - while not denying in any way the importance of such problems to the particular workers whose rights and entitlements are diminished - these are not problems which require an extended and integrated legal analysis. The legal issue involved is simple and straightforward; and it could be handled very simply by restoring the right or entitlement by the abolition of the legislation (where the model has been enacted) or by the rejection of the policy (where the model has not yet been incorporated in legislation). Whether one chooses to take such action depends simply on whether one believes workers' contractual rights should be subject to diminution or not. Admittedly, the proponents of some of the models of decentralisation have argued that those models will not result in the diminution of rights, but rather in greater freedom of choice in the interests of a more productive system. However, there is an abundance of evidence available that, however representative or unrepresentative of the norm they may be, agreements have been proposed - in Victoria, in New South Wales and in New Zealand - which *do* diminish the previous contractual rights of the workers concerned, which do lower the wages, increase the hours, and deny a variety of benefits - without *any* apparent contribution to freedom of choice or enhanced productivity.

Thus, the question remains: do we or do we not accept that a system which can produce such a result should be put in place or continue in place. Though the system producing the result involves law, in that it is created by legislation, and though the effect on the workers concerned involves law, in that the rights they can enforce at law have been altered, it is not a *legal* problem. It is a social and political problem.

The consideration involved in the second possible meaning of the title - the effect of the conceptualisation of work-relations in terms of individual employment contracts on the operation of a system of enterprise-based agreements - *is a legal problem*, because it involves an examination of the nature of employment contracts and of the way contracts of that nature shape workplace relationships. It is only by *legal analysis* that we can identify where the problem lies and how it can be ameliorated. In my view, it is *this* problem which presents the real challenge of the 'Nineties', and it is the solution of this problem which can make a genuine contribution to an increase in productivity in the fullest sense of that word, and therefore I propose to discuss the effect of the contract of employment on workplace agreements, rather than the reverse.

Adopting such an approach involves also the adoption of a more abstract and less partisan notion of what is indicated by "workplace agreements". I am not predominantly concerned here with the *details* of the various models of a decentralised system previously referred to, but rather with the concept of decentralisation itself. I am accepting, as I believe most people in the field have done, that it is appropriate in the context of the 1990s and beyond to provide for a

system of regulation that enables the particular circumstances of individual enterprises to be taken into account. I am accepting that there is no inherent error in facilitating a balancing of conditions and obligations where the result of the balance is genuinely in the interests of all concerned: the employer, the workers, and the public at large. I am accepting as generally incontrovertible the values of multi-skilling, broad-banding, of flattened hierarchies and so on. The features of the particular models designed or allegedly designed to produce such a system are not my main concern here. My main concern is whether such a system can be achieved in the context of the contract of employment as it exists today.

THE REGULATION OF EMPLOYMENT BY CONTRACT

It is difficult (or, more accurately, impossible) for me as an academic employment lawyer to understand the desire of the Coalition parties, at both State and Federal levels, to foster the predominant regulation of employment by individual contracts. The longer and more extensively I research in this area, the more blindingly obvious it becomes that the "employment contract" is an unwieldy and anachronistic construct, ill-adapted to regulate such a fluid relationship as that of employment, and certainly ill-adapted to contribute to increased flexibility in the organisation of work. At every stage - at the stage of "formation" of the contract, at the stage of establishment of the terms of the contract, at the stage of identification of breach of the contract, at the stage of termination of the contract, and at the stage of remedies for wrongful termination of the contract - retention of the contractual format causes difficulties and rigidities that can only be solved (and then only partially) by the use of legal fictions and implications.

Where a particular employer-employee relationship is covered by an award or certified agreement, those difficulties and rigidities can to some extent be bypassed. Though the orthodox interpretation is that such relationship is covered also by an individual employment contract, into which are imported terms of the awards or agreements, it is possible to ignore the contract for most purposes, and look merely to the award or agreement. But where a particular employer-employee relationship is not covered by an award or agreement, the parties must look solely to the contract for the regulation of their relationship.

Despite the obvious problems, lawyers find it inherently difficult to conceptualise the regulation of relationships - not merely the relationship of employment - other than in terms of contract. It could be said that our jurisprudence is fundamentally imbued with the philosophy of contract: so fundamentally imbued that we must make a genuine effort to see that such a philosophy is not part of natural law. In this respect, our jurisprudence is the creature of the *political* philosophy of the 17th to 19th centuries. That philosophy is not, however, inevitable and immutable. It was the result of its own social circumstances, or rather - of the philosophers' interpretation of the social circumstances of their time and of what was a just society. If we retain it, and retain the jurisprudence that reflects it, it should only be on the basis that *our* social circumstances are the same - on the basis that the philosophy is appropriate to the society of the 20th and 21st centuries, in that our vision of a just and properly ordered society is the same as that of the earlier

philosophers. I suggest that a contract-based philosophy and jurisprudence is no longer appropriate.

One of the fundamental flaws of that philosophy and jurisprudence is that their concept of contract is of a bargain between equals. When that concept is translated into today's ordinary world of human affairs, it will inevitably create anomalies because there is seldom an equality of bargaining power. That is particularly true of the area of employment. To adopt a method of regulation predicated on a theoretical equality where there is almost always an actual inequality, and frequently an actual gross inequality is to build error into the very framework of the regulation: put simply, employment contracts **cannot** "work" because as yet the conditions on which they are predicated do not exist.

PROBLEMS ASSOCIATED WITH THE FORMATION OF THE CONTRACT

The orthodoxy is that the employment relationship arises from the conclusion of an employment contract. The parties contract that one will employ the other, that the other will work for the one, and - having so contracted - they enter into an employment relationship. Obviously, the existence of an employment relationship involves an *agreement* between the parties, but there are difficulties in holding that agreement is a *contract*, with all the legal ramifications of that word.

We will all be familiar with the situation where a person who has *orally* engaged him/ or herself to work for an "employer" contends later that he or she "has no contract". The law says that there *is* a contract, and explains the divergence by arguing that, while the parties may not have understood all the niceties of legal theory, what they were intending to do was to establish what is in truth a contract, even though they might not have realised that. The law finds, objectively, an intention to create legal relations, and says that such intention involves a contract. "You intended to contract, even though you did not realise that is the name we give to what you were doing".

To argue against that interpretation is to strike at the fundamentals of contract law, but I would suggest that those "fundamentals" contain some even *more* fundamental **assumptions** that may not be supportable. It is true that the parties in such a situation *intended* to make some sort of *agreement*, and that - if questioned - they would have indicated that they intended that agreement to have some sort of *legal force*; but perhaps we go too far to say that they implicitly intended to contract, and thus did contract, with all the ramifications that the law attaches to contract.

The major problem of implying - indeed imposing - that intention to contract arises from the requirement of contract law that a contract is not concluded until all the terms needed to give it "business efficacy" - all the matters as to which the parties are to have legally enforceable rights and obligations - are settled. That is easy enough to cope with where the contract is with the butcher for a kilo of sausages; it is extremely problematic when the "contract" is for an ongoing and indefinite relationship of "service". Many, if not most, of the matters which will arise for

determination over the course of that relationship will not be considered at the alleged moment of contracting: many will not even be foreseeable at that moment. The law copes with that problem by a two-stage process; it implies a large number of terms as intended by the parties at the time of contracting, and it construes subsequent negotiation as to matters arising in the course of the relationship as variations of the original contract.

But, while the law may thus be able to postulate a process which fits within its rules as to contract, the process is a fictional, rigid and cumbersome method of handling the fluidities of the actual relationship. Moreover, the process postulated scarcely fits within contract rules without further fictions: for example, the rules of contract require that a variation of a contract must itself be supported by consideration, that a variation involving the promise of an extra benefit to one party must be "bought" by that party promising an extra benefit (or assuming an extra detriment) to the other. Many of the matters negotiated during the course of an employment relationship do not truthfully involve supporting consideration. What is the consideration when an employee is given an increased salary for performing the same job?

PROBLEMS ASSOCIATED WITH ESTABLISHMENT OF THE TERMS OF THE CONTRACT

It is not merely in the fictions associated with the implication of terms and their variation that there are problems. There are also anomalies in the content of the terms implied. Since many alleged employment contracts are formed on the basis of a bare minimum of express terms, it is in the terms that are implied that we find the law's concept of the nature and content of the contract and the relationship. When we examine the terms that will be implied, we find they establish a relationship the borders of which are inappropriate to the workplace of the late 20th century. They establish a "master-servant" relationship: the law holds that this is merely another name for an employment relationship, and it *is* another name for the *version* of the employment relationship created by an employment contract. I suggest, however, that a master-servant relationship is not the same thing as the work relationship into which employees of today would intend to enter, and that it is not an appropriate relationship for the realities of the present.

Thus the only obligations which will be imposed on the employer, in the absence of further express agreement, are: to pay a reasonable remuneration (and, in the case of remuneration based on piece-rates or commission, to give sufficient work to enable a reasonable amount of remuneration to be earned); to provide the work contracted for where the employment is in the entertainment area in which future employment depends on the employee maintaining and enhancing his or her reputation in the present employment or where the work contracted for involves an office entitling the employee to privileges and/or powers in respect of that office in addition to salary; to ensure that reasonable care is taken to avoid exposing the employee to unnecessary risk of injury or harm to health; to reimburse the employee for expenses incurred on the employer's behalf or for loss suffered in carrying out the tasks of the employment; and to terminate the contract lawfully - that is, in the absence of a

repudiatory breach by the employee, at the expiration of a fixed term or on the giving of proper notice.

There is no generally implied obligation on an employer to give an employee an opportunity to maintain and enhance his or her skills or to provide a reasonable career structure, no generally implied obligation that an employer should act with consideration to the employee, no generally implied obligation that notice of termination of the employment should be given only where to do so is not harsh, unfair or unreasonable. The rights of the employee involve no "added value" from the relationship; the employee's rights are merely to be protected from loss caused by the employment: loss caused by not receiving payment for the service already rendered, loss caused by an interference to the employee's bodily health, loss caused by a payment by the employee on the employer's behalf, loss caused by a premature termination of the employment.

The obligations which, in the absence of express agreement to the contrary, will be imposed on the employee are to perform well and faithfully the work contractually agreed; to act in the employer's best interests: to obey all lawful orders and to obey them "reasonably" in accordance with the employer's best interests, not to misconduct him/ or herself, not to misuse or disclose the employer's confidential information, not to take any pecuniary profit from third parties for the service rendered to the employer, to hold inventions made by the employee in trust for the employer, to perform the work with reasonable care and skill, and to terminate the contract lawfully - that is, in the absence of a repudiatory breach by the employer, at the expiration of a fixed term or on the giving of proper notice.

These obligations *do* give an employer rights to "added value" from the relationship. The employee's obligation is essentially one of *service*, rather than of performance of an agreed task. The employee must, for the duration of the relationship, provide his or her service, as and when lawfully ordered, for the furtherance of the employer's interests. The essentiality of "service" can be seen in the fact that the contract does not (except in the case of reputation and publicity, privileges and powers) require the employer to give the employee any work to do - "Provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out" - but the contract requires the employee to do whatever the employer lawfully orders, in furtherance of the employer's interests and not the employee's own. It is a contract for the sale, for a wage, of the employee's labour power; not a contract for the remuneration of the employee for the performance of a task.

Since one's labour power is an essential and inherent part of oneself, the contract is one whereby the employer *purchases the employee* for a period (fixed or indefinite). Of course, the courts are quick to draw a distinction between service and servitude. I suggest, however, that such distinction is semantic only. *Servitude* is the basic and underlying feature of the relationship; it may be "voluntary servitude" in that the employee has, on the court's interpretation at least, freely entered into it, but it is servitude nonetheless. Moreover, the employee has no rights to the continuation of the relationship, servile though it may be. He or she cannot protect him/ or herself against an abrupt termination of the benefits for which he or she has sold him/ or herself. The rules as to notice merely impose a delay, usually a short delay, on the termination. The employer may terminate on notice whenever the employer

perceives termination to be in his or her interests, however contrary to the interests of the employee it may be.

PROBLEMS ASSOCIATED WITH REMEDIES FOR BREACH

The inadequacy of the remedies available when employment is regulated on the basis of contract involve a hypocritical denial of the servile character of the employment contract. The established approach, only marginally broken down in recent years, is that - since the employment relationship created by the contract is a personal relationship, remedies involving a forced continuation of the relationship when one or other party seeks wrongfully to bring that relationship to an end are inappropriate: parties should not be forced to remain in a personal relationship which is no longer palatable to them, for to so force them would be to make the relationship one of servitude.

But if the incidents imposed on the employee while the relationship is ongoing are servile, why should the employee be denied the opportunity of the limited rights deriving from those incidents on the grounds that to enforce the rights would be servitude? The law would answer by saying that it would clearly be unacceptable servitude to force an employee to remain in the service of an employer when that service was no longer voluntary, and that therefore, as a necessary corollary, one cannot force the employer to continue to keep in his or her service an employee with whom he or she no longer wishes a relationship. I would deny that the refusal of specific remedies to employees is a necessary corollary to a refusal of such remedies to employers. It only *appears* to be so if we insist on seeing the matter as inherently one of contract, where the rights and remedies of one party must be balanced by the rights and remedies of another.

The recent development whereby courts have acknowledged that, in theory, specific remedies are available to employees, though in practice the situation may not be appropriate for such remedies, while giving a fairer result in *some* cases, involves further problems and inconsistencies. For a start, the cases putting forward this view have *not* suggested that employers should have access to remedies forcing unwilling employees to remain in their service; this acknowledges my earlier point that the refusal of such a remedy to employees is not a necessary corollary of its refusal to employers. Moreover, the matters which will make a theoretically available remedy inappropriate in a given situation reinforce the essentiality to the employment contract of the concept of "service" and therefore - on my analysis - of servitude.

Briefly, an order for specific performance or an injunction against wrongful termination will only be appropriate where the employee has not accepted the employer's breach of contract as putting an end to the contract and relationship, and only where the employee continues ready, willing and able to carry out the contract. Where a wrongfully dismissed employee looks for alternative employment, that will be frequently, indeed almost invariably, interpreted as an acceptance of the breach by the employer as terminating the contract. And if the employee finds and takes up

alternative employment, that will be interpreted as making the employee no longer ready, willing and able to continue the contract.

Judges have acknowledged that the need to earn money on which to live will usually leave an employee with no option, however much the employee would prefer to continue in the original employment, but to seek alternative employment, which - on the judges' interpretation - involves the employee passing up the opportunity to seek to enforce the original contract. The reason that the seeking and accepting of alternative employment will involve acceptance of the breach putting an end to the contract, and the reason an employee who seeks and accepts alternative employment is held not to be ready, willing and able to carry out the contract, is that the employee, in so doing, is no longer making available to the employer the "service", the *availability* to serve as and when required, that is the core of the employment contract. This is exemplified by the passages which argue that an employee can keep the contract on foot by continually going to the place of employment and asserting his or her readiness and willingness to serve!

It would seem to be obvious that there are inherent difficulties in creating a system based on flexible and co-operative arrangements at workplace level if the relations of the persons involved in those arrangements are ultimately regulated by contracts of which the essence is servitude. Our task, then, is devise a method of regulation of work relationships which eliminates the servile incidents of the employment contract.

REMOVING SERVITUDE FROM THE EMPLOYMENT RELATIONSHIP

I acknowledge that I am not the first commentator to criticise the inappropriate nature of the employment contract, nor is this the first time that I have been one of its critics. Such criticism can be found as far back as the 1960s. Much of that criticism suggested the replacement of the contract-based employment relationship with a relationship based on status: whereby the law would recognise rights inhering in the status of employee independent of contractual agreement, implied or express. It was suggested that it was time to reverse the trend posited by Sir Henry Maine: that the movement of progressive societies has been a movement from Status to Contract. Kahn-Freund attacked the recommendation of such reversal, on the grounds that it involved a concept of "status" fundamentally different from that to which Sir Henry Maine referred. That point appears to be true, but is also - I would suggest - *irrelevant*. If some version of status is now an appropriate mechanism for the establishment of the rights of workers, it matters little that it is not the same version as applied in feudal times. What counts is that it be the *right* version for modern times.

I have noted earlier the difficulty lawyers have in freeing their thinking from underlying notions of contract, and there is a danger that what we do when we attempt to reformulate employment law is merely to recreate the contract-based law under another name - that we put old wine into new bottles, as Pat Mills once accused me of having done. But neither the fact that the suggestions relating to status have been around for thirty years, nor the difficulties in extricating ourselves

from the straitjacket of contract, should discourage us from undertaking the task of reformulation. It is of *greater* importance to the industrial situation of the *Nineties* than it was to the situation of the *Sixties*, and it therefore deserves even more attention than it received then.

I am not claiming to have a fully-formulated solution to the task of creating a law of work appropriate to the 21st century. I am asserting that we **need** one; that a law based on the employment contract as we know it is totally inappropriate and will substantially thwart any efforts to reform industrial relations and to achieve genuine increases in productivity through the introduction of flexible and co-operative workplace arrangements. I am suggesting that we should pursue the notion of turning away, as far as possible, from the concept of a contractual basis for employment law; that, while it may be inevitable that the actual agreement to work and to pay be incorporated in contractual form, the incidents of the relationship be established by some other means, by some legally entrenched charter (whether or not we use the contentious term "status"); and, most importantly, that the incidents of that relationship, however established, be freed of any servile incidents.

Ultimately this means discarding the idea of "the boss" and "his/her worker", and the acceptance that the boss orders and the worker complies. If workplace agreements are to be *truly* effective, it must be on the basis that those who are parties to them are a team, that they are a co-operative endeavour in which all involved seek together to achieve genuinely *common* goals, in a context of genuine **equality**. To argue for this is not merely to embrace a "warm-inner-glow" post-Fordism. It is, rather, to postulate the need to move to **post-capitalism**. There is a delicious irony in such a postulation: at a time which has seen the apparent demise of the socialist philosophy in Eastern Europe and has seen moves to the establishment of "free-market" economics in China, my argument is that Karl Marx was right. The need to pass beyond traditional capitalist labour relations arises as an inherent imperative of capitalist development itself. The economic imperatives of capitalism demand that capitalism itself must create the means for its own transmutation!

3. The Contract of Employment and Workplace Agreements: A Commentary

Michael Christie

Commentary on Associate Professor Adrian Brooks' Paper "The Contract of Employment and Workplace Agreements"

Whilst I appreciate the main thrust of Professor Brooks' paper, my views would diverge from hers in relation to the usefulness of the contract, as an institution, in employment relations. In my opinion, the law of contract will continue to have a fundamental and constructive role in the regulation of employment relations.

Much of the criticism of the role of the law of contract in employment relationships arises from a rejection of the 19th Century model of contract law. Labour lawyers sometimes speak of the law of contract as if the contract as understood in the 19th Century is the same as it is today. And yet, in significant respects the modern law of contract would be almost unrecognisable to the great 19th Century judges who contributed so much to the development of the common law. This is attested to by Professor Atiyah's classic work, *The Rise and Fall of Freedom of Contract*¹. It has been noted by none other than the Chief Justice of Australia - in referring to Atiyah's "monumental volume" - that "the topic has excited little interest in Australia".² It ought to excite great interest amongst labour lawyers.

Sir Otto Kahn-Freund, perhaps the greatest labour lawyer of this century, once described the individual contract of employment as "the cornerstone of the edifice" of labour law in Britain.³ Such a description is probably just as accurate in the Australian context and whatever shortcomings the law of contract may have, its merits should not be overlooked. The contract, with its implied terms, provides flexibility to a degree which the award system and statutory regulation can never

1 Clarendon Press, Oxford, 1979.

2 Sir Anthony Mason & S. Gageler, "The Contract", in Finn (Ed.) *Essays in Contract*, Law Book Co., 1987, p.3.

3 See B. Creighton, B. Ford and R. Mitchell, *Labour Law*, 2nd Ed. 1993, p.17

provide. Awards, legislation or work place agreements - no matter how detailed or complex - can never exhaustively cover every conceivable contingency in the employment relationship. I predict therefore that the contract will continue to have an active role in the regulation of employment relationships, although of course the law of contract will continue to evolve.

I said at the commencement of this commentary that in significant respects the modern law of contract is a very different species to its nineteenth century counterpart. Amongst many examples of change, there are two which highlight the changing nature of the law of contract and which provide significant avenues for development in the labour law context. The first relates to the concept of good faith. *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 is of particular interest in this respect. It is a decision of the Court of Appeal of New South Wales. It is not an employment case. But it is a decision on the law of contract which contains very significant observations on the way in which the law of contract as a whole is developing. The judgment of Priestley JA contains an exhaustive analysis of implied contractual terms. Of particular interest is Priestley JA's discussion of the concept of "good faith" in contractual relations (contrast the statutory obligation to act in "good faith" in the course of negotiations pursuant to s.352 *Industrial Relations Act* (NSW) 1991. Priestley JA discussed the concept of "reasonableness" in the context of implied terms. He continued (at 262):

The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many of the civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contracts. Although this implication has not yet been accepted to the same extent in Australia as part of judge-made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised implicit in many of the orthodox techniques of solving contractual disputes, will gain recognition in the same way as it has in Europe and in the United States."

After noting (at 268) that "since 1900 there has been an ever-growing number of statutes permitting Courts to remould the particular kinds of contract in the interests of fairness", including industrial laws, he concluded:

Although each of the statutes dealt with carefully defined types of contract, in the totality they covered contractual situations affecting a great many people, so that, to repeat something I have said elsewhere, "a very large area of everyday contract law is now directly affected by statutory unconscionability provisions carrying with them broad remedies". As the words used in the sequence of statutes show, the ideas of unconscionability, unfairness and lack of good faith have a great deal in common. The result is that people generally, including judges and other lawyers, from all strands of the community, have grown used to the Courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view, this is in these days the expected standard, and anything less is contrary to the prevailing community expectations."

The implied term has played a significant role in the contract of employment. Indeed, the employee's implied contractual duty of good faith and fidelity is of long standing. Finn, citing *Lamb v Evans* [1893] 1 Ch. 218 at 229 and *Robb v Green* [1895] 2 QB 315 at 317, 319-320, has observed that "its modern source seems to be one of those many judgments of Bowen LJ where his Lordship attempts to express equitable obligations in terms of implied contracts."¹ It may be that the use of the implied term in this way is not far removed from the obligations arising from "status" referred to in Professor Brooks' paper. A decision of the Full Court of the Supreme Court of Victoria, *SMK Cabinets v Hili Modern Electrics Pty Ltd.* [1984] VR 391, is of interest in this respect. Again, it is not an employment case, but nonetheless it is of interest to the employment lawyer. The case concerned the "doctrine of prevention" in contract law (whose characteristics are not important for the present discussion.) Brooking J. (with whom Starke and Kaye LL agreed) said (at 395):

"One possible view is that the doctrine of prevention in cases like the present is a rule of law (which will, however, give way to the contrary intention of the parties) based on some such broad notion of justice as that a man should not be allowed to recover damages for what he himself has caused ... Another possible view is that, while the basis of prevention is the theory of the implied term, the term is one which is implied by the Court as a matter of fairness or policy or in consequence of a rule of law, the court not being concerned with the intention of the parties except to the extent that the term may be excluded by an expressed contrary intention: see the classification suggested by Glanville Williams, "Language and the Law" (1945) 61 LQR 71, at p.401 and adopted in Halsbury, 4th Ed., Vol. 9, para 351. If this be the correct view, the distinction between prevention as a rule of law and prevention as a matter of implied term is largely of academic interest. For the law will state the doctrine in the same way whether it achieves the desired result directly, by the operation of a principle, or indirectly, by the introduction of a fictitious term. Glanville Williams, *op cit.*, at p.404 suggests that rules like the one now in question are in truth rules of law which apply in the absence of an expression of contrary intent, and that whether we choose to call them implied terms or not is simply a matter of terminology. This is an attractive view, although even if the matter is one of terminology it may have consequences in relation to pleading ..."

This suggests that not only is the implied term a flexible institution, but that it can be the vehicle for achieving many of the goals which Professor Brooks finds desirable.

The second area which warrants some discussion is the significant development which has taken place in the law of duress in recent years. In *Crescendo Management Pty Ltd. v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45-46 McHugh JA (with whom Samuels and Mahoney JJA agreed) restated the law of duress in a manner which may provide significant opportunities for employees. McHugh JA rejected the "overbearing of the will theory of duress" and applied a much more liberal test. He held:

1 Finn, *Fiduciary Obligations*, 1977, p.267.

"The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or *amounts to unconscionable conduct*. But the categories are not closed." (Emphasis added)

It will be interesting to see how (if at all) this broader doctrine of duress will apply in the employment context.

The reference to "unconscionable conduct" in McHugh JA's judgment is of considerable interest. (As Priestley JA noted in *Renard* (above) unconscionability has much in common with the concept of "good faith"). Its importance extends beyond the context of duress. Though judges do not have a "judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate"², it is hard to exaggerate the impact that the modern concept of "unconscionability" has had on the law of contract. The New South Wales Solicitor-General, Keith Mason QC, succinctly described its potential:³

"[R]ecent history since *Legione v Hateley* (1983) 152 CLR 406 and *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 shows that the idea of unconscionability is capable of having massive impact upon what were hitherto regarded as fixed rules in commercial, trust and contract law. It is now clearly established in Australian law that the very existence of one's "legal rights" (for example, to walk away from negotiations that do not constitute a contract in law, or to duly terminate a contract for breach) can in an appropriate case be disregarded if the exercise of those rights was unconscionable."

In conclusion therefore, modern developments in the law of contract are of considerable interest to employment lawyers and open up interesting possibilities for changes in the employment relationship. The most exciting opportunities are provided by the contractual doctrine of "good faith". Perhaps the Courts, relying on this doctrine, will develop fiduciary-type obligations of employers to employees, not dissimilar to the employee's implied contractual duty of fidelity.

2 *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256, per Deane J.).

3 "Restitution in Australia", in Finn (Ed.), *Essays on Restitution*, Law Book Co., 1990, p.37.

4. The Right To Take Industrial Action

Greg McCarry

INTRODUCTION

In one sense, this topic does not sit easily with the theme of this conference, for whatever else may have been deregulated in Australian Industrial Relations, the right to take industrial action has not. In fact, even to a lawyer it is not seriously inaccurate to say that the right to take industrial action has been and continues to be so heavily regulated in this country that it does not exist as a legal right, save perhaps in some narrow exceptional situations¹. This so called right has been and remains a political aspiration or slogan, rather than an entitlement. It has not been deregulated at all.

But in another sense, this makes it all the more important that the topic be on the conference agenda. The reasons why we have such an array of legal sanctions against industrial action are doubtless complex, but one significant reason in the Australian context must be the clear policies behind the legislation by which were established systems of tribunals to regulate industrial relations. One important branch of the policy was to eliminate industrial action by doing away with the need for it. It was thought that by providing an alternative and, if need be, compulsory method of resolving disputes, the justification for any right to take industrial action had been banished. So it seemed to follow that any right to take industrial action

1 The many surveys and analyses of the law governing industrial action in Australia include: B Creighton, 'Law and the Control of Industrial Conflict', in *Power, Conflict and Control in Australian Trade Unions*, ed K Cole, Pelican Books, Victoria, 1982, Chapter 6, p 121; B Creighton and A Stewart, *Labour Law an Introduction*, Federation Press, Sydney, 1990, Chapter 9, p 216; R McCallum, M Pittard and G F Smith, *Australian Labour Law Cases and Materials*, Butterworths, Melbourne, 1990, Part 4, p 497; K Ewing, 'The Right to Strike in Australia', (1989) 2 *Aust Jnl of Labour Law* 18; R Hamilton 'Strikes and the Australian Industrial Relations Commission', (1991) 33 *Jnl Ind Rlns* 340; G McCarry, 'Amicable Agreements, Equitable Awards and Industrial Disorder' (1991) 13:3 *Sydney Law Rev.* 299 - 334, being reprinted from eds C Phegan & P Loughlan, *The Sydney Centenary Essays in Law*, Law Book Coy, Sydney, 1991, p 61.

which might formerly have existed could properly be legislated out of existence, or at least greatly confined². As is well known, the system did not achieve this policy objective, although with more felicitous drafting and administration it might well have done so. But that is another story³.

The tribunals have now become unfashionable; compulsory resort to them even more so. Their role seems to be changing. As the tribunals which were thought to justify restrictions on industrial action are buffeted by the waves of deregulation, we need to ask whether the restrictions themselves should be revisited. Perhaps they require deregulation in the form of re-casting or even elimination.

A NEW PROVINCE

Since the theme of the conference is a new province for legalism, this paper will concentrate on recent changes in the law governing industrial action. These changes are contained, for the most part, in the statutes which set out the framework for industrial relations or, nowadays, employee relations. It is this legislation which is feared or welcomed as the harbinger of a new legalism.

But, of course, industrial action is regulated by other laws as well. There are essential services acts, crimes acts, the Trade Practices Act. And 'submerged beneath Commonwealth and State compulsory arbitration machinery lies the largely unreconstructed common law,...'⁴. It too has much to say on industrial action, but, characteristically, changes incrementally rather than radically. I shall make only passing reference to these sources where they bear on the matters with which I am primarily concerned.

THE MEANING OF INDUSTRIAL ACTION

The intuitive popular meaning given to the terms 'industrial action' and 'strike' will not necessarily coincide with what the terms mean in law. Nor will they be the same as definitions used for the purpose of work in other academic fields. Not that the law's understanding of the concepts can lay claim to any great precision; far from it. But since we are mainly concerned in this conference with legal issues, it is necessary to form some appreciation of what industrial action includes as a matter of law and what it does not.

'Industrial action' has been widely defined in Australian legislation and generally covers a good deal more than the strike which is the best known form of industrial action. But we should start with the strike.

2 McKernan v Fraser (1931) 46 CLR 343 at 373 per Evatt J; Stemp v Australian Glass Manufacturers Co Ltd (1917) 23 CLR 226 at 237 - 238 per Isaacs J.

3 See G McCarry, 'Amicable Agreements, Equitable Awards and Industrial Disorder' (1991) 13:3 Sydney Law Rev. 299 - 334, being reprinted from eds C Phegan & P Loughlan, *The Sydney Centenary Essays in Law*, Law Book Coy, Sydney, 1991, p 61.

4 Lord Wedderburn, *The Worker and the Law*, Penguin Books, 3rd edn, 1986, p 851

Strike

As Sykes has pointed out, there is little doubt about the general notion of a strike. It is commonly regarded as a concerted refusal to work with the object of gaining some concession or advantage from another, normally the employer⁵. To which should be added that it is intended to be temporary⁶. But, beyond those generalities, the meaning of even this most fundamental form of industrial action is not clear in law⁷.

Too succinctly, Higgins J said that "The ordinary meaning of strike is confined to ceasing work - "downing tools"⁸. This cannot be entirely correct, for it is clear that downing tools in some situations will not be a strike, for example 'in case of danger or in fear of disease or pestilence or for other good and lawful reasons.'⁹ Moreover, Whiteman, just cited, held that a refusal to accept work under a new engagement, as distinct from a cessation of existing work, could amount to a strike in some circumstances even within the ordinary common law meaning of 'strike', let alone in the extended meaning then¹⁰ (and still)¹¹ given to it by New South Wales legislation. This somewhat startling proposition needs to be qualified, at least in the case of penal statutes, in the light of what Dixon J later said in *McKernan v Fraser*. His Honour said that in a penal statute the word 'strike' 'ought not to receive an interpretation wide enough to include the concerted refusal of men to enter into a new employment of long duration, even though that employment is offered according to a regular customary practice by which labour is habitually obtained.'¹²

Conversely, 'men may be actively using their tools and working, yet there may be a strike on.'¹³ A limitation or ban on certain work falling short of a complete cessation has been held to be a strike in New South Wales in both the ordinary and extended statutory senses,¹⁴ although the correctness of this decision has since been doubted,¹⁵ in part because the attention of the Commission does not seem to have been drawn to *McKernan v Fraser*.¹⁶ Sykes, writing before Kidd, argued that the New South Wales decisions may not be correct in principle.¹⁷

There is no need to rummage through all the judicial pronouncements on what does or does not constitute a strike but one should not depart from this issue without noting what was said by Stephenson LJ (Kerr LJ agreeing) in *Coates v Modern Methods and Materials*. His Lordship said:¹⁸

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- 5 E I Sykes, *Strike Law in Australia*, Law Book Coy, 2nd edn, 1982, p 53.
 6 W B Creighton, W J Ford and R J Mitchell *Labour Law: Text and Materials* Law Book Coy, 2nd edn, 1993, p1133.
 7 The legal meaning of 'strike' (and 'lock-out') is analysed in detail in E I Sykes, *Strike Law in Australia*, Law Book Coy, 2nd edn, 1982, Chapter 6.
 8 *Australian Commonwealth Shipping Board v Fed Seamans Union* (1925) 35 CLR 462 at 483.
 9 *Att-General v Whiteman* [1912] 11 AR (NSW) 137 at 147.
 10 *Industrial Arbitration Act 1940* (NSW), s5.
 11 *Industrial Relations Act 1991* (NSW), s4.
 12 (1931) 46 CLR 343 at 361; see also Evatt J at 377.
 13 *In re Pelaw Main Colliery* [1913] AR (NSW) 162.
 14 *Board of Fire Commissioners v NSW Fire Brigade Employees Union* [1953] AR (NSW) 622 at 629.
 15 *Kidd v Savage River Mines* (1985) 9 IR 362 at 367 - 368.
 16 (1931) 46 CLR 343 at 361, 377.
 17 E I Sykes, *Strike Law in Australia*, Law Book Coy, 2nd edn, 1982, Chapter 6.
 18 [1982] 3 WLR 764 at 775, Kerr LJ agreeing at 780 - 1

'...participation in a strike must be judged by what the employee does and not by what he thinks or why he does it. If he stops work when his workmates come out on strike and does not say or do anything to make plain his disagreement or which could amount to a refusal to join them, he takes part in a strike'.

With respect, this makes parallel action, as distinct from concerted action, a strike. The analysis of the dissenter, Eveleigh LJ, is preferable. He pointed out that there are many ways in which a person can be involved in a strike, and there are many ways in which a person's actions can be of assistance to the strikers. It does not follow that they are taking part in a strike. He continues:¹⁹

'In my opinion, for a person to take part in a strike he must be acting jointly or in concert with others who withdrew their labour and this means that he must withdraw his labour in support of their claim. The fact that a man stays away from work when a strike is on does not lead inevitably to the conclusion that he is taking part in the strike.'

INDUSTRIAL ACTION

Perhaps wisely in the light of all this, the *Industrial Relations Act 1988* (Cth) avoids the use of the word 'strike' entirely. It uses the term 'industrial action' which is structured so as to describe at some length what will constitute industrial action for the purposes of the Act.²⁰ Victorian legislation also defines industrial action in terms which avoid the use of the word 'strike' but as we shall see the definition is different from the pattern in the federal act. The New South Wales *Industrial Relations Act 1991* (NSW)²¹ utilises the Australian formula but then for good measure, and perhaps unwisely, adds to the definition substantially the old and difficult definition of 'strike' from the repealed 1940 legislation,²² and also an expanded notion of 'lock-out'. In its 1990 Act, Queensland sticks with the words 'strike' and 'lock-out', but defines them extensively and differently from the other statutes.²³ The new province already emerges as a large one indeed!

Rather than proceed through word by word through the various statutory definitions, it might be more useful to consider a selection of situations and suggest ways in which the various pieces of legislation do or do not apply to them.

The situations I will consider are:

- Industrial action by an individual;
- The need for an objective or purpose;

19 Ibid at 777.

20 *Industrial Relations Act 1988* (Cth), s4.

21 *Industrial Relations Act 1991* (NSW), s4.

22 *Industrial Arbitration Act 1940* (NSW), s5.

23 *Industrial Relations Act, 1990* (Qld), s2.1(1).

- Industrial action falling short of full cessation of work;
- Industrial action after cessation of employment;
- Industrial action by an employer;
- An obligation to bargain

These do not, of course, exhaust all the possibilities, but seem to me to raise some interesting or novel legal issues.

Individual Industrial Action

The popular and common law idea of the strike and of industrial action generally²⁴ has usually been thought to involve collective action (that is, by more than one person). Individual action - whether part of a strike or not - may have other legal consequences for the individual, but unless taken collectively has not generally been regarded as a strike or as industrial action.

These newer statutory definitions make it clear in varying degrees that an individual can commit industrial action, with whatever consequences flow from that.

The clearest situation is that in Victoria, where industrial action is expressly defined to mean, among other things, "a failure or refusal by an employee to attend for work (unless the failure is authorised by the employer);" and also "a failure or refusal by an employee to work as directed by an employer or a ban, limitation or restriction on the performance of work;"²⁵

The definition in the Industrial Relations Act 1988 (Cth) and in those acts which adopt it, such as New South Wales, does not expressly use the singular ('an employee') as is the case in Victoria, but it is drafted in terms which seem apt to include action by an individual. For example, one kind of activity included is "a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by an award or order of the Commission...". An individual can impose a restriction or limitation as well as a group and unless the context is thought to confine the words to group bans or limitations, an individual seems capable of carrying out industrial action.

Queensland's definition of 'strike' makes it clear that there cannot be a strike by one person, for it defines the term to mean '[defined] conduct of 2 or more employees' which is due to or in pursuance of a combination, agreement or understanding which has one of a number of specified purposes, the most important of which is to compel the employer to agree to conditions of employment.²⁶ This accords much more closely with the common meaning of the term.

24 Miles v Wakefield Metropolitan District Council [1987] AC 539 at 558 per Lord Templeman

25 Employee Relations Act 1992 (Vic), s4.

26 Industrial Relations Act, 1990 (Qld), s2.1(1).

The Need for an Objective or Purpose

The standard notion of industrial action and its common law meaning²⁷ involve a requirement that there be an intent or purpose, usually to gain concessions from the other side. This is reflected, for example, in the Queensland definitions of 'strike' and 'lock-out' where the requisite purpose or intent is set out in some detail. Activities otherwise falling within the definitions but lacking one or other of the defined purposes would therefore not constitute a strike or lock-out as the case may be. So it seems that a 'political' or 'protest' strike would not be a strike as defined in Queensland.²⁸

The same cannot be said of all branches of the definitions in the Australian and New South Wales Acts. The absence of any requirement for a purpose or intent in those definitions seems to mean that bans and limitations or refusals to work for political as distinct from economic reasons constitute industrial action in those jurisdictions.

And, if the definitions are read literally, limitations or the like which are imposed on genuinely held safety grounds constitute industrial action as well. This literal interpretation is fairly easily avoided because there is at common law no obligation on an employee to undertake risks to health which have not been contracted for.²⁹ Modern occupational health and safety legislation limits the extent to which contracts involving risks to health can be made. An employee is not obliged to obey orders to do work outside the scope of the contract,³⁰ and a refusal to do such work could thus be excluded from the definitions of industrial action.

Victoria's definition specifically excludes 'any stoppage or cessation of work engaged in for the purpose of avoiding accident or injury.'

Limited Work

Tactics such as work to rule, go-slows, bans and limitations all seem to be covered by the statutes being compared¹.

Industrial Action After Cessation of Employment

The wide range of conduct caught by the form of definition in the Australian and New South Wales statutes is illustrated by *Re Savage and Director-General of Social Security*,³¹ a decision of McGregor J sitting as the Administrative Appeals Tribunal. Section 107(4) of the *Social Security Act 1947* (Cth) provided that a person was not qualified to receive an unemployment benefit unless the person satisfied the Director-General that the person's unemployment was not due to the

27 *Miles v. Wakefield Metropolitan District Council* [1987] AC 539 at 558 per Lord Templeman.

28 Cf the observation of the Industrial Commission of New South Wales in Court Session that 'Protest per se may constitute a permissible form of industrial and social activity...': Notification by Department of Industrial Relations, Employment Etc of a Dispute with the Labour Council of New South Wales and Affiliated Unions re General Strike, Commission in Court Session, 15 Oct 1991, No. 1043 of 1991, statement p7.

29 *Ottoman Bank v Chakarian* [1930] AC 271.

30 See eg *Adami v Maison de Luxe* (1924) 35 CLR 123.

31 (1982) 5 ALD 82.

person being, or having been, engaged in industrial action. Disqualification also arose if the person's unemployment was due to industrial action by fellow members of his union, apparently even if the claimant was not engaged in industrial action. Industrial action was defined in terms substantially similar to those in the *Conciliation and Arbitration Act* 1904 upon which the definition in the current Australian legislation is based.

Savage was one of a number of workers engaged in industrial action who were dismissed from their employment when they refused to sign letters that they would work in accordance with the award. He was refused unemployment benefits for a period after his dismissal. This might not have been objectionable had the decision rested solely on the ground that his unemployment was attributable to the industrial action which he had committed before dismissal or even that it was attributable to industrial action by still employed co-unionists after the Savage's dismissal.

But his Honour specifically held himself satisfied that Savage himself had taken part with others in industrial action after his own dismissal. The industrial action found to have occurred was that Savage, with others, had been guilty of the adoption of a practice in relation to work a result of which was a restriction etc in the performance of work; and that he had taken part or been concerned in bans etc on the performance of acceptance of or offering for work. It is not entirely clear what activity occurred after dismissal. It was apparently intermittent and included, according to the judgment, Savage's continuing refusal to sign the letter to the effect that he would work in accordance with the award. There was also some picketing, it seems. While one may accept that some forms of industrial action, and picketing may be an example, can be committed by some-one who is not an employee, it comes as a surprise that the definition of industrial action is so wide as to gather in action of the kind described when committed by an ex-employee. Picketing aside, how can an ex-employee adopt a practice which results in a restriction in the performance of work? The ex-employee is not even entitled to access to the workplace. Presumably, a person who has never been an employee at all can be guilty of industrial action as well on this approach.

But the Commonwealth provision is not unique. The terms of the Queensland definition of 'strike' put it beyond doubt that an ex employee can be engaged in a strike, for the opening words of the definition are that strike 'means the conduct of 2 or more employees who are, or have been, in the employment of the same employer...". However, it is to be noted that the person must still be an employee, albeit of a different employer, and must have been in the employment of the employer affected by the strike. Thus an unemployed ex-employee, such as Savage, would not, it seems, be capable of engaging in a strike as defined in Queensland.

A rough analogy can be found in the decision in *Power Packing Casemakers v Faust*³², which indicates that employees who refuse to do work which they are not contractually obliged to do can nevertheless commit industrial action within the meaning of the English legislation!

Industrial Action By Employers

Some statutory definitions of industrial action in Australia - New South Wales and Queensland are examples - still include the lock out by name. This was once the traditional employer equivalent to the strike, but the simple lock-out has rarely been used in recent times.

But employers are sometimes alleged to engage in conduct which does not constitute a lock out but which is just as effective industrially and which can, in at least some situations, be categorised as industrial misconduct, that is conduct prejudicial to the integrity of whatever industrial relations framework is in place. As will be shown, some limited employer activity of this kind may be caught by extended statutory definitions. But generally insufficient attention has been given in Australian legislation to industrial misbehaviour by employers. This uneven treatment is probably one among many reasons why regimes of statutory sanctions have not worked very well or at all. If a system is to provide an ultimate mode of resolution which is supposed to obviate the need for any industrial misconduct, surely it obviates it for both sides.

But to what extent does the newer legislation give recognition to the possibility of employer behaviour which is inimical to the proper conduct of industrial relations? Perhaps unexpectedly, one of the most interesting examples is contained in the Victorian legislation. The Victorian definition of industrial action includes "a refusal by an employer to engage employees who are ready and willing unconditionally to perform work as directed when the refusal is for the purpose of compelling any employees to accept terms of employment specified, or comply with demands made, by the employer."³³ As Mitchell points out, this drafting means that it will rarely if ever be able to apply to the traditional 'defensive' lock-out.³⁴

But it is interesting to consider how this might operate in a workplace where the employer is seeking to push through some kind of workplace reform against the wishes of the employees. First, the words "perform work as directed" present something of a logical problem if interpreted literally, but presumably they mean work as directed within the scope of the existing contract of employment, not the proposed new contract. One tactic allegedly used by some employers seeking to bring about change is to present employees at a plant with an ultimatum: agree to new workplace practices and changes in your contracts or we shall close the plant and/or terminate your employment. Behaviour of this kind is arguably a 'refusal to engage' and if so seems to come within the Victorian definition. Unless the circumstances fell within one of the exceptions in s36(1), the industrial action would be unlawful and would expose the employer to a penalty. In the case of an individual employer, the most likely exception providing an escape would seem to be the situation where there was no award or collective employment agreement in force. Even then, the action would be unlawful if it occurred in an industry which was one defined in essential services or vital state industries legislation. Given the

33 Employee Relations Act 1992 (Vic), s4.

34 R Mitchell, Notes on the Employee Relations Act 1992 (Victoria), Working Paper No 70, Department of Management and Industrial Relations, University of Melbourne. This paper contains an extended analysis of the Victorian legislation.

policy which seems to inform much of the legislation one wonders if it was intended to include at least some kinds of unilateral work-place reform in the definition of industrial action. Intended or not, it seems possible that it can cover that situation.

Queensland's Act has a definition of 'lock-out' which covers suspending or discontinuing the business or any branch of it, or a failure to continue to employ with intent to compel or induce employees to agree to conditions of employment or to comply with demands made on them by the employer 'contrary to the provisions of this Act' or with an intent to cause the employees loss or inconvenience. An actual suspension or discontinuation seems necessary to constitute the lock-out.³⁵ This also seems to be the situation in New South Wales, where the lock-out is included in that State's definition of 'industrial action'.³⁶ So pressing workplace reform to the point of, say closing a plant, even temporarily, could be covered by these definitions.

The definition of 'industrial action' in the Industrial Relations Act 1988 (Cth) does not in terms refer to employer activities as explicitly as does the Victorian definition, but it must contemplate that employer actions can be included within its scope, for it excludes from the concept of industrial action "action by an employer that is authorised or agreed to by or on behalf of employees". The terms of the definition would include the traditional lock-out, although it is not mentioned by name: a lock out seems to be either a restriction on the performance of work or a ban on the performance of work adopted in connection with an industrial dispute.

The 'ultimatum' approach to work place change is not so obviously covered by the Commonwealth Act as is the case with the Victorian wording, although the Australian definition is certainly wide enough to leave room to argue that it is. For example, if there was in existence an industrial dispute, the ultimatum could arguably constitute a restriction or limitation on offering for work in connection with that dispute and so fall within par (c) of the definition; or it could be a restriction on offering for work in accordance with an award, if such there be, and so within par (b). In addition, it may be that to come within these words there must be an actual as distinct from a threatened restriction or limitation.

We have noted that the New South Wales legislation of 1991 adopts the definition of 'industrial action' from the Australian Act to which it adds concepts of strike and lock-out substantially taken from definitions in the old State legislation. Therefore the comments just made about the Commonwealth provisions apply to the New South Wales definition.

Save for that part of the Victorian definition which has been discussed, none of the definitions being considered seems to cover what is sometimes alleged to be an employer tactic, namely action so unreasonable as to foment a strike - a 'constructive strike'. This is a serious omission from the definitions.

But the New South Wales Act does refer to industrial action provoked by employers in another context. It is a defence to a summons for allegedly breaching an

35 Industrial Relations Act 1900 (Qld), s2.1(1).

36 Industrial Relations Act 1991 (NSW), s4(1).

injunction or a dispute order to show that the employer - or the employer's agent - provoked or incited the industrial action complained of "by unjust or unreasonable behaviour".³⁷ This defence is also available to a person accused of one of the three kinds of industrial action which are unlawful per se.³⁸ While its availability as a defence is noteworthy, one must ask why such activity is not included in the definition of industrial action, so as to make available to unions or employees the same kind of positive remedies as are available against them, such as dispute orders and injunctions.³⁹

An Obligation To Bargain

Industrial action is not defined in any of these statutes so as to include a refusal to bargain. The *Industrial Relations Act 1991* (NSW) s.352 requires those who engage in negotiations to act in good faith, and the Commission can take into account the extent to which this requirement has been observed in exercising its functions, but the section does not create an offence or render awards void.

If bargaining continues to gather momentum in Australia legislatures are going to have to face the need to define parameters within which bargaining is to take place. They may not be identical to those which were thought appropriate for a tribunal system.⁴⁰ Should a failure to bargain be proscribed conduct or be included in the definitions of industrial action? This problem has of course occurred in the United States, where unfair labour practices are proscribed. There, the parties are required by statute to bargain in good faith. And economic pressure is permitted during the process, although the capacity of workers to exert it has been reduced since it became more common to 'permanently replace' strikers. This is lawful, although it is not lawful to sack them. The distinction between sacking and permanent replacement is elusive.

Australian legislatures may be tempted to include failure to bargain in good faith as a species of industrial action or impermissible conduct. The temptation should be resisted.

Bargaining In Good Faith: The Greatest Legalism?

Section 8(a)(5) of the *National Labour Relations Act 1935* (USA) (the Wagner Act) says that it is an unfair labour practice for an employer to refuse to bargain collectively with the representatives of his employees. Section 8(b)(3) imposes a reciprocal obligation on labour organisations or their agents. The scope of this duty is expanded in s8(d) which says that

"...to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable

37 *Industrial Relations Act 1991* (NSW), s196, s213.

38 *Industrial Relations Act 1991* (NSW), s215.

39 If an employer is accused of a lock-out, it is a defence to show that the lock-out was directed at persons directly involved in industrial action and was in retaliation against that industrial action: *Industrial Relations Act 1991* (NSW), s196, s213.

40 *BFI (Vic) Pty Ltd v Transport Workers' Union of Australia* T197CRN Dec 1258/92 S Print K5369, Munro J, 6 November 1992.

times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.... or the negotiation of an agreement, ...but such obligation does not compel either party to agree to a proposal or require the making of a concession...".

American texts take many pages to give even a propositional exposition of the case law which has arisen around interpretation of this requirement. What does this duty to bargain in good faith mean? In spite of all the litigation the issue is still far from clear. Some suggest that it is unlikely ever to be clear, since the legislative requirement is that the parties maintain a certain attitude or frame of mind. Legal prescription of attitudes is probably as impossible as the attempt is undesirable.

The myriad of American decisions have had to deal with such issues as what is meant by good faith; what subjects are mandatory for bargaining, what are merely permissive and what are illegal; are unilateral changes during bargaining on mandatory subjects a refusal to bargain; what of a strike initiated without the required notice; can the employer by-pass the recognised representative of the workers and bargain direct with them; will 'surface bargaining' be enough and in any case how is it identified; must there be a willingness to compromise; if so, how is it to be reconciled with the statement in the Act that there is no obligation to compromise; may conditions be imposed on bargaining; and what of delaying tactics and so on.

This American experience should sound a clear warning against relying on an obligation to bargain in good faith as the mainstay of a legal framework for bargaining (or any other) regimes. Even the most cursory inspection of the American materials demonstrates that it certain to generate an unending stream of litigation. There may be a number of alternatives. One which has some initial attraction is to try and improve the American model by prescribing in detail the 'objective' ingredients of good faith bargaining obligations. In fact, the present American provisions are the result of just such an attempt. Proliferation of more detailed standards or rules is no doubt possible, but it is likely to shift the frontiers of litigation rather than eliminate them.

Another more promising answer is by all means include in the norms a requirement to bargain in good faith and by all means set out what that involves, but realise that it is not enough. Where bargaining does not produce an outcome, whether because of the absence of good faith or otherwise, provide the parties with a final solution, which, I suggest, should be a compulsorily arbitrated decision.

This is not to say that award clauses requiring bargaining in good faith may not be appropriate in particular cases.⁴¹ But as a general norm a requirement to bargain in good faith is, without a great deal more, an invitation to legalism.

THE CONSEQUENCES OF INDUSTRIAL ACTION

Not only does industrial action mean different things in the different jurisdictions; the consequences attaching to its occurrence also vary from place to place.

Before noting recent changes it is as well to keep in mind a point made earlier. This paper does not attempt to deal comprehensively with all the legal consequences which can flow from a particular episode of industrial action. In particular most activities which fall within the definitions discussed will be breaches of the contract of employment at common law, whether by the employee or the employer, and so will expose the person concerned to liability for damages (at least in theory).

Depending on the circumstances, liability in tort or under some other statute is also possible. Redress through one or other of these avenues has proved more popular in recent years than resort to remedies under industrial relations statutes. These other remedies, although used in industrial situations, have changed incrementally rather than radically, as is their wont. The main recent changes in substantive law have occurred in the statutes which we are considering.

Commonwealth

The *Industrial Relations Act 1988* (Cth) does not punish industrial action directly, except in special circumstances. For example, it is an offence to take industrial action against an employer to try to coerce the employer to disadvantage an employee who is not a unionist because of a conscientious objection to joining the union,⁴² or to try to coerce the employer to take discriminatory action against an 'eligible person' because that person is not a member of the organisation.⁴³ But such exceptions aside, the Act enables most other forms of industrial action to be prohibited by the insertion of a bans clause in an award.

Bans clauses, not often used for many years, seem to have been inserted in awards more frequently in recent times. Their role and utility has been questioned where an enterprise or other agreement is to be the primary instrument for regulating industrial relations, rather than an award.⁴⁴ Moreover, even if a bans clause is inserted in an award and breached, the road to recovery of a penalty for the breach is long, and is marked by what is in effect an enforced 'cooling off' period.⁴⁵ Industrial action by those engaged in public sector employment may be the subject of direct orders to stop the action.⁴⁶

Industrial action can be a focus or ground for various other applications or consequences. For example, the Commission may refrain from further hearing a matter where a party to an industrial dispute has contravened an order to stop

42 Industrial Relations Act 1988 (Cth), s320.

43 Industrial Relations Act 1988 (Cth), s336.

44 *BFI (Vic) Pty Ltd v Transport Workers' Union of Australia* T197CRN Dec 1258/92 S Print K5369, Munro J, 6 November 1992.

45 Industrial Relations Act 1988 (Cth), s4, s125, s181.

46 Industrial Relations Act 1988 (Cth), s127.

industrial action.⁴⁷ Where industrial action is threatened, the Commission may on application insert in an award a provision authorising an employer to stand down any who do engage in industrial action;⁴⁸ or it may order a secret ballot to ascertain whether members of an organisation support industrial action.⁴⁹ Industrial action can ground an application for cancellation of registration of an organisation,⁵⁰ but this is a rare occurrence, and in any case is likely to be granted only in the most extreme cases. Employers cannot 'victimise' or threaten to victimise employees for various activities, including that the employee refused or failed to join in industrial action or, generally, for exercising his or her rights under the arbitration system.⁵¹ It is an offence for an organisation to take or threaten industrial action against an employer to try and coerce an employer to take various kinds of adverse action against such an employee. It is also an offence for the organisation to impose or threaten penalties or disabilities against a member who has not or does not wish to join in industrial action.⁵²

New South Wales

In New South Wales, three kinds of industrial action are unlawful per se. They are industrial action based on a demarcation dispute; sympathetic industrial action; and industrial action for 'strike pay'.⁵³

In addition the Act picks up the 'secondary and other boycott' provisions of the *Trade Practices Act 1974* (Cth) and incorporates them into New South Wales law with some modifications. The modifications seem designed mainly to fill 'gaps' flowing from the constitutional limitations which are necessarily associated with the *Trade Practices Act*.⁵⁴ It remains to be seen whether the New South Wales provisions have dealt with the topic so comprehensively as to create an inconsistency with the Commonwealth Act.

There is a distinction in New South Wales between disputes 'concerning settled rights' and disputes 'not concerning settled rights', that is between rights and interest disputes. The legislation does not use the terminology of 'right' and 'interest' but it is convenient and is adopted here. However the logic of the distinction drawn in the legislation is not followed through, because industrial action in respect of both kinds of disputes, although not unlawful per se, can be made so by the use of the procedures in the Act. These involve, in the case of a dispute not concerning settled rights, the issue of a dispute order by the Industrial Relations Commission and, if that is not obeyed, a summons returnable before the Industrial Court.⁵⁵ A parallel procedure for disputes of right involves the issue of an injunction by the Court followed by a summons if it is disobeyed.⁵⁶ Paradoxically, it is easier to invoke the

47 Industrial Relations Act 1988 (Cth), s111(1)(g)(v).
48 Industrial Relations Act 1988 (Cth), s126(5).
49 Industrial Relations Act 1988 (Cth), s136.
50 Industrial Relations Act 1988 (Cth), s294.
51 Industrial Relations Act 1988 (Cth), s334.
52 Industrial Relations Act 1988 (Cth), s335.
53 Industrial Relations Act 1991 (NSW), s215.
54 Industrial Relations Act 1991 (NSW), s256.
55 Industrial Relations Act 1991 (NSW), s210, s211, s212.
56 Industrial Relations Act 1991 (NSW), s194, s195.

process in the case of an interest dispute, for any dispute order is to be issued by the body by which the dispute is already being considered (i.e. the Commission) whereas an injunction in the case of a rights dispute necessitates a separate application to the Court. In addition, if the dispute order is disobeyed it is mandatory for the Registrar to issue the summons. Issue of the summons following disobedience of an injunction requires an application to be made. In the case of an interest dispute, no dispute order may be issued until either a compulsory conference has been held or a certificate of attempted conciliation has been issued.⁵⁷ It has been observed that this may give a 'right to strike' pending the occurrence of either of those events. This is true, but as it is compulsory to notify the dispute to the Commission if industrial action is threatened or has commenced⁵⁸ and as compulsory conferences can be called very soon after notification, the scope to take industrial action with impunity is limited indeed and consists of a loop-hole rather than a right.

Queensland

As indicated earlier, the *Industrial Relations Act 1990* (Qld) contains definitions of 'strike' and 'lockout' in the terms discussed above. Strikes and lockouts are thereafter treated differently from the pattern in other jurisdictions. With two main exceptions, the decision whether to impose a sanction is very much in the hands of the tribunal.

To deal with the exceptions first, s12.5 is to the effect that if a strike occurs or appears likely, the Industrial Commission may or, in some circumstances must, direct an appropriate official to conduct a secret ballot of the employees to ascertain the number in favour of the strike. If the secret ballot indicates that a majority of those of whom the ballot was directed are not in favour of the strike and it still exists at the time that the ballot is taken (or appeared likely to occur and does occur within one month following publication of the result of the ballot) then the functionary who conducted the ballot is to cause to be published a date, not less than seven days after the date of publication thereof, on or before which the strikers are required to discontinue the strike.⁵⁹

Every person who was one of those of whom a secret ballot was required to be conducted must comply with this obligation. If any person so obliged does not discontinue the strike on or before the published date then that person 'is taken to have terminated, on and from that date, the employment in which the employee, or member, was engaged when the strike commenced, unless the employee, or member, proves that the failure was due to reasonable cause'. For the purposes of this provision, disagreement by a person with the result of a ballot does not constitute reasonable cause.

The other exception is in s11.5 which is to the effect that notwithstanding any provision of the Act or any award or industrial agreement an employer is entitled to stand down any employee without pay on any day or part of any day on which the employee cannot be usefully employed because of the occurrence of anything for

57 Industrial Relations Act 1991 (NSW), s210(3).

58 Industrial Relations Act 1991 (NSW), s204.

59 Industrial Relations Act, 1990 (Qld), s12.6.

which the employer is not responsible or over which the employer has no control. No doubt this could well include a strike occurring elsewhere in the employer's plant or in the plant of a supplier.

Discretionary Powers

Otherwise, the Queensland legislation is based on giving a wide discretion to the Industrial Commission to deal with industrial action. This is provided first through the Commission's general jurisdiction to deal with industrial disputes. 'Industrial dispute' is defined in s2.1 to include a dispute or threatened dispute as to an industrial matter or a situation likely to give rise to a dispute about an industrial matter. In turn, 'industrial matter' is defined to mean, among other things, a matter which affects or relates to any matter whatsoever that, in the opinion of the Industrial Court or Industrial Commission has been, is, or may be 'a cause or contributory cause of a strike, lockout, or industrial dispute' (whether or not it is otherwise an industrial matter as defined).⁶⁰

So, it seems, an industrial dispute arises at the mere prospect of a strike or lockout, irrespective of its cause. Then, under s4.13, the Commission has jurisdiction to hear and determine any industrial dispute as to which an Industrial Commissioner has held a conference under the Act at which no agreement has been reached and which the Commissioner has thereupon referred to the Commission. In this eventuality, the Commission has jurisdiction to determine all questions arising out of the industrial matter or involving the determination of the rights and duties of any person in respect of the industrial matter and all questions it considers expedient to hear and determine in respect of the industrial matter.⁶¹ Section 4.15 empowers the Commission to make an award in respect of the industrial matter which, for example, abrogates or varies contracts for labour made on or after the commencement of the Act on such conditions and exemptions as the Commission thinks just. Its awards may also deal generally with the determination and regulation of any industrial matter.

By use of these sections it appears that the Commission could, if it thought fit, issue an award or an order in such form as would make it an offence punishable by fine for the strike or lockout to continue, irrespective of the cause of the disturbance, and provided only that it was a strike or lock-out in the defined sense.

It seems from all of this that if an industrial dispute, being in respect of a strike or lockout, were made the subject of an award by the Commission and the provisions in the award were not adhered to by those bound by it then the enforcement provisions of the legislation would be available.

For good measure, s4.24 empowers Industrial Commission at any time to issue such directions or make such orders as it thinks fit in relation to a strike or lockout whether actual threatened or apprehended. This would presumably include orders in the nature of a bans clause or an injunction.

60 Industrial Relations Act, 1990 (Qld), s4.13.

61 Industrial Relations Act, 1990 (Qld), s4.13.

So even if an award were not made but pursuant to its powers under s4.24 the Commission made an order which additionally provided for payment of a penalty in the event of disobedience, then an offence would be committed and the person in breach would be liable to a penalty in the amount so provided for: s18.2. This facility provides a mechanism for making a strike or a lockout illegal.

Whether or not any of these avenues will be used extensively remains to be seen. It is submitted that the scheme has a great advantage in that it does not contain a degree of automaticity and confers large discretion on the tribunal to evaluate the circumstances of the case before it. Inappropriate tactical posturing, abuse of process or inflammatory applications for redress are thus brought under a measure of disinterested scrutiny.

For completeness, note that the Commission is given an express power to injunct in s4.23, but only 'to compel compliance with an award, an industrial agreement or this Act or to restrain a breach or continuance of a breach of an award, industrial agreement or this Act'. So if an award contained a prohibition on industrial action, s4.23 would provide a further way to bring industrial action to an end, although it seems to add nothing to the power in s4.24. Again, though, the remedy is within the discretion of the tribunal.

The pattern in the Queensland arrangements can thus be seen to be different from that in Victoria, in the Commonwealth and in New South Wales, each of which differs between themselves. In Queensland it is only in a limited range or circumstances that strikes or lockouts bring with them an automatic penalty, namely when there is disobedience of an order issued following upon a ballot adverse to the continuation of the strike. In that case the penalty is automatic termination of employment.

Victoria

Section 36(1) of the *Employee Relations Act 1992 (Vic)* lists eight circumstances in which industrial action as defined in the Act is unlawful. It makes it an offence to participate in unlawful industrial action.

Section 36(4) provides, somewhat circularly, that participation in industrial action is not unlawful if 'it is not unlawful' under s36(1) and if it relates to the negotiation of an award or collective employment agreement for the participants.⁶² Participation in industrial action is not unlawful under s36(1) if it arises out of or is related to a claim, dispute or grievance under, or in connection with a federal award which applies to the employees concerned.

However any right to take lawful industrial action which might be thought to have been conferred by s36(4) is more apparent than real, because the eight circumstances in which it is unlawful are alternative so that industrial action in any one of those circumstances will be unlawful. More importantly, the eight circumstances cover such a wide range of situations that it is very difficult to think

of an example falling outside them where industrial action can be taken lawfully in any effective or practical way. Some seem to have read s36(4) as conferring a right to strike in disputes of interest. But to gain the protection of the section the industrial action must not be unlawful under s36(1), as well as relating to negotiation of an award or the like. Section 36(1) makes industrial action unlawful, even in such a situation, if, for example, it takes place without a secret ballot having been conducted in accordance with Schedule 2 to the Act or if, a ballot having been conducted, the industrial action is not authorised by that ballot.

When one turns to Schedule 2, the requirements for the conduct of industrial action secret ballots run to 40 clauses and extend over a number of pages. Even if the lengthy procedure is followed and all requirements are met, clause 40 says that

'Any ballot authorising industrial action may only authorise industrial action for up to 5 days within a period of 28 days from the final date for return of ballot papers.'

The effect of this seems to be that even in a situation where there is no existing award or collective employment agreement, a new ballot, complying with all the complexities of the Schedule, would need to be conducted every 5 days.

This arrangement can in no way be said to confer a right to strike nor does it represent an example of deregulation. It is an example of a different and complex regulation.

Further, industrial action will be unlawful under s36(1) if it occurs in an industry that provides an essential service or if it occurs in a vital industry; if it takes place or continues in contravention of a recommendation or order of the Commission or if it is engaged in for the purpose of causing loss or damage to the business of an employer other than the employer of the employees engaged in the action or it otherwise amounts to a secondary boycott or third party dispute.

As was indicated earlier the definition of "industrial action" in the legislation specifically includes

"a refusal by an employer to engage employees who are ready and willing unconditionally to perform work as directed when the refusal is for the purpose of compelling any employees to accept terms of employment specified, or comply with demands made by the employer ..."

Such activity if engaged in by an employer while a relevant award or collective agreement is in force or if engaged in without following specified settlement procedures or if taken in contravention of a recommendation or order of the Commission will be unlawful.⁶³

63 Some of the other circumstances which render industrial action unlawful when committed by employees appear to have no application to employer industrial action as, for example, the requirement for a secret ballot or industrial action amounting to a secondary boycott or third party dispute.

If persons bound by an award or employment agreement fail to comply with it, they are liable to a penalty under s163 of the Act. Activity which constituted such a breach could also come within the definition of unlawful industrial action and so give rise to the penalties for industrial action as well.

Even if industrial action is lawful, the participants might ordinarily be exposed to the risk of liability for breach of contract or for various torts. There is protection from liability for some torts as listed in s37(3). Since it is not easy to think of an illustration of industrial action that is not rendered unlawful by the formulary of this Act this limited immunity from tort liability promises to be of little significance.

One example of industrial action, in its popular not defined sense, is picketing. Perhaps picketing undertaken by employees who are not at the time rostered for work would escape liability under the Act. But, by express provision, the exemption from tort liability, such as it is, does not extend to picketing. Indeed, as Mitchell points out, picketing conducted in support of lawful industrial action will be subject to the threat of tort proceedings, even though those engaged in the industrial action have at least some limited protection from tort liability.⁶⁴

Mitchell gives another example of an activity which might slip through the net of s36(1)(a), and that is industrial action taken by a group of employees who negotiate collectively agreed terms but who then adopt those in the form of common individual agreements. But as he points out, the employees are very likely to be caught by one of the other sub-clauses of s36(1) which would make their action unlawful in any case.⁶⁵

One other ameliorating section in this legislation is s19 which says that a court must not in any proceeding for breach of an employment agreement award damages against any individual employee in excess of \$5,000. The term "employment agreement" is defined in s4 of the Act to mean an agreement entered into under Part 2. This in turn provides that an employer may enter into a collective employment agreement with any or all of the employees employed by the employer. Section 9, which is in Part 2, says that an employee who is not covered by a collective employment agreement and his or her employer may enter into any individual employment agreement that they think fit. Even where the employee is covered by a collective employment agreement the employer and the employee may nevertheless negotiate terms and conditions on an individual basis. Any terms and conditions agreed in that manner which modify the collective agreement must be put in writing. If there is any inconsistency between the collective and the individual agreement the individual agreement will prevail. There are other provisions in Part 2 governing the form and content of employment agreements.

This has led to the view that where "employment agreement" is used in s19 - which limits damages - the phrase can only refer to an employment agreement of the kind defined, that is either a collective or an individual agreement complying with the

64 R Mitchell, Notes on the Employee Relations Act 1992 (Victoria), Working Paper No. 70, Department of Management and Industrial Relations, University of Melbourne, p25.

65 R Mitchell, Notes on the Employee Relations Act 1992 (Victoria), Working Paper No 70, Department of Management and Industrial Relations, University of Melbourne, p22.

requirements in Part 2. It is argued that an employer and an employee may work under a common law contract of employment which is not an employment agreement as so defined and, in that situation, the limitation on damages specified in s19 may not be applicable. It is understood that government spokesmen have indicated that it was not the intention to confine the cap on damages to the statutory form of employment agreement. The possibility of amending legislation to clarify this has been mentioned.

A NEW PROVINCE FOR LEGALISM?

New Province

Almost all of this is new, using new in the sense of different from what was there before. Of the four jurisdictions considered, only the Commonwealth provisions have not been revised in the 1990's. They remain largely an ill assorted accretion of historical and political detrius in spite of the new Act in 1988. Yet none of it is new in the sense that legislation of this kind, that is legislation facilitating the restriction of or actually prohibiting industrial action, has been part of Australian law since we embarked on our distinctive tribunal model. What we have now are some newly surveyed counties in an old province. It remains to be seen whether these new counties will ever be explored, that is whether the provisions I have summarised will be much used. As Bennett has observed, 'It is necessary to draw a distinction between here between the existence of punitive industrial legislation and its utilisation.'⁶⁶ The reasons why provisions of this kind have not been much used are no doubt complex, but among them are the reasons that, often, the sanctions are not consistent with the policies of the act and the administrative mechanisms for enforcement are inappropriate. The New South Wales legislation can be criticised on the former ground and the Commonwealth on the latter. To those possible defects can be added the legal conundrums posed by the regimes which have been examined. But non-legal rather than legal reasons will probably be more significant in determining the pattern of usage of these provisions. But if the new province is explored, lawyers should be the among the first chosen for the expedition.

Legalism

The word 'legalism' has acquired what is probably a permanent air of perjoration. No doubt legal technique can be used in inappropriate ways or circumstances and legalism of that kind is indeed to be criticised. But where our legislators have chosen to pass detailed statutes regulating behaviour, in this case industrial action, and have, in some situations, imposed criminal sanctions on it, then elucidation of the rights of participants necessarily requires the application of legal methodology. This is necessary legalism while ever the statutes remain. Perhaps different drafting could remove the need for some of it, but in the end analysis and application of a statute requires legal technique. In this sense, then, the statutes considered in this paper require legalism, but again only if parties trouble to try and use the various regimes on the statute books.

WHY ALL THE REGULATION?

It is not necessary to accept any theory about the inevitability of conflict between capital and labour to accept that conflict is frequent and widespread, especially in more buoyant economic times, and to accept that if the conflict leads to industrial action it can produce effects which are socially and economically deleterious and not only to the combatants. Thus in pretty well all countries the state has intervened in one form or another to stop or at least control these effects.

It seems to be correct that, with only occasional exceptions, an individual employee will be in a weak bargaining position compared with his or her employer. Indeed most negotiations between an employee and an employer will exhibit at least one of three bargaining disabilities which the law generally has tended to protect from the possibility of exploitation. Thal has identified these as: first, ignorance of value or of the nature of the obligations in issue; secondly, bargaining weakness arising not from ignorance of these kinds, but from necessity; and thirdly, the existence of a relationship of trust such that the stronger party must take care to avoid the presumption of exploitation.⁶⁷ 'This inequality of bargaining power leads to the creation of forms of oppressive subordination under the disguise of freely chosen agreements'.⁶⁸

The effective economic operation of bargaining is postulated on a number of assumptions, one of which - namely reasonable equality of bargaining power on each side of the market - is the direct antithesis of the situation which normally prevails in negotiations between an employer and an individual employee (or even a small group of employees). This partly explains why employees formed unions: to reduce the power imbalance faced by the individual. But, even when collectively organised, the worker has nothing with which to bargain save his or her labour.

This then is one of the main justifications for the recognition of a right to take industrial action in bargaining regimes, although not the only one.⁶⁹ It is likely to make the market work more effectively by promoting equality of power on both sides of a market which is otherwise almost always tilted in favour of the employer.⁷⁰ So it is that in most bargaining regimes, there is some kind of right to strike at any rate in disputes of interest as distinct from disputes of right. Niland described the notion as 'crucial' in recommending its adoption in New South Wales.⁷¹ In fact this was not done. It is true that only some kinds of industrial action are made unlawful per se under the *Industrial Relations Act 1991* (NSW),

67 S N Thal, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 *Oxford Jnl of Leg Studies* 17 at 31 - 32.

68 H Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Ind Law Jnl* 1.

69 There are also justifications based on considerations of equity and basic rights in a free society. As Creighton has shown, Australia's laws appear to fall short of our international commitments in some respects: B Creighton, 'Enforcement in the Federal Industrial Relations System: An Australian Paradox' (1991) 4 *Aust Jnl of Labour Law* 197.

70 O Kahn-Freund and Bob Hepple *Laws Against Strikes*, Fabian Society, London, 1972, p6 - 7.

71 J Niland, 'Transforming Industrial Relations in New South Wales', Green Paper, 1989, Vol 1, at 27.

but industrial action occurring in an interest dispute can be made unlawful more easily than that occurring in a rights dispute.⁷²

The theoretical justification for the array of sanctions which has been attached to industrial action in Australia was noted in the introductory remarks, namely that the tribunal system was thought to have provided an ultimate avenue for resolution of disputes which therefore did away with the need for resolution by other means such as direct action. The independent tribunal provided not only an ultimate solution in the form of the compulsorily arbitrated award but also but also a buffer to neutralise imbalances of power between the disputants.

The reasons why this policy was not realised fully are too complex to discuss here, but the point is that it was that policy which justified the array of sanctions. The further one departs from such a system in favour of a 'market - driven' system, the less can an array of sanctions be justified.

In Victoria, severe penalties and minimal exemptions are at least consistent with one apparent policy of the Act under which, it has been argued, 'the interests of employees are made subservient to the commercial interests of the employer and the enterprise...the Act appears to support the uninhibited restoration of managerial prerogative rather than co-operation'.⁷³ But they are quite inconsistent with another apparent aim of the legislation and that is to rely on the market. In New South Wales there is also an inconsistency between the move to enterprise bargaining and the possibility of sanctions in disputes of interest. This is contrary to what Niland had in mind. But the redeeming feature of the arrangements is that, in a dispute not concerning settled rights, the Commission has a discretion whether to issue a dispute order. Furthermore, although the Registrar has no discretion to refuse to issue a summons for breach of the order, the Industrial Court before which the summons is returnable has a wide variety of options open to it, including, possibly, some role in settling the underlying dispute. Queensland's legislation is similarly marked by wide discretions in the specialist functionaries and tribunals. These are likely to act as buffers against inappropriate use of the sanctions. Nevertheless they are there for appropriate cases. Almost all agree that the Commonwealth provisions stand in need of a total revision. They are largely an accretion of history and compromise. There may well be differences as to what should replace them, but there can hardly be room for dispute that they do need revision. In that revision, the drafters should keep in mind the contradiction in having extensive sanctions while proceeding towards market driven bargaining models. Appropriate, and possibly extensive, sanctions may be justified if the State provides a an independent, compulsory solution of last resort.

Not only should statutory sanctions be congruent with policy. If possible, provisions in different jurisdictions should be common. Co-operative legislation has proved possible in other fields. And of course, the drafting should be as accurate as possible.

72 G McCarry, 'A Disputatious Dispute Procedure: the Industrial Relations Act 1991 (NSW)', (1992) *Aust Jnl of Labour Law* 177 at 185.

73 R Mitchell, Notes on the Employee Relations Act 1992 (Victoria), Working Paper No 70, Centre for Industrial Relations and Labour Studies, University of Melbourne, p25.

The treatment of industrial action in the statutes reviewed in this paper is an unexplored if not an entirely new province for legalism. Indeed it is truly a lawyers' delight. One could spend many an hour rambling its by-ways, pausing to admire an ambiguity here, discovering an obscurity there, resting occasionally in the subdued light filtering through the scattered lacunae and all the while admiring the variegated obfuscations along the way.

5. The Right To Take Industrial Action: A New South Wales Perspective

Alan Rowe

Comments on the paper titled "The Right to Take Industrial Action" by Associate Professor Greg McCarry.

At the outset I would like to apologise on behalf of the Hon John Hannaford, Minister for Industrial Relations, who was unable to be here today as he is attending the Conference of Commonwealth and State Labour Ministers in Brisbane. The Minister asked me to attend in his place. It is certainly an appropriate time for this conference, in view of the Prime Minister's speech to the Institute of Directors luncheon on 21 April, in which he foreshadowed significant changes to the regulation of industrial relations in the federal jurisdiction. The Commonwealth and State Ministers will be discussing the future direction of industrial relations across the nation in Brisbane today. Later in this paper I propose to outline some of the views Mr Hannaford intends to put to the Federal Minister, Mr Brereton, at that meeting. However, I should make it clear that the views expressed in this paper are my own, except where they are explicitly attributed to the Government, and thus they do not necessarily reflect the present or future policies of the Government.

My paper is in two parts: first, comments on the drafting issues raised by Associate Professor McCarry in relation to the New South Wales *Industrial Relations Act* 1991 and, second, some broader comments on the right to strike. In the latter part I will put the case for an 'industrial calendar' framework in order to overcome the confused thinking which has prevailed on this issue in Australia. I do not propose to comment on the recent Queensland or Victorian legislation, but I will support Associate Professor McCarry's views as to the inadequacy of the current Federal legislation.

DRAFTING OF THE NEW SOUTH WALES ACT

Industrial Calendar Framework

The *Industrial Relations Act (NSW) 1991* is designed around Professor Niland's 'industrial calendar'¹. The Act contains a requirement for fixed term awards/agreements which the parties can only vary by consent during their term; awards and agreements must contain grievance procedures; there is scope for tribunal determination of grievances and issues of interpretation arising during the term of an award/agreement, but with only extremely limited scope for the Industrial Relations Commission to vary those instruments during their term; sanctions are available, at the Industrial Court's discretion, against all industrial action occurring during the term of an award/agreement; and there is a recognition of the parties' rights to bargain with a degree of freedom, at the discretion of the Industrial Relations Commission, before a dispute order can be made, with sanctions if it is breached, once an award/agreement has expired. I usually go out of my way to avoid using the terms 'rights' and 'interest' to describe these phases of the calendar, as these terms are still not widely understood in Australia and thus they are alienating to many people. However, Associate Professor McCarry has adopted these terms for convenience and in this learned gathering I will follow his lead.

Definition of Industrial Action

As noted, the New South Wales Act generally adopts the Australian Act's formula, although it avoids use of the term 'dispute', as this term loses its relevance in a rights/interest framework. I concede that there are grounds for criticising the inclusion of definitions of 'strike' and 'lock-out' within the definition of 'industrial action'. Mr Hannaford announced last week that the New South Wales Government was willing to enter discussions with the Federal Government aimed at developing mutually consistent industrial relations legislation on certain pre-conditions. This follows, and is consistent with, earlier statements by the current and previous Premiers indicating New South Wales' support for a nationally consistent industrial relations system. Clearly technical issues such as definitions warrant early consideration if progress is to be made towards national consistency. I will return to the issue of national consistency later in this paper.

The Need for an Objective or Purpose

Two brief comments on Associate Professor McCarry's paper. The issue of the extent to which the New South Wales Act's definition of 'industrial action' covers 'protest' strikes is under appeal in the Industrial Court at present, in relation to a decision by Justice Maidment to refuse to issue dispute orders over protest action taken by the Nurses Association over the Government's decision to build a private hospital at Port Macquarie. The Industrial Court's decision in this matter should assist in clarifying the boundaries of industrial action covered by the Act.

The New South Wales Act recognises that there is a need to exempt actions taken

on safety grounds. These provisions, at S.219, codify the circumstance in which the Industrial Relations Commission can authorise payment for time engaged in industrial action (as otherwise payments by an employer would constitute an offence under S.218 of the Act).

Industrial Action by Employers

I generally accept Associate Professor McCarry's comment that insufficient attention has been given to industrial misbehaviour by employers, although there are extensive provisions in all jurisdictions in relation to an employer's failure to pay wages or to meet other award or legislated entitlements; perhaps the main area of likely employer misbehaviour. He endorses the New South Wales Act's inclusion of a defence mechanism if an employer has provoked or incited industrial action. However, it needs to be added that the Act's rights/interest framework means that 'industrial action' by an employer during the term of an award or agreement is subject to the same injunctive process and sanctions as action by a union. This overcomes a long-standing weakness in the Australian model. Of course, it remains to be seen how the Industrial Court will interpret this part of the Act in relation to areas traditionally seen as management's prerogative as, based on experience in overseas collective bargaining systems, a shift to a rights/interest model could lessen the prerogatives of management. This will also be dependent on the degree of detail contained in awards and agreements.

Bargaining in Good Faith

The New South Wales Act contains a requirement for parties to negotiate in good faith (S.352). While Associate Professor McCarry highlights the legalism surrounding this provision in the USA, the New South Wales provision should not create such difficulties. The Act simply allows the Industrial Relations Commission to take account of the extent to which parties have acted in good faith in deciding to exercise its functions. For example, whether and when to arbitrate a matter during the interest phase and whether, when and on what terms to issue a dispute order. A dispute order could, for example, be made against an employer who refused to bargain in good faith once an award or agreement had expired.

The Consequences of Industrial Action

In his comments on this issue I believe Associate Professor McCarry has been unfair to the New South Wales Act's intentions and likely effect. The paper is correct in stating that it is a more automatic process to enforce a dispute order in the interest phase, once it has been breached, than it is to pursue an injunction in the rights phase. This represents the Government's view that, once a party has gone through the necessary processes to obtain a dispute order and it has subsequently been breached, enforcement should follow without the need for the affected party to make further application. The practicality of this approach, including the respective roles of the Registrar and the parties in bringing evidence that a dispute order has not been complied with, is still to be tested. It must be remembered that the Court has the discretion to decide the timing of Court hearings and also to decide the appropriate sanction, if any, to apply in such cases. Therefore, there may be less

automatic than some have assumed.

In any event, it is a quantum leap from the situation I have just described to the assertions in the paper that the right to take industrial action during the interest phase "is limited indeed and consists of a loophole rather than a right" and "industrial action occurring in an interest dispute can be made unlawful more easily than that occurring in a rights dispute".

As noted, the New South Wales Act provides that industrial action after an award or agreement has expired is not unlawful (under the Act) unless the Industrial Relations Commission has issued a dispute order and that order has been contravened. It is entirely up to the Commission to decide at what stage, if at all, a dispute order should be issued and what orders to make. The Commission must call a compulsory conference before it can issue a dispute order and there is a general requirement that it should take into account the extent to which the parties have acted in good faith in deciding whether and when to exercise its functions. It remains to be seen how the Industrial Relations Commission decides to exercise its discretion. The latest report I have been able to obtain is that in close to 13 months under the new Act there have been five applications for dispute orders, of which only one has been granted. That order against two union officials was granted after nine days of industrial action in the form of bans, limitations and picketing at the Water Board's project at Bombo. The order was granted after a relatively short period of industrial action. However, the dispute essentially related to the issue of whether a sub-contractor was meeting award conditions. Therefore, the dispute was over a rights issue, but it was treated as an interest dispute as the relevant award had expired. The issue of whether that order has been breached is still before the Industrial Court. Therefore, it must be concluded that there is no evidence to date that dispute orders are too readily obtainable over bargaining issues.

THE RIGHT TO STRIKE

Brief History

A key hope of those responsible for introducing the Australian system of conciliation and compulsory arbitration was that it would do away with the need for strike action. In the memorable words of Mr Justice Higgins "the process of conciliation with arbitration in the background is substituted for the rude and barbarous processes of strike and lockout. 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 interests of the public."²

As we all now know, this hope had been destroyed well within the first two decades of compulsory arbitration.

There is insufficient time today for me to traverse the whole history of trends in strike action and of attempts to come to grips with the issue of right to strike in

Australia, and other speakers today are better qualified to do that. However, I will argue that thinking on this issue has been basically flawed from the early days of our systems of conciliation and compulsory arbitration, by both proponents and opponents of a right to strike, and that unless we clarify our thinking we are unlikely to find a long term solution to this issue, whatever the political imperatives of the moment might be.

In doing this, I would like to refer those interested to a much fuller treatment of the historical material on which my arguments are based. This is contained in the Business Council of Australia's Employee Relations Study Commission Report of August 1991 titled "Avoiding Industrial Action".

As argued in that Report³, by 1930 there were several basic flaws with the approach introduced in the original Federal Act and its application in practice, as a result of judicial and arbitral decisions and subsequent amendments to the legislation. These included:

- outlawing all strikes in the original 1904 *Conciliation and Arbitration Act* clearly did not prevent strikes;
- there was, and remains, an inherent contradiction between compulsory arbitration (that is, acceptance of the umpire's decision as final) and the remaining right for parties to bargain for over award conditions;
- the system tried to do too much by attempting to regulate both the process and the outcome of bargaining; and
- the repeal, in 1921, of the requirement that awards be for fixed terms, and the repeal, in 1930, of the prohibition on strikes contained in the 1904 Act, had weakened the responsibilities of the parties.

Whether one agrees with these views or not, there should be agreement that by 1930 there were few restrictions against the right to strike in the *Conciliation and Arbitration Act* (Cth). Given the economic climate of the time there was in fact a lull in strike activity for the next decade and then until after the end of the Second World War, so that it took until the late 1940s for this approach to be fully tested.

In 1947 the scope for sanctions was restored when amendments to the Act made the Commonwealth Conciliation and Arbitration Court a Superior Court of Record, thus allowing the Court to punish for contempt those who disobeyed its orders. This amendment was given greater effect as a result of the High Court's decision in the *Boilermakers' Case*⁴. In 1956 the Act was amended to separate judicial and arbitral functions. The Commonwealth Industrial Court was established to exercise judicial functions, including enforcement of breaches of an order of the Australian Conciliation and Arbitration Commission to comply with an award. The 'balance of power' under the Federal system had thus been altered markedly, although it took

3 Industrial Relations Study Commission, *Avoiding Industrial Action*, Business Council of Australia, 1991, Pp 15-29

4 *R v Kirby: Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254

some years, and a change in the economic outlook, before this change had its full impact. The number of fines under sections 29A and 111 of the *Conciliation and Arbitration Act 1904* (Cth) rose from three with a total value of \$2,500 in 1955 to 454 with a value of \$104,150 in 1968⁵. From the mid-1960s pressures for wage increases grew and the proportion of such increases from over award bargaining rose sharply. Some employers were then prepared to make use of the availability of sanctions to refuse to bargain for wage increases, despite full employment and rising community expectations of rewards from the development of our natural resources. The Court applied penalties mechanistically and maximum fines were imposed. As noted by Deery and Plowman: "Unions increasingly came to believe that the system was merely trying to tame them through impoverishment in a period when boom conditions were increasing the employers' capacity to pay increased wages."⁶ It is important to remember, when addressing the conceptual issue of a right to strike, that during this period sanctions were applied indiscriminately to rights and interest strikes, but it would seem likely that they applied more frequently to the latter category.

Then, as we all know, came the jailing of Mr Clarrie O'Shea in 1969 for failing to pay outstanding fines and, following that, in 1970 the effective gutting by the Coalition Government of the Industrial Court's powers to enforce Commission orders⁷. Equally as important for our understanding of the issue of the right to strike, was the propagation from around that time of the myth that enforcement against strike action was not practical or worthwhile in Australia. This myth is propagated in the Hancock Committee's report in 1985, in which the Committee concluded that the imposition of fines and imprisonment for strikes and lockouts did not provide useful support for the conciliation and arbitration system⁸. Part of its reasoning in support of that conclusion was that any analogy between the use of sanctions in the "ordinary" courts or in sporting contests with sanctions for failure to comply with arbitral decisions ignored the phenomenon of trade union power⁹.

The same logic, although perhaps not as explicitly stated, appeared to influence the Fraser Government's policy towards sanctions in the *Conciliation and Arbitration Act*. The bans clause mechanism was not made more easily enforceable during that Government's seven years in office. Instead, it set up an Industrial Relations Bureau to enforce the largely non-existent sanctions in the Act on the basis that employers were unwilling to use those sanctions. And, of course, it introduced Sections 45D and 45E of the *Trade Practices Act 1974* (Cth), outside the jurisdiction of the industrial relations tribunals, with substantial penalties against industrial action over secondary and some primary boycotts. The placement of these provisions in the *Trade Practices Act*, and thus in the Federal Court's jurisdiction, appeared to reflect a view that the Conciliation and Arbitration Commission was incapable of or unwilling to apply sanctions. However, given the debate in the Federal Parliament

5 Source: J. E. Isaac and G. W. Ford (eds), *Australian Labour Relations Readings*, Sun Books, 2nd ed, 1971, Pp 461-4

6 S.J. Deery and D.h.Plowman, *Australian Industrial Relations*, 3rd ed., McGraw-Hill, 1991, P328.

7 For a brief history of this period see Deery and Plowman, Op cit, Pp327-9.

8 Hancock Committee, *Report on Australian Industrial Relations Law and Systems*, Vol 2, 1985, P 637

9 Hancock Committee, Op cit, p633.

at the time the 1970 amendments were made and the subsequent retention of those provisions, it is hardly fair to blame the Federal Commission for any failure to apply sanctions during the period from 1970 to the present. It is difficult to disagree with Associate Professor McCarry's comment that the Commonwealth sanctions provisions are in need of a total revision and it is thus pleasing to note the Prime Minister's comments about the need for clear and easily enforceable penalties against breaches of awards and agreement.

The formal position in the Federal and some State systems today is essentially the same as it has been for many years. Where sanctions existed (as they did under S99 of the *Industrial Arbitration Act* 1940 (NSW) until its replacement in 1992) they had fallen into disuse.

Despite the continuing weaknesses in the Federal and State systems, strike action fell in the mid-1980s from the high and extremely damaging levels reached from the late 1960s to the early 1980s. Such action has continued to decline in the early 1990s. Reasons which have been advanced for this, and which I do not have time to discuss today, include the influence of the Accord, the increasing willingness of employers to make use of the *Trade Practices Act* and of common law remedies following the demonstration effect of the Mudginberri and Dollar Sweets cases, the effects of increasing international competition and the recessions of the early 1980s and 1990s. There is, however, one other factor which I believe warrants closer study. That is, the insertion of the 'no extra claims' requirement into the Federal and State wages principles from late 1983. I will return to this issue shortly.

I believe that, in the Federal and most State jurisdictions, we are no closer to coming up with a sustainable solution to the right to strike than we were at the start of this century. Perhaps it will matter less in future if the 'shrinking world', greater international competition and pressure from our trading partners leaves us with the stark alternatives of meeting delivery schedules or experiencing a major reduction in living standards. But I would be reluctant to rely on external pressures to resolve our internal problems.

Resolution to Right to Strike?

What then are the essential elements of a sustainable solution to a right to strike?

First, there needs to be acceptance that the extremes of an absolute right to strike and an absolute ban on strikes are both impractical positions which are bound to fail. The former because there are some circumstances where the interests of society as a whole need to come before those of the participants - strikes in an essential service and because there needs to be some mechanism to enforce contractual arrangements (that is, enterprise agreements), as well as to ensure that awards which have been arbitrated and consent awards which have been voluntarily agreed under a system of compulsory arbitration are adhered to by the parties to those arrangements. The latter because, in the last resort, strike action may be the only way by which a union or employer can apply sufficient leverage to achieve changes in conditions of employment against an intransigent adversary. We need, in particular, to learn from the failure of the sanctions regime as it was applied in the late 1960s. Also because

the imposition of penalties for strike action would, in some cases, be counter productive to long-term harmony in a workplace or would not be worthwhile given the magnitude or nature of the breach.

Can strikes be segmented into broad categories in respect of which sanctions should be available and categories where sanctions are not appropriate or where particular pre-conditions should be met before sanctions are available?

In addressing this question, it is helpful to look at the history of strike action in Australia in recent years and, particularly, to the available data on different categories of strikes. The nature of Australian strikes and our relative performance compared to overseas countries are discussed in the Hancock Report. Although the data used in the report are now almost ten years out of date, and there has been a substantial reduction in days lost since that time, the Committee's analysis is still generally relevant. The Hancock Committee noted that Australia has an unusual strike pattern with relatively good performance in averting protracted stoppages, but that we are much less successful than overseas countries in avoiding short-term disruptions, particularly over grievances¹⁰. Similar conclusions have been reached by Professor Niland in his various publications advocating an 'industrial calendar' framework and, more recently, by the Business Council of Australia¹¹.

There are two main data sources on industrial disputes in Australia: the Federal Department of Industrial Relations and the Australian Bureau of Statistics.

Research by Professors Niland and Plowman for the Business Council of Australia's Industrial Relations Study Commission, drawing on the former source, showed that in the six months to June 1980, 1983 and 1988 roughly 70 per cent of strikes reported to the Department concerned grievances over current conditions of employment and about 30 per cent were over new terms and conditions. The study noted that from 1980 to 1988 industrial action over substantive conditions of employment declined by 35 per cent, whereas action over grievances declined by only 16 per cent¹².

The Australian Bureau of Statistics data are shown in the following tables. It can be seen from Chart 1 that for Australia in every year since 1981, the *number of disputes* over managerial policy and physical working conditions, which broadly equate to rights disputes, has substantially outweighed the *number of disputes* over wages and hours of work, ie broadly disputes over changes to employment conditions. Obviously these categories are somewhat rough and ready and some disputes would have more than one stated cause, but overall these categories should be robust enough for analytical purposes. Chart 2 contains similar information for New South Wales. It should be noted that both tables exclude industrial action over the ABS categories of 'leave, pensions, compensation', 'trade unionism' and 'other', due to the difficulty in allocating these categories to rights or interest disputes. Although disputes over new terms and conditions tend to be longer, for the majority

10 Hancock Committee, op cit, P 135.

11 Industrial Relations Study Commission, op cit, Pp 41-50

12 Ibid, P 44

of years in the 1980s (and I suspect for the first sustained period in Australia's history), the *number of working days lost* due to managerial policy and physical working conditions also far outweighed those over wages and hours of work. (Unfortunately the ABS series on the *number of working days lost per thousand employees*, which is the preferable series for long-term comparisons, does not provide this degree of detail.)

The changed distribution of strikes during this period is particularly interesting. The high proportion of *working days lost* over wages and hours of work in 1981 and 1982 clearly reflects the campaign led by the metals and transport unions for higher wages and shorter hours of work. The smaller upsurge in *working days lost* (but not the *number of disputes*) in the period from 1986 to 1988 appears to largely represent an upsurge in activity associated with the unions' campaigns over superannuation and second tier wage increases.

Despite the rapid fall in both the *number of disputes* and in the *number of working days lost* over wages and hours of work over the period and particularly in recent years, there has been little, if any, fall in the *number of disputes* over managerial policy and physical working conditions. Indeed, the *number of working days lost* due to such disputes appears to have risen since 1988. I have not been able to locate any totally convincing explanation for this disturbing trend, although one possibility is that it relates to strikes over closures, staffing reductions and redundancy payouts during the current economic downturn the weakness in this explanation being the sharp fall in these strikes in 1992. This category also includes strikes over the Government's education policies.

The Impact of 'No Extra Claims'

The most interesting question in relation to the issue of right to strike is what has caused a sharp decline in strikes over wages and hours, while having little apparent effect over strikes concerning managerial policy and physical working conditions? I believe that the most plausible explanation, both from its timing and its differential effect, is the introduction of 'no extra claims' clauses into the Federal and State wages principles from late 1983, together with the generally tight discipline exercised by the trade unions and wages tribunals in ensuring adherence to these clauses. Other factors, such as the two recessions or the pressures of international competition, would seem less likely to have such a differential effect. Indeed, although it is rarely described in those terms, the introduction of the 'no extra claims' approach into the Australian system of conciliation and arbitration represents a substantial step towards the 'industrial calendar' recommended by Professor Niland and introduced in New South Wales in the *Industrial Relations Act 1991* (as well as addressing, to some extent, the lack of a fixed term requirement for Federal awards referred to earlier).

An important challenge facing the Australian systems in the period ahead is whether they can reduce industrial action over rights issues, without a resurgence in interest disputes. The 'industrial calendar' approach attempts to do this through its requirement for mandatory grievance procedures, through access to the tribunals over issues of interpretation, through providing individual access to the tribunals and through extending the remedies for unfair dismissal. All of these measures are aimed at making strikes unnecessary during the rights phase.

The New South Wales Approach

The benefits of the New South Wales reforms can already be seen from the following data.

Firstly, Table 1, taken from Volume 2 of the Hancock Report, shows the strike proneness of the States from 1946 to 1982. It can be seen that New South Wales did not fall below second place on this table in any of the periods shown. Indeed, the Hancock Committee commented that New South Wales has typically been worse affected by strikes than the other States¹³.

Next, Chart 3 shows the *number of working days lost per 1000 employees* for each year from 1982 to 1992. It can be seen that New South Wales generally led the States and only fell as low as third place in two years up until 1991. Then in 1992, under the new *Industrial Relations Act*, which took effect from 31 March 1992, the New South Wales has improved its position to become the fourth highest State and its relative performance has improved substantially.

I would now like to show some information from my Department's monitoring of the new *Industrial Relations Act*, drawing on data provided by the Industrial Registry.

Chart 4 shows the number of dispute notifications to the Industrial Registry under the old and new Acts monthly since January 1989. While the monthly figures are volatile, the trend to reduced dispute notifications under the new Act is clear. (Dispute notifications under both Acts do not necessarily imply industrial action.) This trend was expected, given the greater restrictions on varying an award during its term under the new Act and the trend towards enterprise bargaining.

Chart 5 shows the number of unfair dismissal applications under the old and new Acts. Such applications have increased under the 1990 and 1991 Acts. While this is clearly due in part to the right for individuals to make applications, an increase in unfair dismissal notifications and in grievance notifications more generally is consistent with the new Act's scheme of effective sanctions against industrial action during the term of an award/agreement balanced by a right for the parties and individuals to have these matters determined by the tribunals without the need to resort to industrial action to ensure that a matter is heard or to speed up the process. Moreover, the attempted use of sanctions under the new Act has been extremely

limited. To date there have been only two applications for injunctions against industrial action during the term of an award/agreement and no penalties have applied during this phase while, as noted earlier, there have been only five applications for dispute orders.

Of course, not too much can be concluded from a short run of statistics, particularly in a climate of economic recession. However, the New South Wales experience to date bears out that in New Zealand after the introduction of that nation's 1987 Act¹⁴, which also contained a rights/interest framework, where disputes over rights matters fell substantially.

While the level of strike action or the number and type of disputes notified to the tribunals are only a partial measure of the success or otherwise of an industrial relations system, there is little to date to suggest that the benefits of the 'industrial calendar' in New South Wales are outweighed by disadvantages (for example, a system could be so repressive that it impinges on democratic rights or forces discontent into other outlets such as higher absenteeism, reduced productivity or even industrial sabotage). While some parties preferred to continue to operate in traditional ways and it was necessary for the Government to challenge in the tribunals some early attempts to water down the requirement for fixed term awards, the Department is now seeing some genuine attempts being made to take advantage of the benefits of the new framework.

Thus, while it is early days yet, I believe that the benefits of shifting NSW to an 'industrial calendar' framework, as recommended in the Niland Report and adopted by the Government, have been achieved. In particular, this approach provides the necessary framework for industrial stability and the resolution of grievances without the need for industrial action during the fixed term of an award or agreement, and thus justifies the imposition of sanctions against strikes during this period.

The New South Wales approach also builds on the beneficial experience of 'no extra claims' clauses, by providing a firm legislative base for what have been a series of honour agreements of uncertain duration. Most importantly, it provides the conceptual framework within which to make more rational decisions about the right to strike, by setting out clearly the range of circumstances in which strikes should be subjected to sanctions. It overcomes the problem of having to choose between the absolutes of a right to strike or a bar on strikes, which has so confused debate on this issue in Australia.

Now there is an Australian model with these elements, and in view of its successful implementation to date, it is up to the detractors of the reforms to put up a clearly argued case to the contrary and to show that there are better alternatives which are capable of addressing the right to strike.

I suggest that the New South Wales approach represents an important stage in the shift towards a contractual or collective bargaining framework for industrial relations, as exists in the overseas collective bargaining nations such as Germany,

Sweden, USA and Japan, where industrial action is unlawful during the term of an agreement and where there is generally an unrestricted right for private sector parties to take industrial action once an agreement has expired. At the same time the approach recognises the unique elements of the Australian conciliation and arbitration systems: in particular single party access to compulsory arbitration (generally arbitration overseas has to be by consent) and, in return for this right, the need for a tribunal's decision to be enforceable on all parties to a dispute.

In deciding whether to go further towards an unlimited right to strike than currently exists in the New South Wales Act, it will be necessary to retain a balance between all parts of the equation. Issues which warrant further discussion might include whether dispute orders are potentially too readily obtainable thus removing a party's right to legitimate industrial action as part of the bargaining process (there is no evidence of this to date), and/or whether a more radical departure from the Australian model is needed, eg an open or greater right to strike in the bargaining phase in return for the removal of compulsory arbitration. On the latter issue, given the concerns expressed by the Hancock Committee and others that a move to a full collective bargaining model could mean an increase in long and bitter strikes, this trade-off may not be worthwhile, at least until the New South Wales model, and the new enterprise bargaining models around Australia, have withstood the test of a more buoyant economic climate.

Introduction of an unfettered right to strike in the bargaining phase, while single party access to compulsory arbitration remained, would destroy the symmetry of this model. We should be looking to retain the best features of the Australian system of conciliation and arbitration, including the role of the tribunals to set award minima and to compulsorily arbitrate as a last resort, rather than moving to a 'purist' model with an absolute right to strike in the bargaining phase, as some have suggested. I note that Associate Professor McCarry also highlights this trade-off and implies broadly the same conclusion in his paper. If this broad approach is accepted, the key issues are when sanctions in the bargaining phase should be available, the nature of those sanctions, the role of the parties as compared to that for the State in initiating the sanctions and the role this leaves for other sanctions outside the industrial tribunals (secondary boycotts, essential services and the common law).

I suggest that a government has a legitimate right to legislate against strikes in essential services to protect the public interest and against secondary boycotts to protect innocent third parties. Of course, that leaves room to debate the boundaries of such powers, eg no doubt many would disagree with the inclusion of the meat export industry as an essential service, as is the case in New Zealand!

That leaves the difficult issue of the common law remedies and the risk of parties facing penalties outside the industrial relations system for an action which is not sanctionable within that system. The Victorian Government attempted to address this issue in its reforms by providing protection from the common law torts of conspiracy, intimidation, inducement or breach of contract or interference by unlawful means with trade, business or employment during the bargaining phase, while legislating against picketing and secondary boycotts. The New South Wales reforms left the common law remedies intact. At one stage in 1987, it appeared that

the Federal Government was intending to attempt to severely limit access to the common law remedies and the *Trade Practices Act* in return for introducing effective sanctions into its new *Industrial Relations Act*. It may well be that such a proposal is under consideration again at present. However, I would suggest that this issue needs to be carefully thought through. While there may be a case for removing access to the economic torts, provided that there are effective and logically constructed sanctions available to the industrial tribunals, those torts involving picketing with violence or damage to property may need to be retained unless there are other effective remedies against those forms of behaviour.

The Right to Strike: A Nationally Consistent Model?

At the beginning of this paper I undertook to outline the approach Mr Hannaford intends to adopt at today's meeting of Commonwealth and State Labour Ministers. In summary, the current New South Wales Government has been a consistent proponent of integration of the nation's industrial relations systems. New South Wales is supporting measures which have been agreed by Federal and State Ministers to achieve greater comity between the systems in the short term. These include co-location of industrial inspectors, and dual authorisation of those inspectors, the possibility of placing New South Wales award information onto the Fatext system, an award inquiry tie-line between the Federal and State Departments and exploration of the scope to harmonise industrial registry information systems.

However, there is clearly a need to go further. The main goals should be to provide greater scope to rationalise the jurisdictional coverage of single enterprises or workplaces and to work towards harmonisation of legislation.

On 22 April the Minister welcomed Prime Minister Keating's recognition of the need for the Federal system to contain clear and easily enforceable penalties for breaches of awards and agreements. He also indicated that the Federal Government had to recognise fundamental individual rights such as freedom of association, the right for employers and employees to negotiate directly with each other and individual access to the industrial tribunals to achieve redress. Today the Minister will also propose that the Commonwealth and States work together to achieve consistent minimum standards in all jurisdictions, rather than the Commonwealth continuing to push ahead unilaterally with certain legislated minima drawing on ILO Conventions.

CONCLUSIONS

Associate Professor McCarry's paper highlights the extent to which the main jurisdictions currently diverge in relation to sanctions and argues in support of common provisions. He highlights the contradiction between excessive sanctions in the bargaining phase in the shift to a bargaining model, but indicates support for sanctions in this phase if the State continues to provide access to last resort arbitration. It is to be hoped that the Federal Government's foreshadowed reforms address the need for total revision of its sanctions as recommended by him.

I have outlined some further issues to be considered in coming to terms with the right to strike when developing those sanctions, based on the rationale behind the New South Wales model and experience since the implementation of that model.



TABLE 1

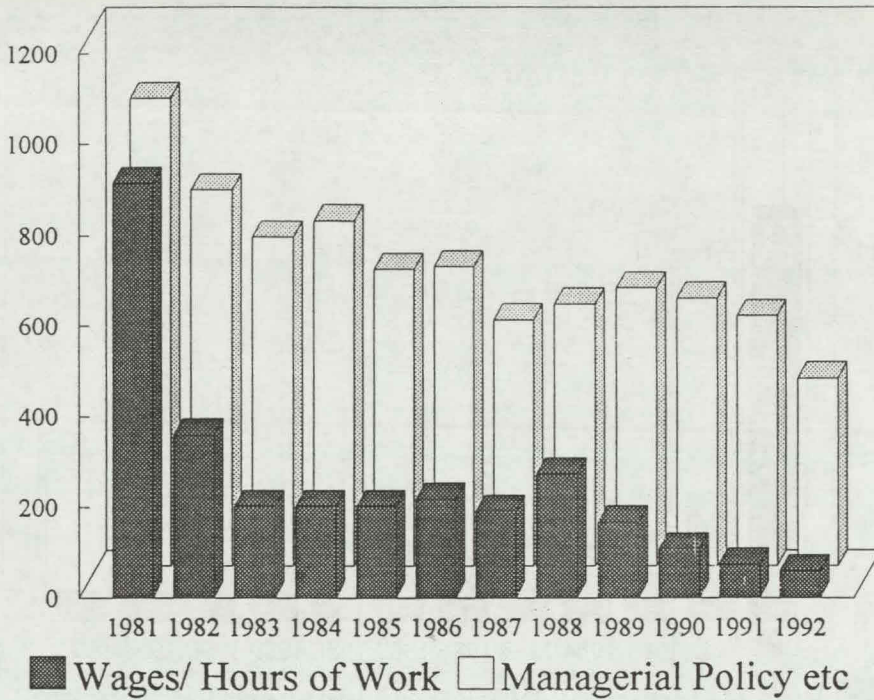
The 'Strike-Proneness' of the States, 1946-83

(Days lost per 1,000 employees as multiple of Australian average)

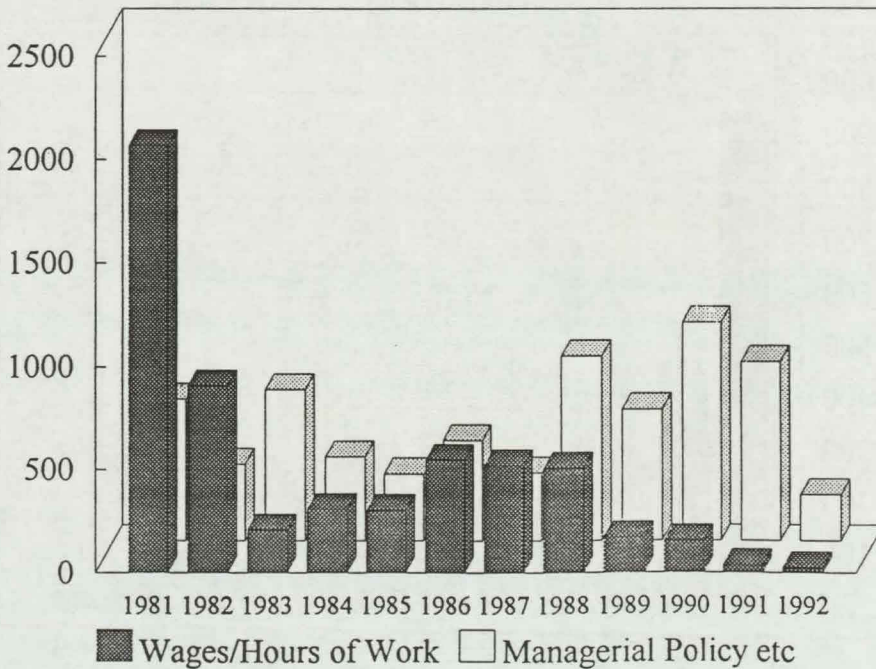
Year	N.S.W.	VIC.	QLD.	S.A.	WA.	TAS
1946-50	1.16	0.93	1.63	0.35	0.23	0.20
1951-55	1.71	0.35	0.94	0.59	0.53	0.56
1956-60	1.35	0.36	1.58	0.41	0.36	0.68
1961-65	1.28	0.94	1.43	0.39	0.34	0.15
1966-70	1.38	0.92	0.89	0.49	0.52	0.34
1971-75	1.21	1.16	0.08	0.44	0.44	0.63
1976-79	1.11	1.25	0.94	0.41	1.04	0.57
1979-81	1.08	1.21	0.92	0.40	0.80	0.67
1982	1.26	0.62	1.60	0.37	0.86	0.25

Source: Hancock Committee Report on Australian Industrial Relations Law and Systems, Vol. 2, 1985, p130.

CHART 1
(a) Australia - No. of Disputes

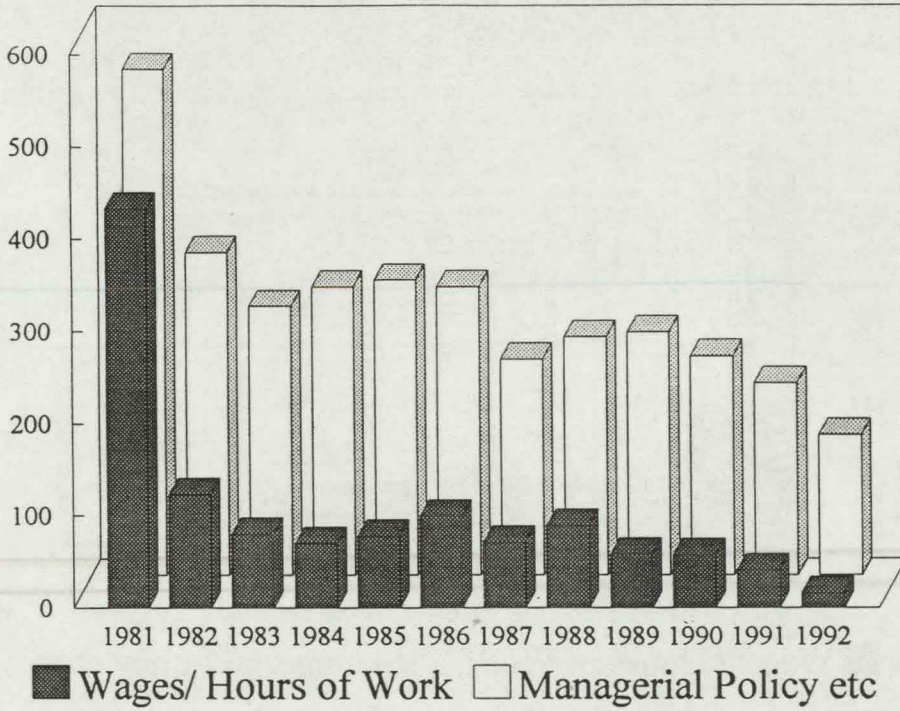


(b) Australia - Working Days Lost ('000)

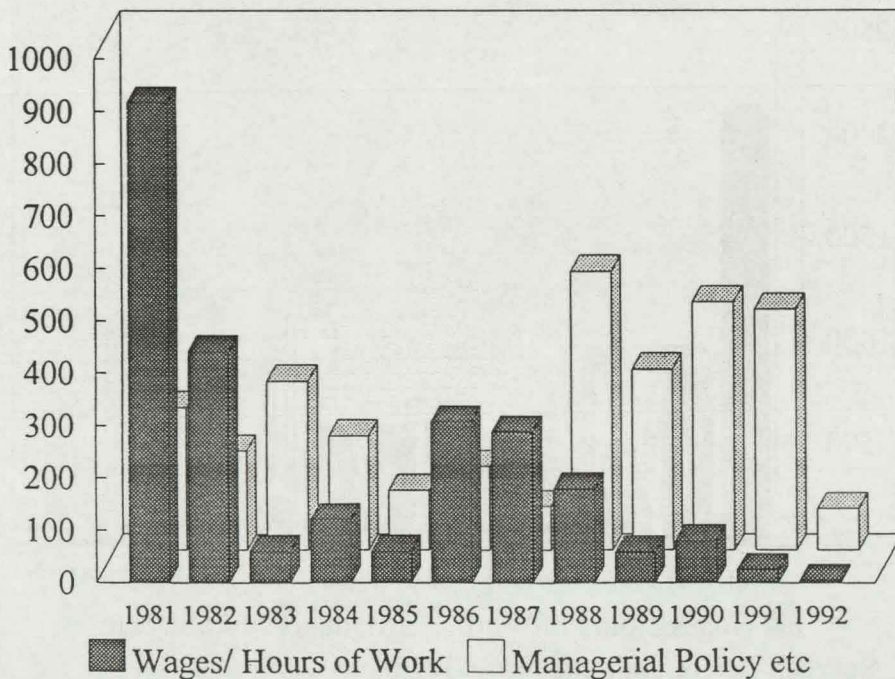


Source: ABS Catalogue No: 6322.0

CHART 2
(a) NSW - No. of Disputes

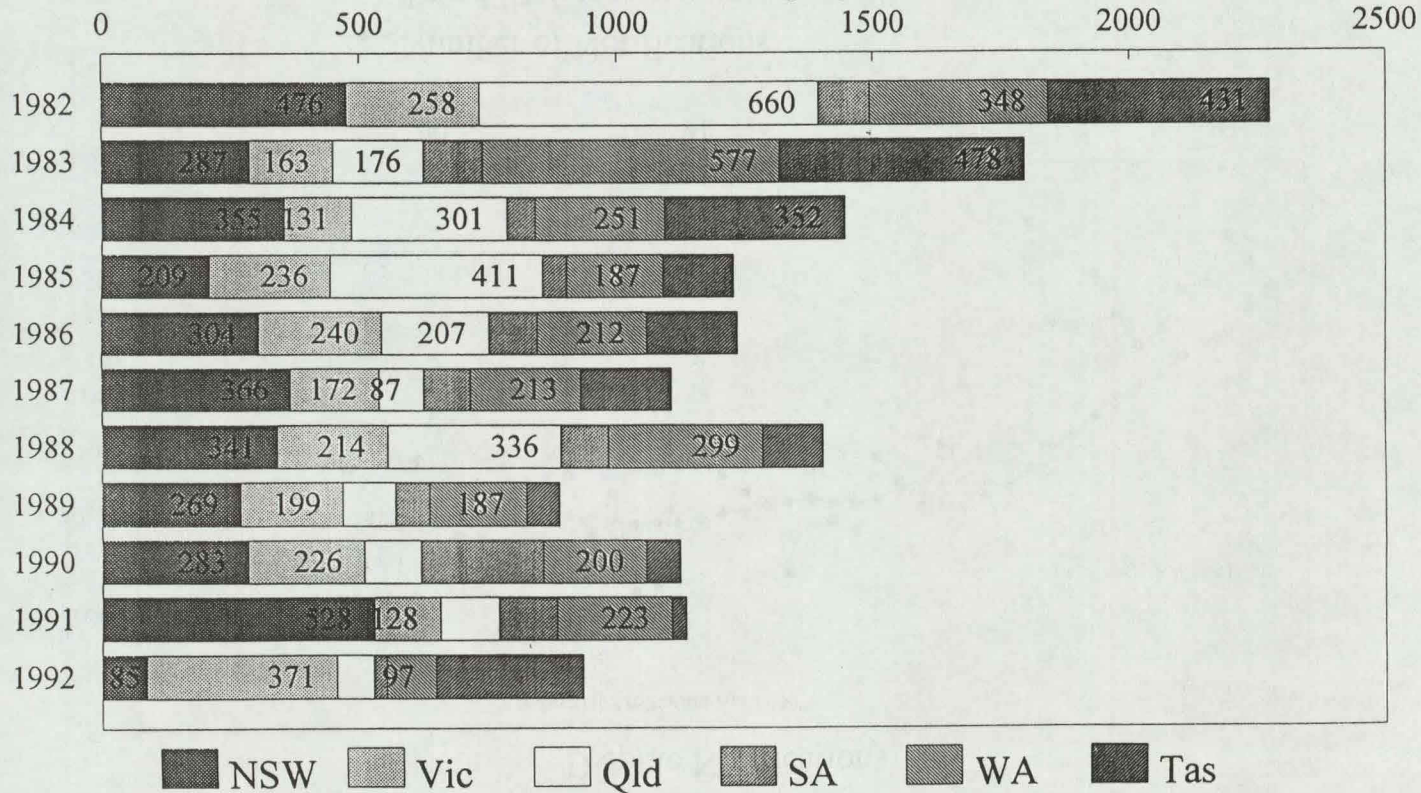


(b) NSW Working Days Lost ('000)



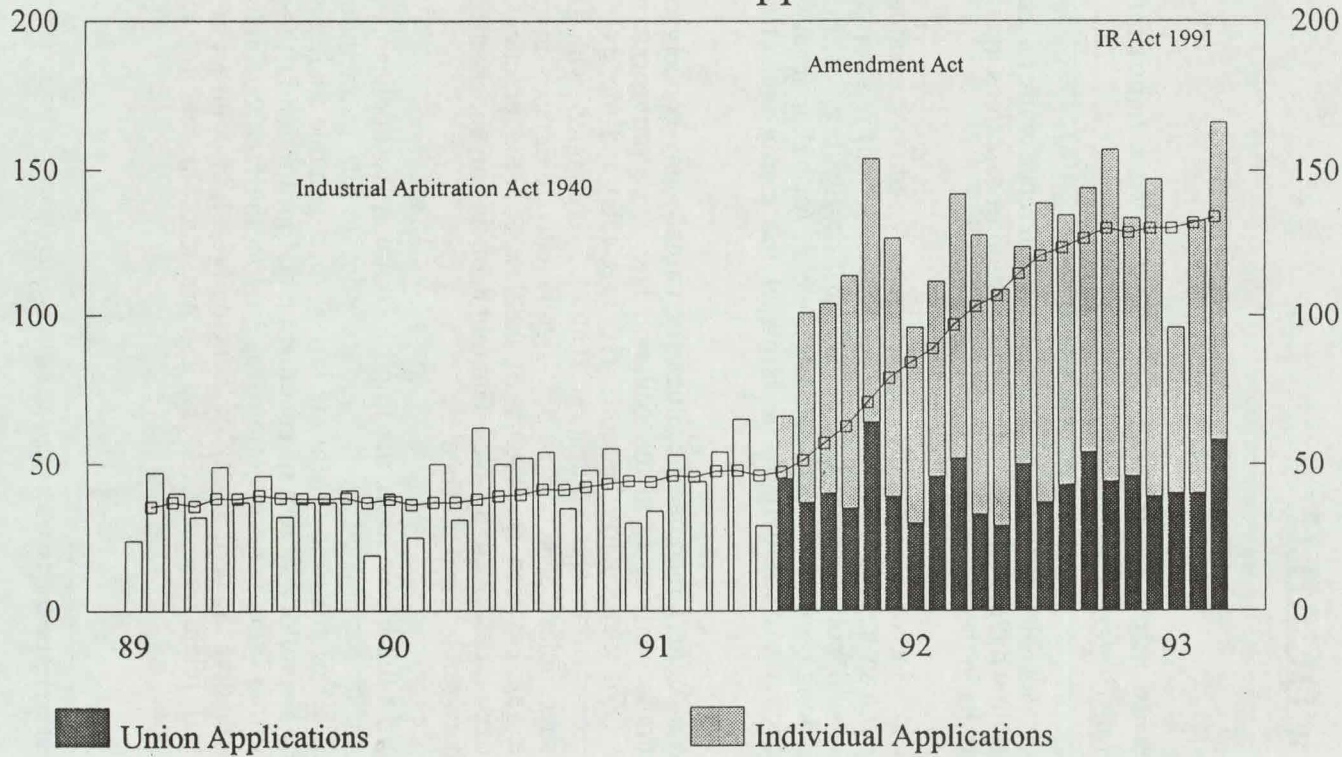
Source: ABS Catalogue No. 6322.0

Chart 3: Working Days Lost
Per 1000 Employees



Source: ABS Catalogue No. 6321.0

Chart 5 Unfair Dismissal Applications



Source: NSW Industrial Relations Commission (Unpublished Data)

6. Sanctions And Labour Law In The 1990s

Jeff Shaw QC MLC

Comments on the paper titled "The Right to Take Industrial Action" by Associate Professor Greg McCarry.

Associate Professor McCarry has provided the conference with an encyclopaedic framework within which to discuss the vexed question of sanctions against industrial action in Australia in the 1990s.

Whether, and to what extent, penalties should be imposed on individuals and trade unions engaged in strikes (or other forms of industrial action) is a complex question of legal and social policy which has never satisfactorily been addressed in our history. It has long been an anomalous area in which Australian legal systems have lagged behind overseas counterparts in terms of the clarity and effectiveness of prescription.

The existence of quite Draconian penalties for virtually any conceivable industrial action in Australia - arising from the common law, from provisions in the *Trade Practices Act 1974* (particularly Sections 45D and 45E) and the specific penalties contained in conciliation and arbitration statutes - combined with the *de facto* existence of such industrial action (*albeit* significantly minimised in recent years) marks a huge gulf between the theory of the law and the practical conduct of Australian citizens, described by Neil Gunningham, in an understated way, as a 'discrepancy between law and practice'.¹

Australia has, in a full-blown form, the English common law applicable to collective industrial action as formulated by the judges prior to the momentous legislative intervention of 1906, protecting from the law of torts genuine trade disputes. The introduction of a statutory system of conciliation and arbitration at the federal level in 1904 meant that little or no attention was paid to the fact that industrial action will invariably involve the civil wrong of inducing breach of contract or interference with contractual relations. As KD Ewing has said, in relation to Australian industrial action:

As a general rule, it can safely be said that the participation by workers in a strike or other industrial action will be regarded as a breach of contract by those concerned.²

The enactment, in the late 1970s, of the secondary boycott provisions of the *Trade Practices Act* 1974 formulated, cumulative upon common law prohibitions, a broadly couched regime of penalty for industrial action involving a corporation, extending well beyond the secondary boycott in the classical 'black ban' sense. Under these statutory provisions, applicants have access to sudden and dramatic curial orders - the interlocutory injunction and the action for contempt of court where that injunction is breached - in addition to damages. At the interlocutory stage, the action is readily proved by hearsay evidence in a way sufficient to support urgent relief. The threat of substantial damages being ultimately awarded looms large over most forms of industrial action.

A further, cumulative layer of penalty is to be found in the industrial statutory law. This law does not modify or restrict the common law or trade practices prohibitions, but adds a third tier of punishment, lest the other avenues for litigation by employers be overlooked or circumvented. As is well known, the so-called 'penal clause' mechanism under the federal statutory scheme has a chequered and colourful history. The 1950s saw a steady use of the insertion of 'bans' clauses by the Commonwealth Conciliation and Arbitration Commission - the systematic imposition of penalties on striking unions became part of a conciliation and arbitration system.³ But in 1969, that process was tested to the point of crisis by Mr Clarrie O'Shea, who had been, for 20 years, the Victorian Secretary of the Australian Tramway and Motor Omnibus Employees Association. Mr O'Shea refused to produce documents or co-operate with the Industrial Court, which was seeking the payment of a fine of \$1,200. As a result, he was gaoled for contempt of court.⁴ However, this was not merely an idiosyncratic stand dependent upon the ideology of a single union or individual officer. Rather, the supportive response given to O'Shea by the trade union movement reflected a longstanding frustration. A million employees stopped work, and the dispute was resolved only by a philanthropic donation.⁵ D W Rawson has commented:

There was general agreement, after the event, that the law at the time of the O'Shea case was too inflexible and resulted in too many fines on too many unions. It is possible that a less severe law would have remained longer in operation;⁶

The result was that the sanctions prescribed by the *Conciliation and Arbitration Act* 1904 have been, since 1969, in the words of former Minister for Employment and Industrial Relations, Mr Ralph Willis, 'a virtual dead letter'.⁷

It was in the context of this labyrinthine background that Mr Willis anticipated that the recommendations of the Hancock Committee of Review into Australia's

2 K D Ewing, "The Right to Strike in Australia", (1989) Vol 2, No 1 *Australian Journal of Labour Law*, p 18.

3 D W Rawson, *Unions and Unionists in Australia*, Allen & Unwin, 1986, p 101.

4 *Ibid.*

5 Bill Ford and David Plowman, *Australian Unions: An Industrial Relations Perspective*, MacMillan, 1983, p49.

6 *Op cit*, p 102.

7 R Willis, The Hancock Report: Blueprint for Reform, (1985) Vol 27, No 4 *Journal of Industrial Relations*, p 560.

Industrial Relations Law and Systems' recommendations as to sanctions was the area 'likely to arouse greatest controversy'.⁸

Although, as I have endeavoured to show, there are some unique Australian aspects to the sanctions' problem, the fact that it is a peculiarly difficult area of public policy is not a case of Australian exceptionalism. In a useful article, Professor Treu has argued that 'the regulation of strikes is one of the most difficult areas for legal and industrial relations' systems', as political systems tend to oscillate between sometimes ambiguous policies of repression, tolerance and (in the most recent phase experienced by democratic countries, particularly in Europe) the explicit recognition of the right to strike, that is the right of workers to withdraw their labour in order to promote their own interests.⁹

In Australia, the issue cannot be left perpetually languishing. There is international pressure to get our labour laws up to an acceptable standard. The Committee of Experts of the International Labour Organisation has held (in case No 1511) quite unequivocally:

The present state of the law in Australia is not in conformity with these principles (that is, respecting the right of workers and their organisations to take strike action to protect and promote their economic and social interests).¹⁰

The Committee of Experts has focused specifically upon the unamended state of the common law in Australia - the central issue in the failure of Australian law to comply with the conventions.¹¹ As McEvoy and Owens argue:

The common law has become a jurisprudence blinded to industrial reality by an individual and retributive focus which has been worked out in context other than those of work relationships.¹²

THE NEW SOUTH WALES' STATE LAW POSITION

The New South Wales' statutory law - that is, the *Industrial Relations Act* (NSW) 1991 is a paradigm case of this dilemma. This is partly because the recent statutory changes in New South Wales have enormously boosted the level of monetary penalty falling upon individual strikers and unions which are participating in the strike. Secondly, we have a new and detailed regime of statutory penalty which is a superstructure built upon (and without in any way modifying) the basic common law sanctions, and whilst also incorporating in a New South Wales' law a replication of the secondary boycott provisions of (federal) trade practices' legislation. Thirdly, we have a procedure for enforceable 'dispute orders' issued by the Industrial

8 Ibid.

9 Tiziano Treu, "Strike Regulation and Job Security", (1992) Vol 13, Part 5 *Industrial Law Journal* [South African], pp 1053, 1054.

10 K P McEvoy and R J Owens, "On a Wing and a Prayer: The Pilots Dispute in the International Context", Vol 3, No 1 *Australian Journal of Labour Law*, p 1 at p 25.

11 Ibid, p 27.

12 Ibid, p 26.

Relations Commission of New South Wales¹³ which triggers (in the absence of an affirmative order that the dispute order has been complied with) a summons issued by the Registrar of the Industrial Court. By this novel mechanism, penal proceedings are perpetuated despite the resolution of the real controversy and despite the wishes of the parties - an uncontrollable complication for ongoing industrial relationships.¹⁴

Although attempting to fuse a system of collective bargaining with traditionalist conciliation and arbitration, the New South Wales' legislation fails to provide any clear or substantial opportunity for industrial action which, in the United States and Europe, has been regarded as a necessary concomitant of the collective bargaining process if labour is to have anything approximating equality of bargaining power with capital.¹⁵ Whilst purporting to reflect Professor John Niland's Green Paper¹⁶, as McCarry points out, the narrow gap for industrial action in the scheme is a 'loophole' rather than a 'right'. The legislation neglects to allow any kind of real or substantial right to strike in relation to 'interest' disputes, that is to say, at the point of renegotiation of the collective bargain. Whilst Niland regarded this right as 'crucial' for the purposes of equity, the New South Wales' legislation views it either as irrelevant or bad. Massive penalties apply to any industrial action taken during the course of an enterprise agreement or an award - that is to say, in relation to 'rights' disputes. Some forms of action are unlawful by definition. But even at the point where, in accordance with collective bargaining theory, a strike would be not only expected, predictable but also legitimate, the employer has the option to seek a 'dispute order' from the Industrial Relations Commission. The only qualification upon the issue of such an order is that the Commission must be satisfied that some process of conciliation has occurred - and obviously in many circumstances this can be quite perfunctory. Once a dispute order has been issued by the IRC, then breaches of that order are penalised by fines of the same magnitude as apply to breaches of an injunction of the Industrial Court of New South Wales in the event of a 'rights' dispute during the pendency of the enterprise agreement or award.

I would argue that any (implicit) right to strike in the New South Wales' legislation is illusory and fails to redress the lack of balance or fairness in the legislative scheme as a whole.

A FAIR SANCTIONS' PACKAGE FOR THE 1990s

Most commentators acknowledge that a right to strike cannot be unfettered. This is particularly so where there is a voluntary system of conciliation and arbitration, which trade unions and employers can either access or decline to do so. As Breen Creighton points out in relation to the federal statutory system:

13 Section 210; under subsection (6)(c) the IRC must specify a time within which application may be made to the Commission for an order that the dispute order has been complied with.

14 Sections 211, 212.

15 I have argued this in more detail in J W Shaw, "Greiner sends the New Right to work", *The Australian*, 26 September 1991.

16 J Niland, "Transforming Industrial Relations in New South Wales", *Green Paper*, 1989.

It is not, and never has been, mandatory to activate that system.¹⁷

It is a voluntary system. And where unions or employers enter the voluntary system, they can reasonably be expected to accept certain norms of behaviour. Where those norms are breached, it is legitimate to apply sanctions.

An additional appropriate area for sanctions lies in the fact that parties make agreements or submit themselves to processes of arbitration which lead to legally binding prescriptions. When those prescriptions are breached, it is not only justifiable but important that there be sanctions to encourage future compliance and mark disapproval of past breach.

Neither of these areas for the proper implementation of sanctions mean that penalties are being imposed upon industrial action *per se*. Rather, if the bases of a sanctions' package are as I have expressed them, it means that sanctions are being imposed either for breach of the rules of an arbitration system voluntarily entered, or for breach of the express terms of agreed or arbitrated settlements.

These seem to me to be reasonable limits to the right to strike and the areas in which the State should impose sanctions. Professor Treu's article¹⁸ makes it clear that the right to strike recognised in modern European democracy is not absolute, but is subject to limitations, and not only in relation to essential services. For example, German courts have applied a 'proportionality' principle to set limits concerning strike action, such as the requirement that the possibilities for negotiation must have been exhausted.

I would crystallise the bases upon which future sanctions' packages in Australia should be developed as follows:

- (i) industrial action itself should not be penalised. Rather, penalties should be directed towards breach of agreements, arbitrated decisions, or orders of authoritative tribunals;
- (ii) the State should implicitly recognise a right to strike, subject to explicit limitations;
- (iii) monetary penalties should be regarded as a last resort, applicable only after the processes of conciliation and arbitration have been exhausted;
- (iv) the system of statutory arbitration should favour, as prior measures, cancellation of awards, reduction or elimination of coverage rights and (ultimately) deregistration rather than monetary penalty;
- (v) a statutory package of sanctions should be developed which is more potent and more expeditious than present remedies and it should be closely allied to the statutory system for the resolution of industrial disputes but this should

17 Breen Creighton, "Enforcement In the Federal Industrial Relations System: An Australian Paradox", (1991) Vol 4, No 3 *Australian Journal of Labour Law*, p 197 at p 224.

18 *Op cit*, at p 1058.

involve more sophisticated measures than the simplistic application of large fines;

- (vi) in exchange for accepting the legitimacy of a new statutory sanctions' package, the trade unions should receive a carefully crafted measure of protection from the processes of the common law and from the more extreme aspects of secondary boycott legislation within the trade practices' law.

It is only when a collection of sanctions is perceived by the community at large, by trade unions and employers as balanced and legitimate that it will work. An imbalanced, punitive or ineffective package will bring the law into disrepute. Thus, the construction of a broadly acceptable measure is one of the key challenges facing Australian governments in the industrial relations' field today.

7. The Ascendancy of Federal Industrial Law

Ronald Clive McCallum

INTRODUCTION

The Integration of Law and of Legal Institutions

Half a century ago, each of the Australian States was very much a sovereign political and legal unit. The State parliaments and State courts were responsible for the vast bulk of domestic law which was applicable to citizens.¹ For example, the entering into of marriages and the creation and control of corporations were all matters for State law. Since then, however, the Australian legal framework has become far less fragmented; thus lessening the need for lawyers who specialise in conflicts of laws.² For example, it is now federal laws which govern marriage and divorce; which control the activities of corporations; and which ensure competitive practices in the business sector. The central government has come to regulate these matters because there has been a broad based consensus that such things should now be dealt with by federal law. Furthermore, the establishment of the Federal Court of Australia in 1977,³ together with the enactment of the cross-vesting of jurisdiction legislation in the late 1980's,⁴ has markedly increased both the integration and efficiency of our federal and State courts.

1 For an illustration of the separate nature of the laws of the states, see *Koop v Bebb* (1951) 84 CLR 629

2 Of course, conflicts of laws situations still arise. For a recent example, see *McKain v R W Miller and Co (SA) Pty Ltd* (1992) 104 ALR 257

3 *Federal Court of Australia Act 1976* (Cth)

4 See, for example, *The Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth)

The Integration of Industrial Relations

Half a century ago, the State industrial relations tribunals were pretty much sovereign bodies. Within their separate spheres of influence, they were largely free from federal interference. Workers under State law did have the capacity to create interstate labour disputes in order to bring themselves under federal industrial law. Decisions of the High Court made it clear, however, that the court wished to retain the present status quo. In particular, it refused to allow many State public sector workers to participate in federal conciliation and arbitration. Since then, however, fresh decisions of the High Court, coupled with the increased economic integration in this nation, has increased the power of the federal government over industrial relations. The federal and State industrial tribunals have in the last decade and a half, become more integrated with one another. A key turning point was the adoption of a system of wage indexation by the Federal Conciliation and Arbitration Commission in April 1975.⁵ The members of the federal and State tribunals realised that unless they co-ordinated their approaches, it would be impossible to operate a wage indexation mechanism on an Australia-wide basis. Now, it is not uncommon for members of State tribunals to hold concurrent appointments as members of the Federal Industrial Relations Commission.⁶ Unlike many other areas of civil law, there has not been a broad based consensus that industrial relations is proper to be dealt with by the central government. On the contrary, since 1990 we have seen a divergence in industrial relations policy and practice. The Australian Labor Party and the trade union movement wish to retain industrial relations tribunals as a means of supervising enterprise bargaining. For their part, the conservative political parties and many in the business sector, wish to abolish conciliation and arbitration. They would replace it with a system based on the law of contract whereby workplace agreements are concluded free from tribunal supervision.

The Shape of the Argument

In my view, the key to the future of industrial relations policy and practice in Australia lies with the federal government. Its legislative powers, coupled with the predilections of the present High Court bench, give it most of the cards in the pack. If one or more States sharply deviate away from the present mix of arbitration and collective bargaining, they may find themselves with a shrinking work force under their control. If the workers desire to move into the federal sphere, and if the central government wishes to have them, then that will be the end result. If on the other hand, the states remain within the four corners of the federal vision, the central government will leave them alone.

5 *National Wage Case April 1975* (1975) 167 CAR 18

6 See the commentary by G F Smith and C Saunders, "Crossing the Boundaries: Jurisdictional Issues in Joint Sitings and Dual Commissions" (1990) 3 AJLL 26

THE PRESENT STATE OF PLAY

The Work Force

Before further examining this argument, it is important to analyse the present federal and State industrial relations mix. State coverage of industrial relations sharply varies from one jurisdiction to another. Western Australia has the highest percentage of industrial coverage, with Victoria having the lowest. In 1990, the Australian Bureau of Statistics figures showed that just over two fifths of the Australian work force which is under award coverage comes within the federal system, while just less than three fifths of these workers come under State law. The figures are as follows:⁷

	<i>Federal %</i>	<i>State %</i>	<i>Not covered by awards etc. %</i>
New South Wales	26.5	48.8	23.9
Victoria	37.9	39.6	17.9
Queensland	23.2	57.3	18.2
South Australia	33.3	47.8	17.4
Western Australia	20.8	57.3	21.3
Tasmania	40.8	45.6	12.5
Australia	31.5	46.5	20.0

Women and Men Workers

The coverage of women and men under federal and state industrial laws, shows that more men come under the federal umbrella than do women. For example, while approximately one in every four women workers come within federal jurisdiction, two out of every five males is within the federal realm. The figures are:

FEMALES

	<i>Federal %</i>	<i>State %</i>	<i>Not covered by Awards etc. %</i>
New South Wales	18.5	59.2	21.5
Victoria	27.6	54.8	12.7
Queensland	16.0	68.5	15.0
South Australia	23.4	61.6	13.7
Western Australia	16.3	65.7	17.5
Tasmania	27.3	61.0	10.6
Australia	23.2	58.4	16.5

MALES

	<i>Federal %</i>	<i>State %</i>	<i>Not covered by Awards etc. %</i>
New South Wales	32.8	40.6	25.9
Victoria	45.7	28.1	21.8
Queensland	28.9	48.6	20.6
South Australia	41.4	36.5	20.4
Western Australia	24.7	50.2	24.5
Tasmania	49.7	35.3	13.7
Australia	38.0	37.3	22.7

What the Figures do not Reveal

While these figures give us some idea of the percentages of various categories of employees, they do not give us any indication of the economic power possessed by federal and State workers. Speaking generally, workers who possess stronger economic leverage and who have a higher trade union density tend to be covered by federal law: whereas employees with lesser bargaining power and a lower trade union density appear to be governed by State law. For example, large scale manufacturing, road rail and air transportation, tele-communications and the federal public sector are all covered by federal industrial law. On the other hand, small scale manufacturing, many teachers and nurses and shop assistants usually come under the State mechanisms.

THE HIGH COURT AND THE FEDERAL LABOUR POWER

The Federal Labour Power

Under section 51(xxxv) of the Australian Constitution, the federal government has power to establish machinery to prevent and settle interstate labour disputes by conciliation and arbitration. It used this power in 1904 to enact the *Conciliation and Arbitration Act*.⁸ In 1989 this statute was replaced by the present *Industrial Relations Act*.⁹ The Industrial Relations Commission now settles labour disputes, either by promulgating awards or by certifying enterprise agreements.¹⁰

8 *Conciliation and Arbitration Act 1904* (Cth)

9 *Industrial Relations Act 1988* (Cth)

10 On the operations of the federal labour power, see R C McCallum, G F Smith and M J Pittard, *Australian Labour Law: Cases and Materials*, (Sydney, Butterworths, 1990) ch 5-9

The High Court and Inter-Governmental Immunities

The early High Court was conscious of the fact that if it allowed State public sector workers to access the federal industrial relations machinery, this would greatly lessen State controls on their own employees. The Court wished State governments to be immune from indirect federal controls over their work forces; thus once it adopted a vigorous interpretation of the Constitution in the *Engineer's Case*,¹¹ the High Court developed a mechanism to prevent many State public sector workers from bringing themselves under federal law. It stated that only employees who possessed the characteristic of being engaged in an industry could come within federal jurisdiction.¹² This capacity was denied to most State public sector workers above menial or mechanical levels.¹³ Thus public servants¹⁴, teachers¹⁵ and the like were forced to remain within their State industrial relations regimes.

The Change of Heart in the 1980's

In June 1983, the High Court had a change of heart. It became less concerned with protecting the industrial relations sovereignty of the States, and more concerned about enabling relatively poorly paid public sector workers to come within the boundaries of federal industrial law. In the *Social Welfare Union Case*,¹⁶ the High Court overthrew this old dogma on the industry concept and held that all workers, other than those performing high level administrative functions for State governments, could bring themselves within the federal industrial realm. In an unanimous joint judgment comprising Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ, their Honours stated this new approach in the following passage. They said:

It is, we think, beyond question that the popular meaning of "industrial disputes" includes disputes between employees and employers about the terms of employment and the conditions of work. Experience shows that disputes of this kind may lead to industrial action involving disruption or reduction in the supply of goods or services to the community. We reject any notion that the adjective "industrial" imports some restriction which confines the constitutional conception of "industrial disputes" to disputes in productive industry and organized business carried on for the purpose of making profits. The popular meaning of the expression no doubt extends more widely to embrace disputes between parties other than the employer and employee, such as demarcation disputes, but just how widely it may extend is not a matter of present concern.¹⁷

11 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129

12 See, for example, *Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation* (1919) 26 CLR 508

13 For comment on the operations of the High Court in this field, see W A Rothnie, "Restoring the Frontiers of an Unruly Province: Intergovernmental Immunities and Industrial Disputes", (1990) 11 *Monash University Law Review*, 120

14 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488

15 *Federated State School Teachers Association of Australia v State of Victoria* (1929) 41 CLR 569

16 *R v Coldham and Ors; Ex parte The Australian Social Welfare Union* (1983) 153 CLR 297

17 Id 312-3

Over the past decade, teachers, university academics, nurses, police and many public servants have all been seeking and obtaining federal coverage. For example, in the *Lee Case*¹⁸ which was handed down by the High Court in 1986, the judges held that school teachers could participate in a federal industrial dispute. This case made it abundantly clear that only high ranking State public servants would be unable to invoke federal jurisdiction because of their status as key administrative personnel of state governments.

THE ROLE OF THE FEDERAL TRIBUNALS

The Section 111(1)(g) Mechanism

Under Section 111(1)(g) of the *Industrial Relations Act*, the Australian Industrial Relations Commission has a discretion to refuse to deal with an interstate labour dispute in certain circumstances. Section 111(1)(g) and its accompanying provisions now provide as follows:

111(1) Subject to this Act, the Commission may, in relation to an industrial dispute:

- (g) dismiss a matter or part of a matter, or refrain from further hearing or from determining the industrial dispute or [part of the industrial dispute, if it appears:
 - (i) that the industrial dispute or part is trivial;
 - (ii) that the industrial dispute or part has been dealt with, is being dealt with or is proper to be dealt with by a State arbitrator;
 - (iii) that further proceedings are not necessary or desirable in the public interest;
 - (iv) that a party to the industrial dispute is engaging in conduct that, in the Commission's opinion, is hindering the settlement of the industrial dispute or another industrial dispute; or
 - (v) that a party to the industrial dispute:
 - (A) has breached an award or order of the Commission; or
 - (B) has contravened a direction or recommendation of the Commission to stop industrial action;

111(1A) Subparagraph (1)(g)(iii) does not apply to proceedings so far as they may affect terms and conditions of employment of a particular kind that are applicable to a particular class of employees, if:

- (a) at any time after 17 December 1992, terms and conditions of that kind and application have been regulated by an order, award, decision or determination of a State industrial authority (whether made before, on or after that date); and
- (b) terms and conditions of that kind and application:
 - (i) cannot be dealt with by a State arbitrator by compulsory arbitration (but not merely because an order, award, decision or determination of a State arbitrator cannot be changed during a particular period); and
 - (ii) are not regulated by an employment agreement; and
 - (iii) are not regulated by an award under this Act.

In this subsection:

"employment agreement" means an agreement that:

- (a) was entered into under a State law; and
- (b) regulates terms and conditions of employment of a particular kind and application that, if the agreement had not been entered into, could have been regulated by a State arbitrator by compulsory arbitration; and
- (c) prevails over any inconsistent order, award, decision or determination of a State industrial authority; and
- (d) during a particular period, but only during that period, prevents terms and conditions of that kind and application from being regulated by a State arbitrator by compulsory arbitration.

111(1B) In considering whether to make an award (other than an interim or provisional award) under subsection (1) regulating terms and conditions of employment of a kind an application to which subsection (1A) applies, the Commission:

- (a) must have regard to the outcome of any consultation between an organisation of employees that is a party to the dispute and employees who would be affected by the award on the question whether the employees wish their terms and conditions of employment to be regulated by an award under this Act; and
- (b) must consider whether, in the circumstances, the views of the employees, or of the employees in sections or classes of the employees, who would be so affected should be ascertained by a secret ballot, and, if so, must refrain from deciding whether to make the award until:

- (i) the employees in question have had a reasonable opportunity to vote on the question in a secret ballot; and
- (ii) the Commission has been informed of the result.

111(1C) Subsection (1B) does not prevent the Commission from taking account of the views of the employees ascertained in any other way.

111(4) In this section:

"compulsory arbitration" means the power to regulate terms and conditions of employment arbitration:

- (a) without the agreement of some or all of the employers and employees who would be affected by the arbitration (or their representative bodies); and
- (b) whether after exhausting alternative means of settlement or otherwise;

"state arbitrator" means a State industrial authority that has, or at the relevant time had, the power, or powers that include the power, to regulate terms and conditions of employment by compulsory arbitration.

The Use of This Federal Discretion

Before the enactment of the *Industrial Relations Act*, portion of what is now s 111(1)(g) was to be found in the *Conciliation and Arbitration Act*.¹⁹ Section 41(1)(d) of the *Conciliation and Arbitration Act* contained the first three subparagraphs of s 111(1)(g). Thus the old Conciliation and Arbitration Commission and its predecessor Court had a discretion to refrain from dealing with a dispute where it was trivial, where it was being dealt with by a State industrial tribunal, or where it was in the public interest not to deal with the matter. Not surprisingly, the Arbitration Court and the Commissions have used this discretion to maintain the existing federal/State balance in industrial relations. As early as 1928, Dethridge CJ of the Arbitration Court made it clear that where workers who were being governed by State industrial awards wished to move into the federal arena, they would require good reasons to justify this change.²⁰ Justice Peter Gray and Shane Marshall have convincingly argued that the federal industrial tribunals had no warrant to use this discretion in this manner, and thus to prevent workers from exercising their right to invoke federal machinery.²¹ This argument is of course correct. Nevertheless as these authors appreciate, it is not difficult to see why the

19 In the original *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), this discretion was to be found in s 38(h). When the *Conciliation and Arbitration Act* 1904 (Cth) was re-numbered in 1956, this discretion was contained in s 41(1)(d)

20 *Federated Hotel Club Restaurant and Caterers Employees Union of Australia v Abbott* (1928) 26 CAR 489, 493-4; see also *Re Merchant Service (Bay Harbour and River Vessels) Award 1957* (1960) 96 CAR 141, 143-4

21 Justice P R A Gray and S R Marshall, "Yielding The Field: The Australian Industrial Relations Commission's Discretion to Refuse to Invoke its Own Jurisdiction", (1990) 3 AJLL 36

federal tribunals were cautious when faced with workers who were seeking to leave the State realm. Why pick a fight with State governments when the terms and conditions of their awards were broadly similar to those of their federal counterpart.

The SEQEB Dispute and Federal Legislation

In 1984-5 the Queensland National Party government had a dispute with the electricians who were employed by the South East Queensland Electricity Board ("SEQEB"). When negotiations broke down and strike activity occurred, the Queensland government passed legislation to prevent these workers from being covered by the Queensland industrial relations tribunal. Instead, it enacted special measures to limit the power of these workers and to lessen their terms and conditions of employment. In an endeavour to aid these Queensland employees to obtain federal coverage, the federal Parliament enacted special legislation²² to bring this dispute into the federal realm. In *Queensland Electricity Commission and Others v Commonwealth of Australia*²³ the High Court held this statute to be invalid. Although the reasoning of the judges varied, in essence their Honours held that this piece of legislation impermissibly discriminated against the State of Queensland. In other words, the federal legislation picked out a single State and subjected one of its industrial disputes for special treatment.

The SEQEB Dispute and the Commission's Discretion

After this failure, the workers created an interstate labour dispute by serving logs of claims upon various electricity authorities.²⁴ The federal Commission, however, invoked its discretion to refuse to deal with this dispute in the public interest.²⁵ It held that the workers should continue to be governed by the special State laws.²⁶ By a three to two majority, the High Court upheld this Commission decision.²⁷ In a joint judgment, Mason CJ, Wilson and Dawson JJ held that the Commission had not committed any judicially reviewable errors of law when exercising this jurisdiction. In separate dissenting judgments, Brennan and Deane JJ held that the Commission had erred, because the workers had the right to invoke the assistance of a federal tribunal, more especially when they had been denied access to the State tribunal. In my view, the arguments of the dissentients are compelling. Deane J succinctly stated his view in the following passage. He said:

In the present case, the ETU was involved in a serious inter-State industrial dispute. The other parties to the dispute were a number of Electricity Authorities including the respondents. The ETU had a statutory right to invoke the jurisdiction of the Commission under the Act. This it did. The result of that invocation of its jurisdiction was that the Commission was under a prima facie statutory duty to seek to resolve the whole dispute by

22 See the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth)

23 (1985) 159 CLR 192

24 The High Court confirmed the existence of this interstate labour dispute, see *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178

25 The Commission relied upon what was then s 4(1)(d)(iii) of the *Conciliation and Arbitration Act 1904* (Cth)

26 *Electrical Trades Union of Australia v Queensland Electricity Commission* (1986) 16 IR 292

27 *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 72 ALR 1

conciliation and arbitration. The issues relating to Queensland were central to the dispute. As I followed the argument, it is common ground that there is no other tribunal which possesses jurisdiction fully to deal with and resolve those issues. Prima facie, the ETU was entitled to insist that the Commission deal with and seek to resolve the whole dispute including its Queensland aspects.²⁸

The recent *Hoyts Case*²⁹ demonstrates, however, that the High Court will only overrule the exercise of the Commission's s 111(1)(g) discretion when it has committed blatant errors of law.

The Industrial Relations Act Amendments

When the *Industrial Relations Act* 1988 came into force in 1989, it made several minor alterations to the wording of s 111(1)(g). Its most significant alteration was, however, to add paragraphs (iv) and (v) to this provision. These measures enliven the discretion of the Commission in the following ways. First, where workers are engaging in conduct which hinders the settlement of a dispute, the Commission may refuse to deal with their claim. Secondly, the Commission may also refuse to hear them if they ignore orders of the Commission; more especially when they engage in industrial action.

THE AMENDMENTS OF DECEMBER 1992

The Victorian Kennett Government

In November 1992, just after coming into office, the Kennett Government enacted its *Employee Relations Act*.³⁰ This statute has deprived workers of the right to access the Victorian industrial relations tribunal, unless their employers agree to such a course of action. Where employers do not agree, then employees will be governed by the law of contract. The so-called safety net of minimal conditions gives very little protection to workers.

The Politics of the December 1992 Amendments

The ACTU requested assistance from the federal government to enable Victorian workers, if they chose to do so, to transfer across to federal coverage. In order to grant such assistance, but also in an endeavour to ensure the votes of Victorian workers in the forthcoming federal election, the Keating government amended the *Industrial Relations Act*. These amendments passed through Parliament on 18 December and took effect on 21 January 1993.³¹

28 Id 14

29 *Re Media Entertainment and Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* (1993) 112 ALR 193

30 *Employee Relations Act* 1992 (Vic)

31 See *Industrial Relations Legislation Amendment Act (No 2)* 1992 (Cth)

The Amendments

The amendments may be briefly described as follows. First, as it stood before December 1992, s 111(1)(g)(ii) gave the Commission the discretion not to deal further with a matter if it was being dealt with by a "State industrial authority". The amendments deleted these latter words and replaced them by the expression "State arbitrator". This term is defined in s 111(4) to mean a tribunal which has the powers of compulsory arbitration, thus excluding from this term the new Victorian Employee Relations Commission. Secondly, a new sub-section (1A) has been added to s 111 to make it clear that it will no longer be in the public interest to refrain from dealing with a dispute where the workers did have award coverage and access to arbitration, but now do not have these advantages. Thirdly, a new object (ba) has been inserted into s 3 of the Act, stating that it is now an object of the statute to facilitate access to conciliation and arbitration. Finally, new sub-sections (1B) and (1C) have been inserted into s 111. The first of these sub-sections was added at the instance of the Australian Democrats in the Senate. It requires the Commission to take into account the views of the workers in question, and if appropriate to do this through the holding of a secret ballot. The second sub-section provides, in effect, that the holding of such ballots is not mandatory, so long as the Commission is able in some other way to ascertain the views of the workers. For the first time the Commission is being asked to directly consider the views of the employees who are seeking to move from State to federal coverage.

The Victorian Challenge

Since the enactment of the Victorian *Employee Relations Act*, large numbers of Victorian public sector workers have been seeking to obtain federal award coverage. These include public servants, teachers, nurses and other health workers. This process has increased in momentum since the federal government was returned with a larger majority in the 13 March 1993 election. In *Re Australian Nursing Federation and Ors; Ex parte State of Victoria*³², McHugh J sitting in the High Court of Australia, granted the Victorian government an order nisi to challenge the attempted transfer of these workers from Victorian to federal coverage. Given the heavy onus resting upon the challenger, McHugh J refused to stay current proceedings in the Commission until the outcome of this challenge. As I understand the position, this Victorian challenge has two prongs. Its first prong is that many of the workers are performing essential administrative functions of the State, and accordingly the federal Commission lacks jurisdiction to deal with them. While some workers will fall into this category, they are likely to be confined to rather high ranking public servants carrying out administrative tasks.³³ The second prong is a frontal challenge to the 1992 amendments to s 111(1)(g). Again, in my view this prong is likely to be unsuccessful. The federal government has learned its lessons from the SEQEB dispute. While these amendments are clearly aimed at Victoria, they do not directly single out this State for attention. Rather, they are aimed at any

32 (1993) 112 ALR 177

33 See, for example, the comments of a Full Bench of the Australian Industrial Relations Commission in *State Public Services Federation and Anor v Her Majesty the Queen in Right of the State of Western Australia and Ors* (1991) 44 IR 86, 103-10

State government which abolishes worker access to compulsory arbitration. It so happens that at present, Victoria is the only State which has taken this step.

CONCLUSION

As I have endeavoured to show, over the last fifty years, the state industrial tribunals have lost much of their autonomy. By 1990, they were part of an integrated industrial relations network. What makes this area of law different from other fields, is that there is no general consensus that the central government should play an increased role in Australian Industrial Relations. Given its legislative powers, coupled with favourable high court precedents, the federal government does not need the concurrence of the states in order to increase its hold on this field of law. It does not wish to unnecessarily diminish the stature of most state industrial tribunals, for this would create enormous problems for the trade union movement which operates very much at the state level. When pushed by circumstances, however, the federal government will use its powers to protect its view of the appropriate arbitral and collective bargaining mix for Australian workers. The vigorous deregulation of Victoria's industrial laws was one such circumstance which forced the central government to react. If other conservative states like Western Australia and Tasmania follow the more cautious approach of New South Wales, the federal government will not seek to interfere with these processes. In his announcement on Wednesday 21 April 1993, Prime Minister Paul Keating made it clear that the federal vision of industrial relations is not written in stone. He envisages an even greater use of enterprise agreements than occurs at present.³⁴ The lesson is that whoever holds power at the central level of our federation, can ensure that its vision of appropriate industrial relations will prevail throughout most of the nation's work force.

8. Federal Regulation and the Use of Powers Other than the Industrial Power

Andrew Stewart

INTRODUCTION

Although there has been much for labour lawyers to talk and write about over the past decade, paradoxically this period has not been one of major legislative change at the federal level. Ten years of Labor government have certainly seen some remarkable developments in the regulation of the labour market, but for the most part these changes have occurred within the existing legislative framework. It has been the ACTU and the Australian Industrial Relations Commission, along with a number of key employers, who have taken the lead in transforming the scope and operation of federal awards and agreements, rather than the Commonwealth Parliament. Or, to put it another way (see Mitchell and Rimmer 1990), changes have principally occurred at the level of "secondary regulation" (awards and agreements) rather than "primary regulation" (the governing legislation).

The federal government has of course played a part in this process of reform, through formal expressions of policy in the various versions of the Accord and in submissions to national wage cases, as well as through its informal dealings with the union movement and business groups. Rarely though has this executive role been reflected in major statutory initiatives. Between 1983 and 1992, it was only in the areas of union structure, training and superannuation that significant legislative changes could be said to have occurred. Despite (or perhaps because of) the Hancock Report (1985), the replacement of the *Conciliation and Arbitration Act* 1904 with the *Industrial Relations Act* 1988 made very little difference to the practical operation of the system.

Now, however, it appears that we are moving into a more interesting period where statutory regulation is concerned. Not as challenging, perhaps, as the constitutional, political and social upheavals that would have ensued had the Coalition won the

recent federal election and John Howard been afforded the opportunity to implement (in one form or another) the policies set out in *Jobsback*. Nevertheless, it seems clear that the returned government's reform agenda for this term will place more emphasis on effecting or at least facilitating workplace change through new legislation. This change of strategy can in fact be seen in the *Industrial Relations Legislation Amendment Act 1992*, which substantially altered the provisions governing the certification of agreements and conferred on the Commission a new jurisdiction over the fairness of work arrangements involving certain types of independent contractor. Important as these amendments are, they pale in comparison to the breadth of the changes foreshadowed by the government for 1993. As with the Coalition's plans, many of these changes appear to require recourse to constitutional powers other than the "industrial power" in section 51(35) of the Constitution. It is to the need for these powers, and their potential scope, that this paper is devoted.

THE CONSTRAINTS OF THE INDUSTRIAL POWER

Section 51(35) permits the Commonwealth to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The limitations of this provision are well documented (see eg Creighton, Ford and Mitchell 1993, chs 14-20). The major obstacles for a federal government intent on exercising substantial legislative control over the labour market stem from the references to "disputes" and "conciliation and arbitration". Plainly the Commonwealth can, as indeed it has done since 1904, establish a mechanism for resolving differences by the stated methods, conciliation and arbitration. Indeed some flexibility is apparent. The Commonwealth could, it would seem, make recourse to conciliation and arbitration entirely voluntary; or compel the submission of disputes but confer no power on the tribunal to make binding determinations; or confer the powers of conciliation and arbitration on some body other than an independent tribunal; or (perhaps) establish a system of conciliation alone.

But what the Commonwealth cannot do under this power is regulate industrial relationships in any direct fashion. Thus it would not be constitutional for the Commonwealth, without using other powers, to enact legislation requiring certain employment conditions to be observed. Nor can it authorise a tribunal otherwise exercising powers of conciliation and arbitration to make "common rule" awards which bind persons who have no connection to the relevant proceedings before the tribunal, a point the High Court emphasised in *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311 and reiterated in *R v Kelly; ex parte Victoria* (1950) 81 CLR 64.

It would also seem that the Commonwealth cannot effectively use section 51(35) to facilitate private dispute resolution by autonomous bargaining, whether individual or collective. In practical terms it is not enough simply to withdraw the authority of the Industrial Relations Commission (or whichever body happens to be charged with the power to conciliate and arbitrate) in respect of any agreement reached by the parties. Such a law is valid, for the power to do something always encompasses the

power to undo it. But it is also potentially ineffective, since without more the States to ensure that this does not happen, the Commonwealth must, if it is to protect the agreement from the application of State awards and statutes, confer some special status on the agreement. The trouble is that it is hard to see how a law giving force to agreements reached by parties is one that relates to "conciliation and arbitration", even if the body required to certify such agreements is one that in other circumstances acts as a conciliator or arbitrator.

If this is correct, there must be serious doubts as to whether the government's new certified agreements provisions, introduced in 1992 as Division 3A of Part VI of the 1988 Act, are constitutionally valid. It is one thing to *permit* the Commission to ratify agreements made in settlement of a dispute over which it has jurisdiction, for the Commission's capacity to determine whether certification is warranted leaves it in control of the process. It is quite another to *require* the Commission to certify an agreement which meets certain defined criteria, as the new provisions do in the case of an agreement limited to a single enterprise which does not reduce existing employee entitlements. Since in this case the parties may effectively preclude the Commission from conciliating or arbitrating by the simple device of producing an agreement, it is difficult to characterise the certification provisions as being a law with respect to conciliation and arbitration. It may well be that nobody will ever raise this point in the High Court. One possible circumstance though is that of a party who wishes to escape from what has turned out to be an unfavourable agreement; or perhaps that of a union which has been "frozen out" of an enterprise by another union through a combination of an enterprise agreement and a demarcation order under section 118A. It may be that these scenarios are not very likely: but if the question did come before the High Court, existing authority together with the plain words of section 51(35) would tell against the provisions being upheld.

Besides the need for "conciliation and arbitration" of "disputes", section 51(35) also requires an element of interstate nature about the disputes in question. The High Court's continuing recognition of the validity of a "paper dispute" has meant that in practice this requirement can readily be satisfied by a union (or occasionally an employer) making a common set of demands in relation to employees working in more than one State (for a recent example, see *Re AMIEU; ex parte Aberdeen Beef Co Pty Ltd* (1993) 67 ALJR 363). This effectively leaves responsibility for the scope of the federal arbitration system in the hands of the union movement, subject of course to the Commission's power to decline jurisdiction under section 111(1)(g) of the Industrial Relations Act, as discussed in Ron McCallum's paper (Chapter 7). A federal government intent on increasing the coverage of federal awards and agreements at the expense of the State systems would have to rely on unions being prepared to create the necessary interstate disputes. Of course the very reason why State coverage has persisted is that many unions have elected not to make the transfer, whether through a concern on the part of local officials to retain their power and influence, or a perception that the relevant State system has more to offer, or sheer apathy.

Over the past decade the High Court has been able, it is true, to reduce the constricting effect of section 51(35) in certain important respects. In particular, the

term "industrial" no longer presents the problems it once did. In successive decisions the Court has dispensed with its former insistence that disputes brought before the federal tribunal occur in an "industry" (*R v Coldham; ex parte ASWU* (1983) 153 CLR 297), indicated that most if not all State public servants may be covered by a federal award (*R v Lee; ex parte Harper* (1986) 160 CLR 430), and adopted a broad definition of what may constitute an "industrial matter" and thus be the subject of an award (*Re Cram; ex parte NSW Colliery Proprietors Asscn Ltd* (1987) 163 CLR 117). Although the Kennett government in Victoria has been intent on contesting the second of these points (see eg *Re Australian Nursing Federation; ex parte Victoria*, (1993) 67 ALJR 377, in which Justice McHugh granted leave to pursue this point but refused to stay the operation of the relevant awards), it appears unlikely that it will succeed. In *Re FSPU; ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311 the High Court also took a more expansive view of the Commission's power to act by way of prevention rather than settlement of disputes, a point which at the very least ought to make it easier for the Commission to deal with intrastate problems which have not yet acquired an interstate dimension (see Stewart 1991).

It is also interesting to consider the potential of the Commonwealth's capacity, implicit in every grant of legislative power, to regulate matters which are "incidental" to the subject of the power in question. (As to the relationship between this implicit incidental power and the express incidental power conferred by section 51(39) of the Constitution, see Creighton, Ford and Mitchell 1993, pp 316-7.) In the case of section 51(35), this incidental power has been found to be sufficient to support the extensive provisions regulating the registration and internal affairs of trade unions (*Jumbunna Coal Mine, No Liability v Vic Coal Miners Asscn* (1908) 6 CLR 309), as well as the prohibition of certain types of union pressure (*R v Bowen; ex parte AMWSU* (1980) 144 CLR 462; *R v Sweeney; ex parte Northwest Exports Pty Ltd* (1981) 147 CLR 259). These last two decisions in particular suggest that the incidental power might be used for all manner of purposes, including for instance the reform of sanctions against industrial action or the imposition of an obligation to bargain in good faith in respect of any matter brought before the Commission.

But despite the High Court's amelioration of section 51(35), and the untapped potential of the incidental power, the wording of the provision still presents many obstacles to significant reform of the federal industrial system. At the very least, recourse to the industrial power alone locks us into a complicated division of responsibilities between the Commonwealth and the States.

THE GOVERNMENT'S REFORM AGENDA

Before considering what alternatives to section 51(35) the Constitution offers the Commonwealth, it may be helpful to identify some of the reforms which the federal government might be expected to attempt or at least contemplate during this term. Recent pronouncements, together with speculation (both informed and uninformed) as to the regulatory picture which the government would or might like to see emerge, suggest a number of possibilities, presented here in descending order of likelihood or imminence.

PROTECTION OF MINIMUM STANDARDS

The government's stated concern with minimum labour standards is not so much directed towards the content of federal awards or agreements. So long as the Commission retains its present role, it will be expected to ensure that awards will not be made or agreements registered which transgress acceptable norms in relation to basic employment conditions. The objective is rather to protect workers who are currently outside the federal system, particularly those in Victoria who may be subject to the new regime of individual employment agreements. In December 1992 the government indicated that it would enact legislation in order to protect minimum wages, the principle of equal pay for equal work, access to reinstatement or compensation for unfair dismissal, the right to notification and consultation over proposed redundancies, and basic entitlements to parental leave, each (with the possible exception of the last, as Breen Creighton notes in his paper: Chapter 9) the subject of an ILO convention.

One possibility would simply be to enact minimum standards in the relevant areas and make them immediately applicable to all workers. However if the government proceeds in accordance with its stated strategy, it will instead authorise the Commission to consider applications from workers allegedly disadvantaged by State laws. In effect, the Commission would be able to apply award-style conditions even in the absence of an interstate industrial dispute over the conditions in question. The legislation might well attempt to mute criticisms of undue Commonwealth interference by permitting the federal Commission to intervene only where the equivalent State body lacked or had been deprived of the power to deal with the relevant matter. To take one example, this would mean that workers unable to make an effective unfair dismissal complaint in their State tribunal would be able to seek reinstatement or compensation from the federal Commission.

SANCTIONS AGAINST INDUSTRIAL ACTION

As a matter of law, there is no freedom to strike in this country: almost any form of industrial action is illegal in one way or another, a position which puts Australia out of step with most industrialised democracies and in breach of international labour standards (see Creighton 1991). In practice, of course, it has been rare for employers in all but extreme situations to invoke the law as a response to industrial action. Nevertheless the union movement remains concerned that what it sees as a

legitimate counter to the economic power that employers possess may be stifled if employers do become more willing to assert their rights. There are strong indications that the federal government may be about to respond to these concerns by reforming the law on sanctions. Since it came to power in 1983, Labor has made three unsuccessful attempts to address this issue. In 1984 a proposal to repeal the "secondary boycott" provisions of the *Trade Practices Act* failed to win the support of the Australian Democrats in the Senate. In 1987 poor timing brought the government undone: introduced into parliament not long before the election of that year, the government's reform package proved to be too controversial and, in the face of employer opposition, was withdrawn in order to prevent industrial relations becoming a significant issue during the election campaign. And in 1991, when it appeared that a report from the ILO criticising Australia's record in failing to guarantee the right to strike had handed the government a perfect opportunity to legislate, its proposed changes appeared to lose the support of the ACTU at the last minute.

In any event, with the recent election campaign having demonstrated that Labor now regards industrial relations as a strength rather than a potential weakness, the government appears once again poised to introduce legislation. Although the final shape of the package is yet to emerge, it seems likely to involve the repeal of the provisions in the *Trade Practices Act*, severe restrictions on the capacity of employers to bring common law actions in tort, and the ousting of inconsistent State legislation on the subject. These changes will probably be balanced by a revamp of the sanctions procedures in the *Industrial Relations Act*, in order to make it somewhat easier for employers to secure and enforce return to work orders made by the Commission.

CERTIFICATION OF AGREEMENTS

Apart from the question of their constitutionality, the new provisions for the certification of agreements contained in Division 3A of Part VI leave a lot to be desired in relation both to the complexity of the requirements imposed on those who wish to register an agreement, and the ambiguity of some of the key terms. Given these difficulties, there must be some doubt as to whether the new procedure will facilitate the spread of enterprise bargaining at anything like the rate envisaged by the government. While to date the Commission does not appear to have obstructed the registration of enterprise agreements, even under the new provisions there would appear scope for it to assert more of a supervisory role over the negotiation and content of agreements than the government and the ACTU might like. Similarly, there is no guarantee that the Commission will abide by the role allocated to it by Accord Mark VII, under which it is to provide a modest wage increase only to those who have tried but failed to win one through enterprise bargaining. On the other hand, if the Commission wholeheartedly embraces the enterprise bargaining strategy and Australian industry does likewise, it is hard to see that the Commission would have the resources or the practical capacity to process hundreds or even thousands of agreements, given the complexity of the criteria that must now be considered.

It seems likely then, and indeed the government has suggested as much since the election, that the certified agreements provisions will have to be amended. Speaking to a business audience recently, the Prime Minister floated the idea of removing the requirement that at least one registered union be party to each certified agreement. While it seems unlikely that the government would go quite that far, it is reasonable to expect that both the criteria and the certification process will be simplified. It may even be that the government will contemplate taking the process out of the hands of the Commission altogether, with certification becoming simply an administrative procedure (perhaps to be overseen by the Registrar) and the Commission being left to exercise its powers of dispute resolution in those instances where agreement is lacking, or possibly where a multi-enterprise agreement is involved.

A "PURE" BARGAINING REGIME

Judging by some of the government's post-election rhetoric, observers would be forgiven for thinking that its ultimate goal in industrial relations is something not very far removed from the policies which the Coalition took into the last election campaign: a system based on bargained agreements, backed by minimum standards to protect weaker workers. One scenario would see more and more emphasis being placed on workplace bargaining freed from the constraints of arbitral tribunals and their insistence on considering the "public interest", with the parties being encouraged to live or die by their own negotiating skills. On this model, the role of the Commission (or of some substitute body) would be progressively reduced to one of providing conciliation services only. Minimum standards would be enshrined in legislation rather than in the awards of an arbitral tribunal. Of course the government could point to several important differences between such a system and that advocated by the Coalition. The minimum standards, for example, would be set at more than the rock bottom levels envisaged by the conservatives, and could well be based on existing award conditions. Importantly too, agreements would need to remain the product of genuine collective bargaining, rather than the potentially one-sided individual employment arrangements given overriding effect under New Zealand's *Employment Contracts Act 1991* or the *Employee Relations Act 1992* in Victoria.

It needs to be stressed that there are no clear indications that the government intends to proceed towards this type of system, at least in the immediate future. Moreover the disquiet that many of the industrially weaker unions have voiced about Accord Mark VII and the emphasis on obtaining wage increases through enterprise bargaining rather than national wage cases bodes ill for any broad acceptance of such a strategy. Nevertheless pressure for such a change will continue to be brought to bear by business groups, and even perhaps by those in the union movement (especially at the peak level or in the stronger unions) who see a "pure" bargaining regime as offering more incentives to unions to win conditions and attract members than the "cossetting" of the arbitration system.

A NATIONAL SYSTEM

In many ways, the creation of a unified or national system for the regulation of labour relations ought to be a top priority for any federal government concerned with efficiency and productivity. That it is not simply reflects the political realities of the Australian federation. Without the co-operation of the States, not to mention those unions who have chosen to stay out of the federal arbitration system, it is hard to see any Labor government taking the plunge. On the other hand, the notion of State co-operation being forthcoming cannot entirely be disregarded, especially if the context were one of a broader reorganisation of Commonwealth and State responsibilities. As a number of premiers have hinted in recent years, among them Nick Greiner, the States might well be prepared to cede their powers over industrial relations in return for action over the "fiscal imbalance" that presently leaves the States, which deliver the bulk of public services, financially beholden to the Commonwealth, which raises the bulk of the revenue.

THE NEED FOR ALTERNATIVE CONSTITUTIONAL POWERS

It should be evident that most of the reforms outlined in the previous section would effectively require the Commonwealth to rely on powers other than section 51(35). It is possible, as was indicated earlier, that the projected changes to the law relating to sanctions could be accomplished merely by relying on the incidental power, so long as the changes were presented as being necessary to the proper functioning of the conciliation and arbitration system. But this could be of no assistance in relation to any system for the registration of (enterprise) agreements that stood apart from, or even replaced, the existing conciliation and arbitration processes, or the provision of minimum standards other than by way of awards made in settlement of interstate disputes, or of course the creation of a single, national system.

To date the occasions on which the Commonwealth has utilised powers other than section 51(35) in the industrial context have been relatively few, with the exception (as noted in the next section of the paper) of the power over the Commonwealth public service. In a revealing turn of phrase, the Hancock Report (1985, Vol 2, paras 5.59, 6.62-6.66) referred to these powers as "exotic" and refused to recommend their use, a conclusion generally in keeping with the conservative approach taken to most other issues in the report. The reasons given were the risk of invalidity of legislation enacted under those powers, the divisiveness of the strategy, and the risk of "gaps in coverage". Of these, while the second objection has much force, the other two can surely be met by a combination of ingenuity and care in the drafting of legislation, something that section 51(35) has always required in any event.

While proposals for reform to the federal system based on powers other than section 51(35) are by no means new (see eg Smith and McCallum 1984), it has been the radical policies propounded first by groups such as the HR Nicholas Society, and then in turn by the Liberal/National Coalition, which have really taken the scope of these powers beyond the realms of mere academic speculation. A number of lawyers in recent years have addressed the question of whether the Constitution

would permit the implementation of these policies, with the response generally being in the affirmative (see eg Spry 1986, Hulme 1992; though cf Craven 1991). John Howard, responsible as Opposition Leader for adopting these policies and seemingly set to become Minister for Industrial (or Employee?) Relations in a Hewson government, announced publicly before the recent election that the Coalition would rely on the corporations power to achieve its ends.

The fact that the conservative parties, with their great tradition of at least paying lip-service to "States' rights", were prepared to explore the limits of the Commonwealth's powers in order to achieve their ends, appears to have had some sort of liberating effect on the Labor Party. Whatever the reluctance of the Hawke government to embrace these powers, it appears that under Keating it will be a very different story. Indeed the *Industrial Relations Legislation Amendment Act 1992* has already provided an example in this regard by giving the Commission jurisdiction, without the need for any interstate dispute, to review unfair contracts relating to the performance of work by independent contractors. Under the new section 127C, this jurisdiction can only be exercised in relation to a contract which is connected to a financial, trading or overseas corporation; interstate or overseas trade or commerce; a Territory; or the Commonwealth or a Commonwealth authority. Each of these connections seeks to take advantage of a different constitutional power, as will become apparent.

OTHER POWERS: THE GOVERNMENT'S OPTIONS

This final section outlines some of the more obvious powers that the Commonwealth might seek to use in implementing its reforms.

Section 51(20) "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth"

Apart from the new provisions on independent contractors, the corporations power has been used by the Commonwealth to support sections 45D and 45E of the *Trade Practices Act 1974*, in so far as those provisions protect the relevant types of corporation from the effect of secondary boycotts (and indeed many other forms of industrial action). In *Actors & Announcers Equity Asscn v Fontana Films Pty Ltd* (1982) 150 CLR 169 the High Court upheld the validity of most of section 45D, on the basis that it was legitimate for the Commonwealth to use its power over trading corporations not only to regulate the trading activities of such bodies (as most of the *Trade Practices Act* does), but also to protect those activities from the conduct of others. But can section 51(20) support a law which is not directly concerned with the trading activities of a trading corporation, but which seeks to impose obligations on, or in favour of, the relevant types of corporation in relation to matters which may or may not involve "trade"? Both in *Actors Equity* and in the *Dams* case, *Commonwealth v Tasmania* (1983) 158 CLR 1, a number of judges indicated that it can, including three still on the Court - Chief Justice Mason and Justices Brennan and Deane. The view generally taken by commentators is that the present Court would have little hesitation in upholding any law which is directed to trading,

financial or overseas corporations, no matter what the other subject matter of the law.

On that basis, and given the broad view taken by the Court of what constitutes a "trading" corporation, it would appear that the Commonwealth could use the power to regulate any aspect of a corporate employer's labour relations. The only problem with this strategy is that there are many small to medium employers in Australia who do not have corporate status, but instead operate as sole traders or partnerships. In industries such as construction and retail, for instance, only 15-20% of small businesses (those employing fewer than 20 workers) elect to incorporate (ABS 1991, p72). This point would indeed have created some difficulty for John Howard had the Coalition taken office, given his commitment that only the corporations power would be used to underpin any new legislation. The effect would have been to force many small businesses - the constituency to which the Coalition's policies are most obviously directed - to choose between the often heavy costs of incorporation and the capacity to operate under the new legislation. While the total number of workers involved would have been relatively small, the political fallout may well have proved somewhat greater.

Section 51(1) - "trade and commerce with other countries, and among the States"

The High Court has been prepared to accept the argument that if the Commonwealth can regulate interstate or overseas trade and commerce, then it may as part of that regulation deal with employment conditions and labour relations at or affecting firms engaged in such trade and commerce (see eg *R v Wright; ex parte Waterside Workers Federation of Australia* (1955) 93 CLR 528; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120). Thus section 51(1) has been used to extend the jurisdiction of the Industrial Relations Commission to cover industrial matters involving flight crew officers, maritime workers and waterside workers, even in the absence of an interstate dispute (*Industrial Relations Act* 1988, Sched 1). It supports the application of sections 45D and 45E of the *Trade Practices Act* to certain situations where no corporation is involved, as well as the specific prohibition in section 45D(1A) against interference with interstate or overseas trade and commerce. And, as already set out, it is one of the powers used to establish the Commission's jurisdiction over unfair contracts for services.

The fact that the Commonwealth has not generally used the trade and commerce power to support new and more direct forms of industrial regulation simply reflects the fact that there are many employers engaged only in intrastate trade. Moreover these employers are likely to be the very types of small business who, as already explained, are missed by the corporations power. Accordingly the use of section 51(1) can add little in practice to the reach of a regulatory system founded primarily on section 51(20). One argument that would considerably expand the significance of section 51(1) is that because interstate trade and intrastate trade are economically interdependent, the Commonwealth's power over the former must extend by inference to the latter, so as to make the regulation of interstate trade effective. But while this reasoning has been adopted in relation to the equivalent power in the United States Constitution, permitting the *National Labor Relations Act* to extend

to all private sector employers in that country, the High Court has consistently refused to accept it (see eg *Wragg v NSW* (1953) 88 CLR 353 at 385-6). Until that view is reconsidered, the trade and commerce power cannot be seen as a complete solution to the Commonwealth's apparent lack of direct authority over labour relations.

Section 51(29) - "external affairs"

In a series of important decisions in recent years, the High Court has held that this power comprehends any matter which is the subject of a treaty or other international instrument to which Australia is party, or perhaps indeed any matter which is merely of international concern, whether or not that matter otherwise falls within the Commonwealth's defined legislative powers. Thus the Commonwealth has been permitted to proscribe racial discrimination (*Koowarta v Bjelke Peterson* (1982) 153 CLR 168), block development projects on environmental grounds (*Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission of Tasmania* (1988) 164 CLR 261) and enact retrospective legislation to penalise "war crimes" occurring overseas (*Polyukhovich v Commonwealth* (1991) 172 CLR 501).

The only significant use to date of the external affairs power in the industrial context is the enactment of anti-discrimination legislation applicable, inter alia, to acts done in relation to employment (see *Racial Discrimination Act 1975*; *Sex Discrimination Act 1984*; the *Human Rights and Equal Opportunity Commission Act 1986*). However, as Justices Evatt and McTiernan suggested more than half a century ago (*R v Burgess; ex parte Henry* (1936) 55 CLR 608 at 687), there would seem ample scope for the Commonwealth to implement a variety of ILO standards, as well as other international obligations pertaining to labour and employment. As Breen Creighton outlines in his paper, this would potentially give the Commonwealth legislative authority over matters such as freedom of association (including the right to strike), collective bargaining, minimum wages, termination of employment, work safety, and so on. The High Court has repeatedly stressed in its recent decisions that legislation enacted to implement a treaty or convention must remain reasonably faithful to the instrument in question. On the other hand a literal translation has not been required, and in any event the broad language typically used in the relevant ILO conventions and recommendations would appear to give the government considerable freedom in deciding how best to proceed.

That being so, it is possible to envisage something close to an entire system for regulating labour relations being founded on the external affairs power. For instance, a system for the making and enforcement of collective agreements (though not, it would seem, individual agreements) could be established, with further provision for (a) bargaining duties; (b) the capacity of parties to take industrial action; and (c) minimum standards to be observed on matters covered by ILO conventions or recommendations. As at present, a range of further matters could be covered under the implied incidental power, such as the regulation of trade union affairs. At the very least, section 51(29) holds out the promise of filling any gaps in coverage left by the corporations or trade and commerce powers. That being so, it seems doubtful whether the Coalition, if they had been elected, would have been able to keep John Howard's promise of refraining from any recourse to this power.

Section 52(2) - "matters relating to any department of the public service"

The public service power is used to support the *Public Service Act 1922*, which specifies various employment conditions in relation to those workers who are directly employed by the Commonwealth. Matters such as wages, hours and leave are presently left to awards and agreements made by or registered with the Industrial Relations Commission, though there is no reason why section 52(2) could not be used to regulate labour relations in the federal public service in any way the Commonwealth saw fit. The same applies to Commonwealth instrumentalities such as Telecom and Australia Post, except that the relevant constitutional power must be found elsewhere: in the case of the two bodies mentioned, section 51(5), which empowers the Commonwealth to legislate with respect to "postal, telegraphic, telephonic, and other like services".

Section 122 - "government of any territory"

As with the public service power, the Territories power would allow the Commonwealth to regulate labour relations in any of the Territories in any manner it saw fit. To date, the Commonwealth has contented itself with extending the jurisdiction of the Industrial Relations Commission where Territory matters are concerned. Thus the Commission may deal with a dispute in a Territory even if the dispute does not extend interstate (see eg *Northern Territory (Self-Government) Act 1978*, s53), and may also make awards which operate by way of common rule throughout a Territory (*Industrial Relations Act 1988*, ss141, 142). As mentioned earlier, the Territories power has also been invoked to confer jurisdiction on the Commission over unfair arrangements involving independent contractors.

Section 51(2) - "taxation"

If there is a "sleeper" amongst the various constitutional powers which are commonly discussed as possible alternatives to section 51(35), it is the taxation power. The key to its potential is the High Court's liberal approach to the question of "characterisation" - the determination of whether the subject of a given law falls within the legislative competence of the Commonwealth. The Court has long taken the view that a federal statute is valid if it can be characterised as dealing with a subject covered by one of the Commonwealth's defined heads of power, whether or not it can also be characterised as dealing (either equally or more obviously) with other subjects. Thus provided a statute can be regarded as imposing a tax, that is all that need be shown to bring the statute within section 51(2). As a majority of the High Court recently observed in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 67 ALJR 290 at 295, "if a law, on its face, is one with respect to taxation, the law does not cease to have that character simply because Parliament seeks to achieve, by its enactment, a purpose not within Commonwealth legislative power".

The laws being considered in that case were in fact the *Training Guarantee Act 1990* and the *Training Guarantee (Assessment) Act 1990*. This legislation, together with the *Superannuation Guarantee Charge Act 1992* and the *Superannuation*

Guarantee (Administration) Act 1992, represents the most significant use yet made of the taxation power in relation to employment conditions. Both the training and superannuation levies are imposed only upon employers who have not met the minimum standards required by the government in relation to expenditure on training or contribution on behalf of workers to superannuation schemes. Neither training nor private provision for retirement is within the Commonwealth's defined powers. Nevertheless the High Court upheld the training legislation as being laws with respect to taxation, whatever the "real" subject of the exercise. The fact that the Commonwealth had and has no intent to raise revenue from the levy was regarded as irrelevant to the question of whether the statutes should be characterised as relating to taxation.

On the face of it then, it seems that the Commonwealth could legislate to require employers (or indeed workers or unions) to observe a wide range of duties, on pain of paying additional tax. Indeed with a little ingenuity any form of industrial regulation could be implemented by the Commonwealth in this manner, with the only apparent drawback being the cost of establishing the administrative machinery necessary to monitor compliance and collect the tax or levy from recalcitrants.

Section 51(37) - "matters referred to the Parliament of the Commonwealth by the Parliament or Parliament of any State or States, but so that the law shall extend only to States by whose Parliaments the matters are referred, or which afterwards adopt the law"

The final possibility to be considered is that of the reference to the Commonwealth by one or more States of some or all of their powers over industrial relations (see Ludeke 1980). Such a reference requires each State to pass a statute to that effect, with the Commonwealth then acquiring power under section 51(37) to legislate on the referred subject matter in each referring State. Alternatively, the Commonwealth may legislate in anticipation of a reference, with the new law becoming valid and operable in any State which subsequently "adopts" the law by enacting the requisite reference of power. Importantly, any reference of power is likely to be revocable, so that the State may alter or withdraw the Commonwealth's authority merely by amending or repealing its referring legislation.

In practice, the reference mechanism has scarcely been used in any significant area of law, with most co-operative schemes being effected by complementary federal and State legislation. Examples of this in the industrial context include the legislation passed by the Commonwealth and New South Wales for the joint regulation of the coal industry in that State (*Coal Industry Acts 1946*), and more recently the provision for dual appointments, joint sittings and cross-vested powers in relation to the federal and State industrial tribunals (see eg *Industrial Relations Act 1988*, ss13-14, 173-175). Nevertheless, if the federal government were to seek to negotiate with the States for the creation of a national scheme of industrial regulation (a prospect which, as noted earlier, is not entirely inconceivable), it would do well to do so through a reference of power rather than through complementary legislation. While from the States' point of view it makes little difference, since in either case a State may withdraw from the scheme by amending or repealing its own legislation, the reference mechanism has the great virtue that the resulting regulation

appears in one law rather than (up to) seven. Apart from simplifying matters, this means that minor changes can be accomplished through a single process of amendment, rather than running the risk of creating temporary or even permanent variations between supposedly uniform federal and State legislation.

CONCLUSION

Not every constraint on the Commonwealth's legislative capacity can be circumvented by using powers other than section 51(35). It remains forbidden, for instance, to vest judicial authority (that is, the capacity to enforce existing rights and duties) in any body or tribunal other than a court properly created under Chapter III of the Constitution and staffed with tenured judges, no matter what legislative power is employed (see *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; (1957) 95 CLR 529). There are also various limitations on the Commonwealth's power considered by the High Court to be implicit in the federal structure created by the Constitution. Apart from striking down legislation which discriminates against or between the States (see eg *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192), the High Court has consistently indicated since *Melbourne Corp v Commonwealth* (1947) 74 CLR 31 that the Commonwealth must not unduly inhibit or impair the capacity of a State to perform its governmental functions. This issue is indeed before the Court at the moment, thanks to the Victorian government's strenuous attempts to resist the transfer of State employees to federal award coverage. While three members of the present Court expressed doubt in *R v Lee; ex parte Harper* (1986) 160 CLR 430 at 453 as to whether the exercise of the conciliation and arbitration power would ever transgress that principle, and while it seems unlikely that the Victorian challenges will succeed, it remains possible that some senior State public servants at least may be beyond the reach of the federal arbitration system. If so, the same would of course be true of any new Commonwealth regulation based on other powers.

Nevertheless, the constitutional powers that have been discussed in this paper offer considerable scope to the Commonwealth to overcome the restrictions imposed by the wording of section 51(35) on its capacity to regulate labour relations. As both the ALP and the Coalition begin to look beyond the century-old reliance on conciliation and arbitration as the dominant form of industrial regulation, these powers are likely to loom large in the thinking of successive federal governments. If there are obstacles to their use, they are not so much legal or constitutional, as political. Lack of numbers in the Senate or effective opposition from the States seem far more likely than the High Court to prevent future governments getting their way.

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9. Industrial Regulation and Australia's International Obligations

Breen Creighton

INTRODUCTION

I feel confident that a conference of this nature held two or three years ago would not have included a separate session devoted to the potential impact of Australia's international obligations upon attempts to accelerate the process of labour market deregulation. The omission of specific consideration of this perspective would have been entirely consistent with the long-standing neglect of international standards as a factor in the development of our industrial relations system.

Policy-makers, legislators, industrial relations practitioners and academic commentators must all take their share of responsibility for this neglect. I suspect that this in turn can be attributed to an unholy alliance of ignorance, intellectual indolence, parochialism and the traditional Anglo-Celtic distrust of generalised "rights" concepts. Be that as it may, the organisers are warmly to be congratulated on their decision to break with tradition by including this important issue in the programme for this Conference.

This inevitably prompts the question why it is that this issue was perceived to be relevant in 1993 when it has been largely neglected for so many years.

I think it is reasonable to assume that the major proximate factor was Prime Minister Keating's announcement on 2 December last year that his Government proposed to use the external affairs power in the Constitution, together with relevant ILO Conventions, to guarantee certain minimum standards relating to minimum wage fixation, equal pay for work of equal value and unfair dismissal. He further indicated that consideration was being given "to legislation protecting some other internationally recognised standards, such as annual leave, maternity and parental leave and hours of work". These commitments are reflected in paragraph 4.4 of

Accord Mark VII.

The Prime Minister's remarks were made in the specific context of an attack upon the Victorian Government's recently-introduced *Employee Relations Act*, which was perceived to be inconsistent with Australia's obligations under ratified ILO Conventions relating to minimum wage fixation and equal pay, and with the standards relating to unfair dismissal and redundancy which are set out in the then-unratified Termination of Employment Convention, 1982 (No 158).¹ No doubt his decision to call these standards in aid in his attack upon the Kennett legislation in some measure reflects political expediency. But I do not think it is entirely fanciful to suggest that it also reflects a more general increase in awareness as to the potential significance of such standards in the development of Australian labour law.

This is borne out by the fact that in May 1991 the Hawke Government established an Interdepartmental Taskforce to review Australia's ratification record in relation to ILO Conventions. It is also reflected in the extensive publicity which was accorded to a 1991 Direct Request from the ILO's Committee of Experts on the Application of Conventions and Recommendations which indicated that various aspects of state and federal law relating to industrial action were inconsistent with Australia's obligations under the Freedom of Association and Right to Organise Convention 1988 (No 87),² and in the extensive reliance upon ILO standards in the course of the controversy surrounding the New South Wales Government's industrial relations reforms in the same year.³ Nor is this awakening of interest in ILO standards confined to the labour movement, as is evidenced by the decision of the then CAI to present a complaint to the ILO's Committee on Freedom of Association concerning the 1990 amendments to the Industrial Relations Act relating to the registration and continued registration of unions with fewer than 10,000 members.⁴

Against this background I propose briefly to outline Australia's existing international obligations in the industrial relations context, and to look at the legislative and policy environment within which those obligations have evolved. I will then offer some thoughts as to the role which international standards might play in the future.

EXISTING OBLIGATIONS

Without doubt, the most important source of international obligations concerning industrial relations is the International Labour Organisation - and in particular the various Conventions and Recommendations which have been adopted by the International Labour Conference over the years, and which have (in the case of

1 The text of this Convention, and accompanying Recommendation No 166, appears as Attachment 1 to this paper.

2 See for example *Sydney Morning Herald*, 2 September 1991, at 1; *Herald Sun*, 3 September 1991, at 9; *Sydney Morning Herald*, 3 September 1991, at 7 and *Australian*, 3 September 1991, at 1 and 4. See also Parliamentary Debates, Senate, 3 September 1991, at 1015-1017; Parliamentary Debates, Senate, 9 September 1991, at 1237-1239; and Parliamentary Debates, House of Representatives, 5 September 1991, at 779-781.

3 See for example *Australian*, 11 September 1991, at 11 and *Daily Commercial News*, 12 September 1991, at 34.

4 Case No 1559 (Australia). See Committee on Freedom of Association, 281st Report, paras. 326-364 and 284th Report, paras. 200-263.

Conventions) subsequently been ratified by Australia. It is, therefore, upon the role of these standards that I will principally concentrate in this paper.

Non-ILO Standards

I should emphasise, however, that the ILO is by no means the *only* source of international obligation in the industrial relations context. For example, the United Nations has promoted the adoption of a number of international instruments dealing with discrimination on grounds of race and sex. The scope of these instruments extends beyond, but includes, discrimination in employment. Several of them have been ratified by Australia, and indeed have been used as the basis for federal anti-discrimination legislation.⁵

The International Covenant on Economic, Social and Cultural Rights [ICESCR] and the International Covenant on Civil and Political Rights [ICCPR] were also adopted under the auspices of the United Nations. Both impose important obligations in relation to freedom of association for trade union purposes. For example, Article 8 of the ICESCR states that:

"1. The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organisations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike, provided it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of those rights by members of the armed forces or of the police or of the administration of the State.

5 See for example the *Racial Discrimination Act*, 1975 which relies upon the International Convention on the Elimination of All Forms of Racial Discrimination; the *Sex Discrimination Act*, 1984 which relies upon the International Convention on the Elimination of All Forms of Discrimination Against Women; and the *Human Rights and Equal Opportunity Commission Act*, 1986 which draws upon the Discrimination (Employment and Occupation) Convention 1958 (No 111), the International Covenant on Civil and Political Rights, the UN Declaration on the Rights of the Child, the UN Declaration on the Rights of Mentally Retarded Persons and the UN Declaration on the Rights of Disabled Persons.

- 3 Nothing in this article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."

Article 22 of the ICCPR is to the same effect - although it does not make specific reference to the right to strike.

Both the ICESCR and the ICCPR have been ratified by Australia.⁶

Like Article 8(3) of the ICESCR, Article 22(3) of the ICCPR expressly preserves the operation and effect of the Freedom of Association and Protection of the Right to organise Convention, 1948 (No 87). In practice alleged contraventions of both provisions are almost invariably dealt with in accordance with the ILO's supervisory procedures. Nevertheless, the Covenants do stand as important sources of international obligations in relation to freedom of association in their own right.

ILO Standards

Since its establishment in 1919 the ILO has adopted 173 International Labour Conventions and 179 formal Recommendations. Collectively, they constitute what is commonly referred to as the International Labour Code. The various organs of the ILO have also adopted countless resolutions, declarations and other formal statements of principle relating to labour matters over the years. However it is the Code which is principal relevance for present purposes.

The Conventions and Recommendations which constitute the Code deal with a very broad range of employment-related matters, including:

- (i) three fundamental human rights issues, namely freedom of association, discrimination in employment and occupation, and abolition of forced labour;
- (ii) employment conditions such as minimum wages, hours of work, annual leave, parental leave etc;
- (iii) occupational health and safety;
- (iv) social security and workers' compensation;
- (v) the needs of certain categories of workers who are perceived to be in need of special protection, notably children, young persons and women; and
- (vi) the special circumstances of specific occupational groups like seafarers, dock

⁶ The ICESCR was ratified in 1975, and the ICCPR in 1980. With effect from 24 December 1991, Australia has acceded to the Optional Protocol to the ICCPR. This means that in certain circumstances aggrieved individuals have the right to complain directly to the United Nations Human Rights Committee in relation to alleged violations of their rights under the Covenant - see further Robertson and Merrills 1992:37-41 and 54-69.

workers and workers in agriculture.

Conventions and Recommendations can be adopted only by a two thirds majority of delegates present and voting at the annual International Labour Conference.⁷ Adoption is invariably preceded by an exhaustive process of research, discussion and consultation involving governments, employers, workers and unions, technical experts etc. often this process can extend over many years.

Once adopted by Conference Conventions become open to ratification. It is most important to appreciate, however, that there is no obligation to ratify, and that unratified Conventions do not create any obligation in international law.⁸ Recommendations are not open to ratification, and do not, therefore, create binding obligations in their own right. They are generally used either to complement the obligations set out in Conventions, or to deal with matters which are not considered to constitute suitable subject-matter for a Convention.

Conventions become binding upon the ratifying State one year after the date of ratification. They remain binding in perpetuity unless and until denounced. This may be done every tenth year after the Convention first entered into force.⁹

Ratification obliges the State concerned to maintain their law and practice in conformity with the Convention. In Australia, however, ratification does not have any effect in municipal law unless or until the instrument concerned is expressly given such effect by the parliament. This contrasts with the situation in certain other countries - such as the United States - where international treaty obligations may have effect in domestic law simply by virtue of the fact of ratification.¹⁰

Ratifying States are required to report to the International Labour Office at stated intervals¹¹ as to the effect given to all ratified Conventions in law and practice.

7 ILO Constitution, Article 19(2).

8 On the other hand Article 19 (5),(6) and (7) of the Constitution requires member-States to draw all newly-adopted Conventions and Recommendations to the attention of the "competent authorities" (usually the Legislature) "for the enactment of legislation or other action". This must be done within 18 months of adoption, and must be reported to the ILO. The "other action" can perfectly properly consist of a decision not to ratify, but the point is that the substance of the new instrument *must* be drawn to the attention of the relevant body. Failure to do so constitutes a breach of the Constitutional obligations of the country concerned.

9 Conventions enter into force twelve months after registration with the Director General of the ILO of their second ratification. Denunciation is possible for a period of twelve months commencing on each tenth anniversary of the Convention entering into force. To date, Australia has denounced only one Convention, the Underground Work (Women) Convention, 1935 (No 45) which was ratified in 1953 and denounced on 20 May 1988 (the Convention having entered into force on 30 May 1937).

10 For a detailed comparative study of this issue see Leary 1982.

11 Article 22 of the ILO Constitution envisages the submission of annual reports. In practice reports on core Conventions (for example those dealing with fundamental human rights) are normally required every two years, whilst reports on non-core Conventions are required every four years. Reporting is no longer required for a number of out-moded Conventions, although it should be appreciated that such Conventions do remain binding in international law unless or until denounced. The work-load associated with reporting on ratified Conventions is a somewhat contentious issue. Governments of both developed and developing countries complain that existing requirements are so onerous that the requisite reports cannot be

These periodic reports are subject to scrutiny by the Committee of Experts on Conventions and Recommendations, the observations of which may in turn form the basis of discussion at the Conference Committee on the Application of Conventions and Recommendations. Non-compliance with ratified Conventions may also form the subject-matter of a representation under Article 24 of the Constitution of the ILO, or may lead to the lodging of a complaint under Article 26.¹²

As at 30 April 1993, Australia had ratified 53 of the 173 Conventions which had been adopted up to that point.¹³ This figure includes all of the key instruments relating to fundamental human rights,¹⁴ but only a small number of those dealing with employment conditions.¹⁵ They include no occupational health and safety Conventions,¹⁶ no social security Conventions, and just four pre-War Conventions dealing with workers compensation.¹⁷ On a more positive note, Australia has ratified no fewer than 15 Conventions dealing with various aspects of the employment of seafarers, but not the pivotal Merchant Shipping (Minimum Standards) Convention, 1976 (No 147).

The total of 53 ratifications does not compare particularly favourably with Western European countries such as France, Italy and Spain which have ratified more than 100 Conventions. On the other hand it is markedly superior to most of our neighbours and trading partners in the Asia-Pacific region, and compares very favourably with that of other federal states such as the United States of America (11) and Canada (27). It is also important to appreciate that the mere fact of ratification does not necessarily denote compliance. For example certain Latin American and (former) socialist Governments in Eastern Europe were notorious for their practice of ratifying Conventions as a political gesture, but making little serious attempt to honour the commitments incurred thereby. Like most developed countries, Australia generally does not ratify Conventions unless law and practice is actually in compliance at the relevant time, and unless there is a commitment to keeping it that way.

provided on time, and that they also inhibit further ratification of Conventions, especially those which deal with complex technical issues such as occupational health and safety. On the information available it seems probable that these pressures will result in radical changes to reporting requirements sooner rather than later.

- 12 See further on ILO supervisory procedures Valticos and Sampson 1990.
- 13 A complete list of ratified Conventions appears as Attachment 2 to this paper.
- 14 The Forced Labour Convention, 1930 (No 29); Abolition of Forced Labour Convention, 1957 (No 105); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87); Right to Organise and Collective Bargaining Convention, 1949 (No 98); Equal Remuneration Convention, 1951 (No 100); and Discrimination (Employment and Occupation) Convention, 1958 (No 111). For comment on the ratification and implementation of these Conventions see Creighton 1993a.
- 15 See for example Minimum Wage-Fixing Machinery Convention, 1928 (No 26); Forty-Hour Week Convention, 1935 (No 47); Minimum Wage-Fixing (Agriculture) Convention, 1951 (No 99); and Minimum Wage Fixing Convention, 1970 (No 131).
- 16 The Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No 27) is a very partial exception. For a general discussion of ILO occupational health and safety standards see Creighton 1993.
- 17 Workmen's Compensation (Agriculture) Convention, 1921 (No 12); Workmen's Compensation (Occupational Diseases) Convention, 1925 (No 18); Equality of Treatment (Accident Compensation) Convention, 1925 (No 19); and Workmen's Compensation (Occupational Diseases)(Revised) Convention, 1934 (No 42).

As indicated, unratified Conventions do not create any obligations in international law. Nevertheless, both unratified Conventions, and Recommendations, can have a considerable normative impact in some instances - for example by serving as a reference point for changes to national law and practice, perhaps with a view to ratification at some stage in the future. There are also suggestions that the standards embodied in at least some Conventions may have found their way into customary international law.¹⁸

Apart from opening the way to ratification of International Labour Conventions, the mere fact of membership of the ILO is taken to create certain obligations in international law. In particular, it carries with it an obligation to respect the "principles of freedom of association". Respect for these principles is considered to be so fundamental to the functioning of the Organisation that all member-states are assumed to have agreed to observe them by virtue of becoming members of the Organisation, and special procedures have been established for dealing with alleged violations of these principles.¹⁹

THE LEGAL AND POLITICAL CONTEXT

Constitutional Competence

The capacity of the Commonwealth to ratify International Labour Conventions and other international instruments derives from the fact that it can be assumed to have inherited the prerogative powers of the Crown in relation to treaty-making at the time of federation.²⁰ These powers are exceedingly far-reaching, and are not limited to the enumerated matters in relation to which the federal Parliament has the capacity to make laws under the Constitution. Therein, it is often assumed, lies the rub. Although the Commonwealth has a largely untrammelled capacity to enter into international obligations, it does not necessarily have the capacity to implement them.

It may well be, however, that this problem is more apparent than real.

First of all, it is clear that a number of the Commonwealth's specific legislative powers could provide a basis for legislation to give effect to obligations under certain categories of international obligations without the need to rely upon the external affairs power in s.51(xxix) of the Constitution. These would include: the trade and commerce (s.51(i)), corporations (s.51(xx)), immigration (s.51(xxvii)), conciliation and arbitration (s.51(xxv)) and incidental (s.51(xxxix)) powers.

Secondly, and most importantly, it seems quite clear that the Commonwealth could legislate in reliance upon the external affairs power in order to give effect to any

18 See for example Jenks 1957:6 and von Potobsky 1972:83.

19 See further Creighton 1990, and the sources cited therein. For all practical purposes the substantive content of the principles can be assumed to be the same as that of Conventions Nos 87 and 98.

20 See further Sawyer 1966 and Droeker 1966.

obligations assumed by virtue of ratification of ILO Conventions.

Writing some years before the establishment of the ILO, Sir Harrison Moore (1910:461-462) expressed the view that:

"The power to give effect to international arrangements must, it would seem, be limited to matters which *in se* concern external relations; a matter in itself purely domestic, and therefore within the exclusive power of the States, cannot be drawn within the range of federal power merely because some arrangement has been made for uniform national action. Thus, there is at the present time an international movement for the amelioration of labour conditions, and the International Union has arrived at some agreements for uniformity of legislation. It is submitted that the Commonwealth could not, by adhering to an international agreement for the regulation of factories and workshops, proceed to legislate upon that subject in supersession of the laws of the States."

This approach to the interpretation of s.51(xxix) was subject to critical scrutiny by the High Court in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.

All five members of the Court took the view that the Commonwealth could legislate in reliance upon s.51(xxix) to give effect to an international convention on air navigation. There was some difference of opinion as to the precise scope of the power, but a clear majority consisting of Latham CJ and Evatt and McTiernan JJ decisively rejected the approach advocated by Moore. The joint judgment of Evatt and McTiernan JJ is particularly instructive in relation to the possible use of s.51(xxix) to give effect to ILO Conventions (at 681-682):

"In truth, the King's power to enter into international conventions cannot be limited in advance of the international situations which may from time to time arise. And in our view the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement. Accordingly (to pursue the illustration) Australia is not "a federal State the power of which to enter into international conventions on labour matters is subject to limitations [within the meaning of Article 19(9) of the Constitution of the ILO as it then stood]." A contrary view has apparently governed the practice of the Commonwealth authorities in relation to the draft conventions of the International Labour Office.²¹ In our opinion such view is wrong."

Later in their judgment, their honours suggested that the Commonwealth could use the external affairs power to give effect not only to ratified Conventions, but also to Recommendations (at 687):

"it is not to be assumed that the legislative power over "external affairs" is

21 Up to 1946 Conventions were referred to as "draft Conventions". This usage was abandoned following amendments to the Constitution of the ILO in that year.

limited to the execution of treaties or conventions; and, to pursue the illustration previously referred to, the Parliament may well be deemed competent to legislate for the carrying out of "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject

matters of concern to Australia as a member of the family of nations."

Despite this strong and clear statement of principle, the Commonwealth has, until recently, evinced no real preparedness to use the external affairs power to give effect to ILO Conventions, let alone Recommendations. This despite the fact that it has been prepared to use this power to override the States in relation to issues such as the protection of fundamental human rights and of the environment.²²

Ratification Policy and Practice

Not only has the Commonwealth been reluctant to use the external affairs power as a basis to override State legislation in the industrial relations area, it has also been extremely cautious about ratifying Conventions in the first place.

This caution is understandable in circumstances in which there is, or is perceived to be, an absence of legislative capacity to give effect to the commitments attendant upon ratification. This was an especially significant factor in the 1920s and '30s, when several States adopted a particularly uncooperative position in relation to the ratification and implementation of international standards.²³

The ratification process was freed up in some measure in the late 1940s through the adoption of a system of regular consultation between the Commonwealth and the States on ILO matters at officer level, and in the placing of ILO matters on the agenda of periodic meetings between State and federal labour Ministers. These arrangements proceed on the basis that Conventions are ratified only: (i) when law and practice in all jurisdictions is adjudged to be in compliance with the Convention concerned, *and* (ii) when all States and Territories have formally agreed to ratification. In keeping with the tripartite structure of the ILO, employer and worker

organisations are also consulted about ratification issues under the auspices of the National Labour Consultative Council.²⁴

The (relative) success of these procedures can be gauged from the fact that only

22 See for example *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 and *Richardson v Forestry Commission* (1988) 164 CLR 261. See also *Polyukovich v Commonwealth* (1991) 172 CLR 501. For comment see Bymes 1985.

23 See further Castles 1969:6-10.

24 See *National Labour Consultative Council Act 1977* (Cth). These procedures are intended to ensure compliance with the Tripartite Consultation (International Labour Standards) Convention 1976 (No 144), which was ratified by Australia in 1979.

twelve out of the 67 Conventions which were adopted prior to the outbreak of War had been ratified by that time,²⁵ whereas a further 41 have been ratified since 1945.²⁶

Only two Conventions have been ratified without the agreement of all States and Territories. The first was the Workers With Family Responsibilities Convention, 1981 (No 156) which was ratified in March 1990 without the agreement of New South Wales and the Northern Territory. The Northern Territory subsequently provided agreement to ratification, but New South Wales has still not done so.²⁷

The second was the Termination of Employment Convention, 1982 (No 158) which was ratified on 26 February 1993 without the formal agreement of *any* State or Territory.

The ratification of Convention No 158 was also unusual in that law and practice in *no* jurisdiction - including the Commonwealth - was in compliance at the time of ratification. As indicated earlier, Conventions do not become legally binding until the first anniversary of ratification. It follows that Australia has until 26 February 1994 to bring law and practice into line with the requirements of Convention No 158. If this has not been done by that time the Commonwealth may then find itself subject to adverse comment by the Committee of Experts on the Application of Conventions and Recommendations, and/or may be subject to representations or complaints under Articles 24 and 26 of the ILO Constitution.²⁸

There appear to be three methods by which compliance with Convention No 158 could be established:

- (i) the States, Territories and Commonwealth could each legislate so as to bring their own law and practice into line with the requirements of the convention;
- (ii) the Commonwealth could legislate in reliance upon the external affairs power so as to introduce an entirely new, Australia-wide regime relating to termination of employment; or
- (iii) the Commonwealth could legislate, again in reliance upon s.51(xxix), to enable a federal body or bodies (for example the Australian Industrial Relations Commission and/or an appropriate court or tribunal) to deal with termination matters in situations where the workers concerned did not have access to substantive or procedural rights which were at least equivalent to

25 Nine of these were Conventions which could be given effect on the basis of "Commonwealth-only" compliance. Eight related to seafarers, and the ninth to immigration.

26 These include 10 pre-War Conventions. One of these, the Minimum Age (Sea)(Revised) Convention, 1936 (No 58), was ratified only in June 1992. Of the 41 post-War ratifications eight have been "Commonwealth-only" Conventions.

27 It should be noted that law and practice in all jurisdictions was considered to be in compliance at the time of ratification. The refusal of New South Wales and the Northern Territory to agree to ratification seems to have been regarded as politically motivated.

28 Non-compliance does not, however, affect the validity of ratification. Nor, contrary to the reported views of the New South Wales and Western Australian Governments, does any alleged failure to consult with, or to obtain the agreement of, the States and Territories. See *Australian* 29 April 1993 at 6 and *Australian* 1 May 1993 at 3.

those required by the Convention.

It is not clear at this juncture which of these options will be adopted. The first would be the least controversial. It is true that it requires a measure of cooperation from the States which the history of federation suggests may not be forthcoming. On the other hand the governments concerned may take the view that it is better to legislate to protect the integrity of the State system rather than to accept a further federal encroachment upon their jurisdictional patch. This logic finds some support from the reported outcome of a meeting of State and federal labour Ministers on 30 April 1993 in relation to cooperation in relation to minimum employment conditions.²⁹

In a rational world, the second alternative would seem to have most to commend it. In the irrational real world the third option appears to be the one most likely to be adopted - assuming that the States do not in fact bring law and practice into line by the due date in February 1994. Even this, however, would constitute a profoundly important break with past practice, and has the potential to open up a new era in federal industrial regulation.

THE FUTURE

As indicated earlier, ILO Conventions deal with the whole gamut of employment matters ranging from fundamental human rights issues such as freedom of association and abolition of forced labour to more mundane matters such as the "marking of weight (packages transported by vessels)".³⁰ It might seem, therefore, that ratification and implementation of such Conventions could provide a basis for comprehensive Commonwealth legislation in a significant number of areas.

To some extent this is indeed the case.

On the other hand it is important to appreciate that the standards embodied in many Conventions are essentially minimalist in character. In other words, they lay down standards which fall some way short of those which would be regarded as the social and industrial norm in developed countries such as Australia. Indeed this has often been cited as one of the explanations for Australia's fairly modest ratification record: the standards embodied in many Conventions were so basic that they simply were not relevant to an "advanced" country such as this. As against that, it might be argued that if it is indeed the case that law and practice in Australia is markedly in advance of the standards laid down in certain Conventions then: (a) it should be an easy matter for Australia to ratify them, and (b) doing so would set a good example to other countries whose standards had not yet attained the high levels reached in Australia.

Unfortunately for this line of reasoning, the Taskforce on Ratification to which I referred earlier found that there were actually very few unratified Conventions

29 See *Australian* 1 May 1993 at 3.

30 Convention No 27, which was ratified by Australia in 1931. See further note 16, supra.

where law and practice were already in compliance with, let alone in advance of, these allegedly minimalist standards!

It should also be appreciated that many Conventions - especially those adopted in recent years - are "promotional" rather than "prescriptive" in nature. This means that they commit ratifying states to pursue certain vaguely defined policy objectives, but leave it to national law and practice to determine how, and at what pace, those objectives are to be attained.³¹ Ratification of such Conventions can perform a useful function in terms of committing governments to the pursuit of entirely worthy policy objectives, but they might well constitute a fragile foundation for prescriptive Commonwealth legislation in reliance upon the external affairs power. This consideration might, for example, militate against any attempt to use the Workers with Family Responsibilities Convention (No 156) as a basis for legislation requiring rather than encouraging or facilitating the grant of parental leave (paid or unpaid).³²

Bearing these considerations in mind, it is possible to identify at least three areas where ratification and implementation of ILO Conventions could have a significant bearing upon the development of legislative policy in the future:

(i) Protecting Minimum Employment Conditions

The behaviour of the Kennett Government since its election in October 1992 suggests that even minimalist international standards could be used to provide a worthwhile measure of protection for groups of workers who are not in a position adequately to promote or to protect their interests in a deregulated industrial environment. It seems reasonable to assume that an awareness of this potential underpinned the Prime Minister's statement of 2 December 1992 to which I referred earlier.

Even in less contentious circumstances than those which currently prevail in Victoria, ILO standards could still play a useful role in helping to maintain minimum standards in a deregulated industrial relations environment. This could be done, for example, on the basis of complementary State/federal legislation, agreed federal legislation, or overriding federal provision on the basis of s.51(xxix).

(ii) National Uniformity

Ratification and implementation of ILO Conventions could also be used in order to establish uniform provision in certain areas where there is a division of legislative

31 Examples of such Conventions would include the Employment Policy Convention, 1964 (No 122); Paid Educational Leave Convention, 1974 (No 140); Human Resources Development Convention, 1975 (No 142); Collective Bargaining Convention, 1981 (No 154); and Workers with Family Responsibilities Convention, 1981 (No 156). Australia has ratified Nos 122, 142 and 156, but not No 140 or 154. Both of these Conventions have, however, been identified as suitable targets for ratification by the Ratifications Taskforce.

32 See *The Age*, 28 April 1993, at 5. It should be noted, however, that para.22(1) of accompanying Recommendation No 165 does state that "either parent should have the possibility, within a period immediately following maternity leave, of obtaining leave of absence (parental leave), without relinquishing employment and with the rights resulting from employment safeguarded". See also ILO 1993: paras 157-169.

and administrative responsibility between the Commonwealth and the States, and where there is a perceived need for national uniformity.

The field of occupational health and safety is a particularly obvious candidate for regulation on this basis. This is an area where there is a clear need for uniform national standards but where attempts to achieve this objective on a voluntary basis have consistently been thwarted by parochialism and sheer bloody mindedness on the part of some or all of the States and Territories.

There is a range of ILO Conventions which deal with specific occupational health hazards such as air pollution, noise, vibration, radiation, asbestos and chemicals. Others deal with the health and safety of particular occupational groups such as dock workers, seafarers and construction workers. Most importantly, however, the Occupational Safety and Health Convention, 1981 (No 155) provides a framework for the overall regulation of occupational health and safety and for the joint involvement of employers and workers in the development and implementation of occupational health and safety policy at both national and workplace level.

The policy approach which is embodied in Convention No 155 is very similar to that which underpins the so-called "Robens-style" legislation which has been adopted in most Australian jurisdictions in recent years.³³ It would, therefore, provide an entirely appropriate basis for comprehensive federal legislation in this area.

(iii) Establishing Compliance with Existing Obligations

The first and second strategies basically entail ratification of previously unratified Conventions, and then legislating to give effect to the obligations incurred thereby either on a cooperative basis or in reliance upon s.51(xxix) of the Constitution. The third strategy also envisages either State/Commonwealth cooperation or overriding federal legislation, but in this instance the trigger would be pre-existing obligations in relation to which Australian law and practice has been found not to be in compliance.

The Prime Minister's announcement of 2 December 1992 was, for example, premised on the assumption that the Victorian *Employee Relations Act* had taken Australia out of compliance with a number of Conventions relating to minimum wage fixing,³⁴ and equal pay.³⁵ Even more important, perhaps, is the fact that the ILO's supervisory bodies have determined that various aspects of State and federal labour legislation are inconsistent with ILO standards relating to freedom of association - for example in relation to the right to strike and trade union registration.

In some contexts it would not be necessary for the Commonwealth to rely upon the

33 See further Brooks 1988 and Creighton et al 1993, chapter 40, and the sources cited therein.

34 See Minimum Wage Fixing Machinery Convention, 1928 (No 26); Minimum Wage-Fixing Machinery (Agriculture) Convention, 1951 (No 99); and Minimum Wage Fixing Convention, 1970 (No 131). These Conventions were ratified in 1931, 1969 and 1973 respectively.

35 Equal Remuneration Convention 1951 (No 100), which was ratified in 1974.

external affairs power in order to bring its own law and practice into line with these standards. For example in the case of s.45D of the *Trade Practices Act* it could simply legislate on the basis of the heads of power which were used to make the impugned law in the first place.³⁶ Where it might be necessary and appropriate to rely upon the s. 51(xxix) power is in situations where the Commonwealth wanted to ensure that law and practice in all jurisdictions came into, and remained, in compliance with the relevant ILO standard.

This option might be used, for example, to ensure that the State essential services legislation conformed to ILO principles relating to the right to strike,³⁷ or to override State equivalents to s.45D.³⁸ It could also be used to strike down State laws which denied the right to engage in collective bargaining as guaranteed by Article 4 of the Right to Organise and Collective Bargaining Convention, 1949 (No 98), or to provide comprehensive protection against common law liability for industrial action.³⁹

CONCLUSION

The principal emphasis throughout this paper has been upon the potential role of international standards and the external affairs power as a basis for uniform national legislation in the field of industrial relations. This seems to entirely appropriate in light of the fact that this option at last appears to have moved into the realm of practical politics in Australia. However, it is important not to lose sight of the more traditional role of international standards in our industrial relations system.

Despite my earlier comments about the failure of policy-makers and others to take adequate account of the role of international standards in the formulation and implementation of industrial relations law and policy, it would be misleading to suggest that this issue has entirely been ignored in the past.

36 Namely the trade and commerce (s.51(ii)) and corporations (s.51(xx)) powers. See further *Seamen's Union of Australia v Utah Development Corporation* (1978) 144 CLR 120; *Actors and Announcers Equity v Fontana Films* (1982) 150 CLR 169; *AMIEU v Mudginberri Station* (1985) 61 ALR 417 and *Roberts v Murlar* (1986) 68 ALR 62.

37 For example in 1991 the Committee of Experts determined that certain aspects of the Essential Services Act, 1988 (NSW) were inconsistent with these principles. Essential services legislation in other jurisdictions was due to be examined by the Committee in 1993. It is highly likely that provision such as the *Vital State Industries (Works and Services) Act, 1992* (Vic) would also be found to be incompatible with these standards. See further on ILO standards relating to essential services Pankert 1980 and Ben-Israel 1988:103-104 and 109-116.

38 See for example the (repealed) *Industrial (Commercial Practices) Act, 1984* (Qld); ss. 256-274 of the *Industrial Relations Act, 1991* (NSW); and s. 36(1)(h) of the *Employee Relations Act, 1992* (Vic). See also s. 164 of the *Industrial Relations Act, 1988* (Cth).

39 The Committee of Experts has already determined in direct requests in 1989 and 1991 that the absence of such protection is inconsistent with Australia's obligations under Convention No 87. It seems reasonable to assume that the Committee adhered to this position in a further direct request in 1993, although the text was not available at the time of writing. The Committee on Freedom of Association also expressed considerable disquiet on this issue in the context of a complaint arising out of the pilots' dispute of 1989-90 - see Case No 1511 (Australia), Committee on Freedom of Association, 277th Report, paras. 151-246 at para. 236. See also McEvoy and Owens 1993.

On the contrary, even unratified ILO Conventions, and Recommendations, have been used as benchmarks against which to measure the appropriateness of proposed legislative or administrative developments. On occasion they have been used as reference points for legislation which is intended to ensure compliance and to permit ratification.⁴⁰ In yet other instances direct requests or observations from the Committee of Experts have led to the enactment of legislation to bring law and practice into conformity with ratified Conventions.⁴¹ Finally, ILO standards have been used as reference points in a number of important test cases in the industrial tribunals over the years,⁴² although there do not appear to be any instances where ILO standards have been overtly relied upon by courts of law as part of the decision-making process. On the other hand Gray J did use the reference to the right to strike in Article 8 of the ICESCR as part of the rationale for his decision in the *MATFA Case*.⁴³

The fact remains, however, that international standards in general, and those adopted under the auspices of the ILO in particular, have not had the kind of influence upon law and policy in Australia which I believe they can and ought to have had. There is now reason to suppose that this is about to change. I for one have no doubt that our labour law will be the better for it.

40 See for example the International Labour Organisation (Compliance With Conventions) Act, 1992 (Cth) which was introduced for the express purpose of permitting ratification of the Seafarers Identity Documents Convention 1958 (No 108). It was also intended to facilitate ratification of the Medical Examination (Seafarers) Convention 1946 (No 73), and to remove certain of the remaining obstacles to the ratification of the Merchant Shipping (Minimum Standards) Convention, 1976. Neither Convention No 108 nor 73 had been ratified at the time of writing.

41 For example the *Navigation Act Amendment Act*, 1979 (Cth) repealed s. 105 of the *Navigation Act* 1912 (Cth) (and certain associated imperial provisions) in response to a number of direct requests and observations by the Committee of Experts to the effect that this provision was contrary to the Abolition of Forced Labour Convention, 1957 (No 105). The present federal Government has also indicated that it will amend the registration provisions of the *Industrial Relations Act*, 1988 to give effect to the decision of the Committee on Freedom of Association in Case No 1559.

42 See for example the *Termination, Change and Redundancy Case* (1984) 8 IR 34 and (1984) 9 IR 115. For a review of the influence of ILO standards in Australia see Landau 1990. This work should be treated with great caution due to the large number of factual inaccuracies contained therein, but it is useful in that it does identify many of the areas where ILO standards have exerted a significant influence upon law and practice in this country.

43 *AMIEU v MATFA* (1991) 32 FCR 318 at 327-328.

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Attachment 1**Convention No. 158****Convention concerning Termination of Employment at the Initiative of the Employer¹**

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and

Noting the existing international standards contained in the Termination of Employment Recommendation, 1963, and

Noting that since the adoption of the Termination of Employment Recommendation, 1963, significant developments have occurred in the law and practice of many member States on the questions covered by that Recommendation, and

Considering that these developments have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries,

Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two, the following Convention, which may be cited as the Termination of Employment Convention, 1982:

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS*Article 1*

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

¹ Date of coming into force: 23 November 1985.

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms "termination" and "termination of employment" mean termination of employment at the initiative of the employer.

PART II. STANDARDS OF GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5

The following, *inter alia*, shall not constitute valid reasons for termination:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

- (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;
- (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

DIVISION D. PERIOD OF NOTICE

Article 11

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to:

- (a) a severance allowance or other separation benefits, the amount of which shall be based *inter alia* on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
- (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
- (c) a combination of such allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS
OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR
SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

- (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
- (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term "the workers' representatives concerned" means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

* * *

Articles 15-22: Standard final provisions.²

Recommendation No. 166

Recommendation concerning Termination of Employment at the Initiative of the Employer

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and

Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Termination of Employment Convention, 1982;

adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two, the following Recommendation, which may be cited as the Termination of Employment Recommendation, 1982:

I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

1. The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

2. (1) This Recommendation applies to all branches of economic activity and to all employed persons.

(2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.

(3) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, which as a whole provide pro-

tection that is at least equivalent to the protection afforded under the Recommendation.

(4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

3. (1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following:

- (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;
- (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;
- (c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

4. For the purpose of this Recommendation the terms "termination" and "termination of employment" mean termination of employment at the initiative of the employer.

II. STANDARDS OF GENERAL APPLICATION

Justification for Termination

5. In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:

- (a) age, subject to national law and practice regarding retirement;
- (b) absence from work due to compulsory military service or other civic obligations, in accordance with national law and practice.

6. (1) Temporary absence from work because of illness or injury should not constitute a valid reason for termination.

(2) The definition of what constitutes temporary absence from work, the extent to which medical certification should be required and possible limitations

to the application of subparagraph (1) of this Paragraph should be determined in accordance with the methods of implementation referred to in Paragraph 1 of this Recommendation.

Procedure Prior to or at the Time of Termination

7. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.

8. The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

9. A worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation.

10. The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.

11. The employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment.

12. The employer should notify a worker in writing of a decision to terminate his employment.

13. (1) A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.

(2) Subparagraph (1) of this Paragraph need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of the Termination of Employment Convention, 1982, if the procedure provided for therein is followed.

Procedure of Appeal against Termination

14. Provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment.

15. Efforts should be made by public authorities, workers' representatives and organisations of workers to ensure that workers are fully informed of the possibilities of appeal at their disposal.

Time Off from Work during the Period of Notice

16. During the period of notice referred to in Article 11 of the Termination of Employment Convention, 1982, the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

Certificate of Employment

17. A worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying only the dates of his engagement and termination of his employment and the type or types of work on which he was employed; nevertheless, and at the request of the worker, an evaluation of his conduct and performance may be given in this certificate or in a separate certificate.

Severance Allowance and Other Income Protection

18. (1) A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to—

- (a) a severance allowance or other separation benefits, the amount of which should be based, *inter alia*, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
- (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
- (c) a combination of such allowance and benefits.

(2) A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1) (a) of this Paragraph solely because he is not receiving an unemployment benefit under subparagraph (1) (b).

(3) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1) (a) of this Paragraph in the event of termination for serious misconduct.

**III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF
EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR
SIMILAR REASONS**

19. (1) All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any

termination of employment for these reasons on the worker or workers concerned.

(2) Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

Consultations on Major Changes in the Undertaking

20. (1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, *inter alia*, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes.

(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.

(3) For the purposes of this Paragraph the term "the workers' representatives concerned" means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Measures to Avert or Minimise Termination

21. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might include, *inter alia*, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

22. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice.

Criteria for Selection for Termination

23. (1) The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

(2) These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

Priority of Rehiring

24. (1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.

(2) Such priority of rehiring may be limited to a specified period of time.

(3) The criteria for the priority of rehiring, the question of retention of rights—particularly seniority rights—in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

Mitigating the Effects of Termination

25. (1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned.

(2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

(3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

26. (1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.

(2) The competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph, in accordance with national law and practice.

IV. EFFECT ON EARLIER RECOMMENDATION

27. This Recommendation and the Termination of Employment Convention, 1982, supersede the Termination of Employment Recommendation, 1963.

Attachment 2**ILO CONVENTIONS RATIFIED BY AUSTRALIA - APRIL 1993**

- 2# Unemployment, 1919 (ratified 15.6.72)
- 7# Minimum Age (Sea), 1920 (28.6.35)
- 8# Unemployment Indemnity (Shipwreck), 1920 (28.6.35)
- 9# Placing of Seamen, 1920 (3.8.25)
- 10 Minimum Age (Agriculture), 1921 (24.12.57)
- 11 Right of Association (Agriculture), 1921 (24.12.57)
- 12 Workmen's Compensation (Agriculture), 1921 (7.6.60)
- 15# Minimum Age (Trimmers and Stokers), 1921 (28.6.35)
- 16# Medical Examination of Young Persons (Sea), 1921 (28.6.35)
- 18 Workmen's Compensation (Occupational Diseases), 1925 (22.4.59)
- 19 Equality of Treatment (Accident Compensation), 1925 (12.6.59)
- 21# Inspection of Emigrants, 1926 (18.4.31)
- 22# Seamen's Articles of Agreement, 1926 (1.4.35)
- 26 Minimum Wage Fixing Machinery, 1928 (9.3.31)
- 27# Marking of Weight (Packages Transported by Vessels), 1929 (9.3.31)
- 29 Forced Labour, 1930 (2.1.32)
- 42 Workmen's Compensation (Occupational Diseases) (Revised), 1934 (29.4.59)
- 45* Underground Work (Women), 1935 (7.10.53)
- 47 Forty-Hour Week, 1935 (22.10.70)
- 57@ Hours of Work and Manning (Sea), 1936 (24.9.38)
- 58 Minimum Age (Sea) (Revised), 1936 (11.6.92)
- 63# Statistics of Wages and Hours of Work, 1938 (5.9.39)
- 76@ Wages, Hours of Work and Manning (Sea), 1946 (25.1.49)
- 80@ Final Articles Revision, 1946 (24.1.49)
- 81 Labour Inspection, 1947 (24.6.75)
- 83# Labour Standards (Non-Metropolitan Territories), 1947 (15.6.73)
- 85# Labour Inspectorates (Non-Metropolitan Territories), 1947 (30.9.54)
- 86# Contracts of Employment (Indigenous Workers), 1947 (15.6.73)
- 87 Freedom of Association and Protection of the Right to Organise, 1948 (28.2.73)
- 88# Employment Service, 1948 (24.12.49)
- 92 Accommodation of Crews (Revised), 1949 (11.6.92)
- 93@ Wages, Hours of Work and Manning (Sea) (Revised), 1949 (3.3.54)
- 98 Right to Organise and Collective Bargaining, 1949 (28.2.73)
- 99 Minimum Wage-Fixing Machinery (Agriculture), 1951 (19.6.69)
- 100 Equal Remuneration, 1951 (10.12.74)
- 105 Abolition of Forced Labour, 1957 (7.6.60)
- 109@ Wages, Hours of Work and Manning (Sea) (Revised), 1958 (15.6.72)
- 111 Discrimination (Employment and Occupation), 1958 (15.6.73)
- 112 Minimum Age (Fishermen), 1959 (15.6.71)
- 116@ Final Articles Revision, 1961 (29.10.63)
- 122 Employment Policy, 1964 (12.9.69)
- 123 Minimum Age (Underground Work), 1965 (12.12.71)
- 131 Minimum Wage Fixing, 1970 (15.6.73)

- 133 Accommodation of Crews (Supplementary Provisions), 1970 (11.6.92)
135 Workers Representatives, 1971 (26.2.93)
137# Dock Work, 1973 (25.6.74)
142 Human Resources Development, 1975 910.9.85)
144# Tripartite Consultation (International Labour Standards), 1976 (11.6.79)
150 Labour Administration, 1978 (10.9.85)
156 Workers with Family Responsibilities, 1981 (30.3.90)
158 Termination of Employment, 1982 (26.2.93)
159 Vocational Rehabilitation and Employment (Disabled Persons), 1983
(7.8.90)
160# Labour Statistics, 1985 (15.5.87)

Total number of Conventions ratified by Australia: 53

- * *Denounced 20 May 1988*
Commonwealth only
@ *Has not come into force, or final provisions only*

10. The Deregulation of Industrial Relations Systems and the Rise Of the Non-Union Option: A Cross-National Sketch

Richard Mitchell

The conference upon which this monograph is based was titled "*A New Province for Legalism? Legal Issues and the Deregulation of Industrial Relations*". The papers presented at the conference, and which now form the content of this monograph, dealt with important legal issues which arise in the context of Australia's transition from a centralised compulsory arbitration system to a more flexible industrial relations framework based on workplace or enterprise conditions. The topics covered in the papers presented here have included an examination of the federal government's legal power to extend its regulation of industrial relations, and in particular its obligation to give effect to certain international standards of labour regulation. We have also reviewed the steady growth of influence of the federal authorities in Australia industrial relations, the role of the right to strike in a bargaining system, and examined the contract of employment as a vehicle for giving effect to workplace arrangements.

Important as these issues undoubtedly are, it is also necessary for us to see these Australian developments in a broader focus, and particularly to ask whether Australia fits into any broad pattern of international development of industrial relations. There are, it is true, disadvantages to very generalised accounts of cross-national developments. We know, for example, that even between like-types, labour law frameworks and industrial relations systems vary enormously. Even if it is possible to identify a common characteristic of deregulation, both the process and the outcomes will certainly vary widely between countries. Nevertheless this paper attempts to make a generalisation about the character of deregulation in Australia and some other countries. This generalisation is not definitive of the process of deregulation but identifies an important aspect of it. The paper attempts to draw

from these international developments some implications for the development of Australian labour law.

First, however, it is necessary to deal with the concept of "deregulation". It is acknowledged that deregulation consists of a variety of legal and institutional changes within industrial relations systems, with a variety of outcomes.¹ Nevertheless the expression "deregulation" is a misleading one for two reasons at least. First, by "deregulation" it is not meant that all legal regulation of the labour market will be removed. In its most extreme form it would remove all statutory and institutional regulation (i.e. through trade unions and tribunals) but leave in place the common law rules of contract and property as the means through which employment rights and obligations are imposed and accepted.² Second, and relatedly, advocates of "deregulation" are really seeking merely to change the manner and location of the regulation. This may be put in terms of seeking to replace regulations which are external to the workplace or enterprise with those which are determined *within* them.³ Equally it may be seen in terms of replacing uniform national or industry standards with standards which are determined within business units.

If it is possible to discern a most common term broadly encapsulating the aims of deregulation it is the "decentralisation" of bargaining.⁴ In most if not all advanced industrialised economies this trend is evident; among those countries with essentially decentralised systems a move to greater decentralisation, and among those with centralised systems, a move to decentralisation.⁵ But to observe "deregulation" as "decentralisation" obscures two other important aspects of the process - for the push for deregulation has included an attack upon the role of trade unions in the labour market. It has facilitated a *de-collectivisation* of industrial relations by making individual-based employment agreements a more common outcome in industrial relations regulation. It has also brought about a *de-unionisation* of industrial relations by enabling the withdrawal of union recognition. It is these latter aspects of deregulation which are the specific focus of this paper.

On the assumption that Australia is responding to economic pressures in a way which is similar to some international trends, then it is useful to consider what implications this might have for Australian labour law. Two countries in our region stand out in frequency of comparison, namely the United States of America and Japan. But Australia has had a labour law framework which differs from the American and Japanese in quite important respects. Clearly we need to consider the development of our system carefully especially in accommodating ideas from other

1 Eg. see generally, *Workplace Bargaining in the International Context*, Industrial Relations Research Monograph No. 2., Commonwealth of Australia, AGPS, Canberra, 1992.

2 See B Napier, "Deregulation, Flexibility and Individual Labour Law in the United Kingdom", (1988/89) 4 *International Journal of Comparative Labour Law and Industrial Relations* 206 at p208.

3 J. Buchanan & R. Callus, *Efficiency and Equity at Work: The Need for Labour Market Regulation in Australia*, Australian Centre for Industrial Relations Research and Teaching, University of Sydney, Working Paper No. 26, 1993.

4 E.g. see the research material presented in *Workplace Bargaining in the International Context*, *op. cit.*

5 *Ibid.*

models. This in turn, I think, confronts labour lawyers with a challenging task, and one which has implications for the conceptualisation of the subject and its relationship to policy formation.

The paper is divided into three parts. Part 1 deals with the development of industrial relations systems in the early industrialising countries, and in the newly industrialising countries of the East. The essential role of trade unions as participants in these industrial relations systems is discussed. Part 2 deals with the process of deregulation of the systems, particularly those of the earlier industrialising Western countries. The particular point at issue is the degree to which these systems can be said to be withdrawing from the original premise upon which they were based (i.e. trade union recognition and incorporation). Part 3 attempts to draw some implications from these international trends for the development of Australian labour law and its role in labour market policy.

THE DEVELOPMENT OF INDUSTRIAL RELATIONS SYSTEMS

Advanced Industrialised Countries

Formalised systems for the settlement of industrial disputes between capital and labour emerged in the industrialised countries of the West during the period approximately marked by the close of the nineteenth century and the 1940's. These developments in Western Europe, North America and Australasia were followed in the post-war period of the 1950's and 1960's by the development of similar systems in the newly industrialising countries of the world, principally in North and South-East Asia (e.g. Singapore, South Korea, Hong Kong, Taiwan and other Asian countries). Japan, which in terms of industrialisation overlaps developments in the East and the West, emerged only as a leading industrial nation in the post-war period. The relevance of its labour law framework is, therefore, largely confined to the post-war context.

Obviously the context and the nature of these arrangements varied between countries and regions. In some of the countries the legal and/or institutional framework was settled relatively early and remained largely unchanged for at least three quarters of the twentieth-century (e.g. Denmark, Britain, Australia, New Zealand).⁶ Others, even among the advanced countries, failed to mature in legal terms until the 1930's and 1940's (e.g. the U.S.A. and Canada), and in the case of the former at least, endured *in practice* (though not in legal policy) for a relatively

6 The development of labour law in Western Europe is the subject of a major comparative work in B. Hepple (ed.), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945*, Mansell, London, 1986. The origins of arbitration in Australia are covered in S. Macintyre and R. Mitchell (eds.), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914*, Oxford University Press, Melbourne, 1989. For New Zealand see J. Holt, *Compulsory Arbitration in New Zealand: The First Forty Years*, Auckland University Press, Auckland, 1986. The legal framework for collective bargaining in the U.S.A. is outlined in W.B. Gould, *A Primer on American Labor Law*, MIT Press, Cambridge (Masschts.), 1983, and its impact is briefly discussed in T.A. Kochan, H.C. Katz and R.B. McKersie, *The Transformation of American Industrial Relations*, Basic Books Inc., New York, 1986, pp. 21-29.

short period of time.⁷ Many of the European systems - Germany and Italy being notable examples - were disrupted by the rise of fascism, and re-emerged in their modern forms only in the post-Second World War period.

The different country systems also varied widely in their objectives and in their legal and institutional arrangements. Australia and New Zealand, for example, legislated for systems whereby strikes and other forms of industrial action would be unnecessary because the role of the state was to supervise the making of "fair" employment agreements between employers and employees. Other systems, those of the collective bargaining countries such as Britain and the U.S.A., accepted the incidence of industrial action as part of labour relations adjustment to market pressures, and sought to set down rules within which industrial action could be taken by the parties to disputes.

On the whole European systems favoured voluntary rather than compulsory arbitration as a means of state intervention to avoid industrial action. The clear exceptions were the German Arbitration Decree of 1923, and the system of compulsory arbitration introduced into France in 1936. Under the German system, where the parties could not reach voluntary agreement compulsory arbitration and binding awards took over in a way similar to the underlying theory, if not the practice, of the Australasian models. Industrial action was illegal for the duration of the award.⁸ In France, compulsory arbitration was used more as a means whereby the government forced employers to deal with unions or suffer the imposition of arbitrated terms.⁹ British unions (apart from wartime periods) eschewed the idea of compulsory state arbitration consistently from the mid-1800's onwards. Canadian unions flirted with the idea of following the Australasian experiments of the 1890's, but abandoned the idea at the turn of the century.¹⁰

A further notable difference between the various systems may be found in the extent of institutional or state intervention in the *outcomes* of dispute settlement (i.e. the content of the contract of employment). The Australian and New Zealand systems favoured extensive legal prescription of terms and conditions of employment, against a more laissez-faire position in the North American and British models. Of the European systems, we have noted, Germany favoured the prescription of terms and conditions by award for much of the 1920's, but the legal prescription of minimum standards by *legislation* has characterised continental Europe to a far greater degree than elsewhere. Furthermore, even within types (i.e. bargaining or arbitral models) there were notable differences. The British collective agreement, for example, was usually a very brief document, with the contract of employment drawing most of its terms from local arrangements, custom and practice and so on. On the other hand, the American collective agreement tended to be lengthy and

7 See T.A. Kochan, H.C. Katz and R.B. McKersie, *op. cit.*, p. 45.

8 See A. Jacobs, "Collective Self-Regulation" in B. Hepple (ed.), *op. cit.*, p. 231.

9 A. Jacobs, *op. cit.*, p. 227.

10 See R. Mitchell, "Solving the Great Social Problem of the Age: A Comparison of the Development of State Systems of Conciliation and Arbitration in Australia and Canada", in G.S. Kealey and G. Patmore (eds.), *Canadian and Australian Labour History: Towards a Comparative Perspective*, ASSCH/CCLH, University of Sydney, 1990, p. 47.

detailed, rather in the fashion of the Australian award.¹¹

Notwithstanding these and other differences, however, *one underlying feature* characterised all these labour law systems. They were based upon an acceptance of the role of trade unions in the labour market. They also provided a role for state institutions in the labour market, though, as we have earlier noted, the role of such institutions varied. In most Western European countries, including Britain, France, Belgium, Italy, Denmark and the Netherlands, a proliferation of courts and bodies for dealing with industrial disputes developed from the late 1800's to the 1920's. However, as Jacobs has noted, these were principally seen as supporting mechanisms to the process of collective bargaining and provided the state with no compulsory powers.¹² The degree to which these systems regulated the bargaining process itself varied - but in the North American systems the role of the principal institutions (e.g. the National Labor Relations Board) was to give effect to the recognition procedure, and to monitor the bargaining process. In others, we have noted, the full extent of the industrial relations process was institutionally regulated - covering recognition, process and outcomes (e.g. Australia and New Zealand).

In the British system, which was above all one of collective *laissez-faire*, neither the bargaining process, nor the content of the employment contract (with some exceptions) was the concern of state legislation until the 1960's and 1970's. Nevertheless, British industrial relations was, in keeping with other systems, based upon trade union recognition and collective, rather than individual, bargaining.

The means whereby trade unions were integrated into the political economy also varied widely between countries. As a first step, the right to organise into trade unions had to be legally protected. Criminal sanctions against the simple act of combination were removed from the statute books from most if not all industrialising countries during the nineteenth century.¹³ However, penal laws against various types of industrial action continued for a much longer period, and the modified right to strike in most countries was only established well into this century.¹⁴ Beyond that basic legalisation, the incorporation of trade unions relied

11 See E.I. Sykes, "Labour Arbitration in Australia", in J.E. Isaac and G.W. Ford, *Australian Labour Relations: Readings* 2nd ed., Sun Books, Melbourne, 1971, p.352 at p.370. Though Sykes noted a number of important differences between Australian awards and U.S.A. collective agreements, the subsequent extension of award terms reduced the number of these differences during the 1970's.

12 A. Jacobs, *op. cit.*, p.230.

13 On Western Europe see A. Jacobs, *op. cit.*, pp.196-215. The Australian position is dealt with in W.B. Creighton, W.J. Ford and R.J. Mitchell, *Labour Law: Text and Materials*, 2nd ed., Law Book Co., Sydney, 1993, pp.1146-1148. In the U.S.A. labour unions *per se* were declared lawful in a decision of the Supreme Court of Massachusetts in 1842. Trade union activities, however, as was the case with those in Britain and elsewhere in Europe, were continually subject to prosecution under criminal and civil doctrines until much later: see W.B. Gould, *op. cit.*, chapter 2.

14 See A. Jacobs, *op. cit.*, p.214. In the U.S.A. a basic freedom to strike was reached only with the introduction of the Norris-La Guardia Federal Anti-Injunction Act in 1932; see W.B. Gould, *op. cit.*, chapter 2. It was further clarified and qualified in the National Labor Relations Act 1935 and the Taft-Hartley amendments in 1947; W.B. Gould *op. cit.*, pp.101-105. The Australian position is still complicated by the gap between law (in which there is virtually no right to strike) and practice; see B. Creighton, "Enforcement in the Federal Industrial Relations System: An Australian Paradox", (1991) 4 *AJLL*, 197.

upon a mixture of voluntarism and legal right. Some systems (e.g. Australia, New Zealand, Britain) required registration for participation in the industrial relations system, or at least made registration desirable from a union point of view. Through this process of registration, unions obtained various protections against legal action, plus the benefits of legal capacity in one form or another. Other systems had no requirements for union registration.

With or without registration, participation in the industrial relations system was assured by the *recognition* of unions by employers. Recognition was legally assured in some systems through the process of registration itself (e.g. Australia and New Zealand).¹⁵ In Western Europe, voluntary methods predominated in countries such as Britain, Belgium, the Netherlands and Denmark.¹⁶ The earliest form of national multi-industry scale recognition came in Denmark in 1899.¹⁷ Whilst Britain had a long experience of collective bargaining and conciliation and arbitration in particular trades since the mid-nineteenth century, it was the development of government recognition of trade unions, and the establishment of the Whitley Councils during the First World War which effectively nationalised the policy.¹⁸ In some other European countries, however, recognition, and the right to bargain collectively, was established by positive statutory rights (e.g. Germany 1919, France 1936).¹⁹ In the North American systems of Canada and the U.S.A., the process of recognition fell mid-way between these points of legal right and voluntarism. In these systems, the legal framework provided no *general* positive rights. It did, however, oblige employers to recognise and to bargain in good faith following a particular procedure.²⁰

Above all, it was the approach of governments and business as to the desirability and necessity of dealing with unions which defined the form and influenced the timing of the introduction of the industrial relations system. Following the protracted and bitter industrial warfare which characterised industrial relations in the 1890's in Australia and New Zealand, it was necessary for the colonial governments to produce workable systems which could institutionalise the struggle between capital and labour. The compulsory arbitration frameworks were essentially an outcome of the compromise between the state, unions and substantial groups of employers.²¹ In Western Europe and North America, too, resistance to unions gave way to a pragmatic reconciliation to the need to establish orderly relations. Where employers continued to resist, they were forced by governments to concede (e.g. France, 1936).²² In the U.S.A., where employers had long resisted trade unions, recognition and collective bargaining with unions, following the New Deal arrangement of the 1930's, provided the stability which was essential to America employers in the

15 E.g. see W.B. Creighton, W.J. Ford and R.J. Mitchell, *op. cit.*, p. 987.

16 A. Jacobs, *op. cit.*, p.228.

17 A. Jacobs, *op. cit.*, p.224.

18 A. Jacobs, *op. cit.*, pp. 225 and 228.

19 A. Jacobs, *op. cit.*, pp. 226-27.

20 W.B. Gould, *op. cit.*, chapters 3-5.

21 See S. Macintyre and R. Mitchell (eds.), *Foundations of Arbitration*, *op. cit.*, chapters 1, and 6-8.

22 Through the Mantignon Agreement of 1936; see A. Jacobs, *op. cit.*, p.227.

growing economy of the 1940's and 1950's.²³

The legal and institutional frameworks for collective bargaining were only one aspect of the recognition and incorporation of trade unions. The representation of the interests of labour through unions was also guaranteed and nurtured through tripartite arrangements arising from state intervention. A few examples will suffice. In Britain the tri-partite Industrial Council was established between 1911-1913 to support existing methods of co-operation. Trade union leaders were members of War Cabinets in the First World War, and the government sponsored Whitley Committees were formed in the post-war period with lasting structural impact upon collective bargaining.²⁴ Similar arrangements characterised relations between the labour movement, employers and the state elsewhere in Europe; labour councils in France, the Netherlands, Denmark and Italy; high level political office for union leaders in France and Germany.²⁵ Many of these arrangements were renewed and improved after the First World War.²⁶

In Australia and New Zealand the relations between the State and unions were forged principally through the arbitration machinery, and the close relationship between the unions and the Labor Party when that party held political office. At least in the case of Australia, however, there was far less "administrative" type incorporation of trade unions than characterised Western Europe, and it was not until the 1950's that such joint arrangements began to emerge.²⁷ In the U.S.A. the National War Labor Board in World War One and the National Labor Board of 1933 had served to encourage and facilitate collective bargaining principles in industry²⁸ prior to the introduction of the system formalised in the National Labor Relations Act of 1935.

The recognition of trade unions by state and by employers as the legitimate agents of the working class, and as partners in the economic and social process, is the principal constant factor in industrial relations systems in the free enterprise world at this historical juncture. In most other respects there was little uniformity - legal frameworks and legal methods for resolving disputes varied between systems. So too did the development and incidence of industrial relations practices. The level of unionisation of the workforce, for example, varied markedly between systems, with relatively high rates being experienced in Australasia and many European countries (e.g. Britain, Germany and Sweden) compared with relatively low rates in North America and Japan. There were also variations in the structure and coverage of bargaining. Countries with relatively de-centralised bargaining structures (U.S.A., Canada, Japan), for example, tended to have a lower proportion of the workforce covered by collective agreements than those countries (e.g. Australia, New Zealand,

23 See T.A. Kochan, H.C. Katz and R.B. McKersie, *op. cit.*, pp. 30-45.

24 T. Ramm, "Workers' Participation, the Representation of Labour and Special Labour Courts", in B. Hepple (ed.) *op. cit.*, pp. 262-263.

25 T. Ramm, *op. cit.*, pp. 261-262.

26 T. Ramm, *op. cit.*, p. 263.

27 See R.M. Martin, *Trade Union and State in Australia*, Unpublished Ph.D. Thesis, Australian National University, Canberra, 1958, chapters 4 and 10.

28 T.A. Kochan, H.C. Katz and R.B. McKersie, *op. cit.*, p. 24.

Belgium, Germany, Netherlands) where bargaining was relatively centralised.²⁹

Newly Industrialising Countries

There are two obvious and apparent major influences on the forms of labour law adopted by the industrialising countries of East and South-East Asia in the period from the late 1940's to the late 1960's.

The most important of these was the direct role of the British and American governments in the post-war period. Hong Kong, Singapore and Malaysia were British colonies, and influenced by British industrial relations concepts,³⁰ though in the case of Singapore and Malaysia, somewhat different labour law systems emerged following their attainment of independent status in the 1960's.³¹ The Philippines was a colony of the U.S.A. from 1898-1946, and has been under its major influence since. Japan and South Korea both were governed by occupying American military forces following the defeat of Japan in 1945.

A second influence which must be noted was the steady internationalisation of labour law standards under the influence of the International Labour Organisation which commenced operation as a body of the League of Nations in 1919.³² Through this organisation the Anglo-American model of industrial relations, based on the right to form trade unions and the right to bargain collectively, was dominant, particularly in the period of post-war reconstruction and development.³³

It is not surprising, then, that under these influences most of the leading Asian economies developed labour law frameworks which were consistent with the principles of free trade unionism and collective bargaining. There were, of course, numerous important differences between the systems of the several countries, just as there were between the systems of the countries in the older order. Hong Kong, for example, has remained, in essence, legally a version of the classical British "voluntarist" model, whereas Malaysia and Singapore, following their obtaining independent status, moved to more interventionist legal frameworks based, to differing degrees, on concepts drawn from Australian compulsory arbitration.³⁴ Of the countries under American influence, Japan and South Korea adopted very similar versions of the American model as it was embodied in the National Labor Relations Act of 1935.³⁵

In legislative terms, then, the industrial relations systems of the newly industrialising

29 See *Workplace Bargaining in the International Context*, *op. cit.*

30 See S. Deery and R. Mitchell "Introduction" in S. Deery and R. Mitchell (eds.), *Labour Law and Industrial Relations in Asia: Eight Country Studies*, Longman Cheshire, Melbourne, 1993, p. 1 at pp. 3-5.

31 *Ibid.*

32 See T. Ramm, "Epilogue: The New Ordering of Labour Law 1918-45", in B. Hepple, *op. cit.*, p. 277 at pp. 279-284.

33 See A. Sturmthal, "Industrial Relations Strategies" in A. Sturmthal and J.G. Scoville (eds.), *The International Labour Movement in Transition: Essays on Africa, Asia, Europe and South America*, University of Illinois Press, Chicago, 1973, pp. 5-9.

34 See S. Deery and R. Mitchell (eds.), *op. cit.*, pp. 3-5.

35 See S. Deery and R. Mitchell (eds.), *op. cit.*, pp. 6-7.

world was, and is, compatible with the established order. Trade unions are recognised, and bargaining is permitted between employers and unions. These similarities in legal systems, are, however, overwhelmed by differences in practice and, perhaps importantly, in culture. Leaving aside Hong Kong, which is an exceptional case,³⁶ and Japan, which arguably fits the Western experience, all other developing Asian countries, including South Korea, Malaysia, Singapore, Thailand, the Philippines, Taiwan, Indonesia and China, are characterised by the total or substantial repression of genuine "oppositional" unionism.³⁷

It is possible to draw a few generalised points of difference between the models of Asia, and those of the earlier industrialising group of countries. First, many Asian countries, including some of the most economically successful, have been characterised by an absence of democratic process, or the periodic suspension of constitutional rule (e.g. Taiwan, Thailand, South Korea, the Philippines). The role for trade unions in such environments is always precarious.

Second, even in normal circumstances, trade unions in the Asian models generally are much more legally controlled and regulated than their counterparts in the West. For example registration is, to all intents and purposes, compulsory in Hong Kong, Malaysia, Singapore, South Korea, the Philippines and Thailand.³⁸ In Taiwan, union membership in law is compulsory.³⁹ In all these countries, expressly or by implication, participation in the industrial relations system is dependent upon registration. Registration in most of these countries also provides a vehicle for governments to control union leadership, objectives and sometimes structure. In some instances, governments deal with trade unions only through one nominated union federation (e.g. Singapore, South Korea, Taiwan). Through these means unions are very closely tied to government policies and objectives.⁴⁰

Thirdly, powers of government intervention in disputes through compulsory arbitration are far more common in the Asian systems (e.g. Malaysia, Singapore, South Korea, the Philippines, Thailand, Taiwan).⁴¹ As a general rule, therefore, strikes which are inconvenient to the government or deemed contrary to the public interest may be prohibited, and, if they take place at all, are unlikely to extend in time.

Fourthly, there are exemptions which apply to the industrial relations process which effect the permissible scope of collective bargaining. These range from geographic exemptions (e.g. economic zones etc., Malaysia, Singapore, the Philippines, South

36 See D.A. Levin and Ng Sek Hong, "Hong Kong" in S. Deery and R. Mitchell (eds.), *op. cit.*, p. 20, particularly at pp. 41-43.

37 For general accounts of the legal framework and its impact on industrial relations in South Korea, Malaysia, Singapore, Taiwan, Thailand and the Philippines see S. Deery and R. Mitchell (eds.), *op. cit.*

38 See S. Deery and R. Mitchell (eds.), *op. cit.*, pp. 32-33 (Hong Kong); pp. 73-74 (Malaysia); p. 113 (Singapore); p. 149 (South Korea); pp. 217-218 (the Philippines); p. 254 (Thailand).

39 See Hwang Yueh-chin, "Taiwan (R.O.C.)", in S. Deery and R. Mitchell (eds.), *op. cit.*, p. 269 at p. 280.

40 See S. Deery and R. Mitchell (eds.), *op. cit.*, pp. 9-10.

41 E.g. see D. Ayadurai, "Malaysia"; C. Leggett "Singapore"; Park Young-ki "South Korea"; and S. Manusphaibool "Thailand" in S. Deery and R. Mitchell (eds.), *op. cit.*, at pp. 94; 111; 153-4 and 251-253 respectively.

Korea), to the proscription of certain subjects of bargaining (Malaysia and Singapore) and to the proscription of bargaining outcomes (e.g. Malaysia and Singapore place limits on the negotiations of improved terms and conditions in certain types of undertakings).⁴²

Finally, restrictions on strikes and other forms of industrial action are widespread in the Asian systems. The impression is that these tend to be far more extensive than those generally present in the earlier industrialised countries, though the volume of anti-strike provisions in Australia would undoubtedly exceed those of most Asian countries.



It is necessary to make three important observations based upon the foregoing information. The first thing to note is the sheer length of time that it took for a general commitment to a collective industrial relations system based upon trade union recognition to become established throughout the industrialised world. Even discounting the time it took for unions to be legalised, the evolution of the various systems spanned a period of fifty-years from about 1890 to about 1940.⁴³ Among the earliest countries to adopt national policies were Denmark, New Zealand and Australia. However, neither the American nor the French policies took shape until the mid-1930's, and Canada only adopted a "collectivist" legal structure through wartime regulation in 1944.⁴⁴ Prior to the Second World War, therefore, it is difficult to gauge how effectively "collective" some of these systems were. As late as 1933 only 7.5 per cent of French workers, for example, were covered by collective agreements, and it is difficult to imagine that the percentage of workers so covered in North America could have been much higher.

In Asia the position is complicated by the changes in status of some of the countries and by interruptions in several countries to the democratic process. If we confine our attention to the post-war period we find that the basic rights of collective bargaining, and the registration of unions, was in place in Hong Kong by 1948. The Japanese and South Korean models were in place by the late 1940's and the mid-1950's respectively. In the Philippines the centre-piece of its bargaining framework was enacted in 1953. Although trade unions and collective bargaining were recognised as legitimate in Malaysia and Singapore under British rule, their modern national policies only emerged with independence. Malaysia completed its legislative framework in 1967⁴⁵ and Singapore in 1968.⁴⁶ Thailand and Taiwan are more difficult to deal with. Legislation permitting collective bargaining as a national policy was first enacted in Thailand in 1956. However the status of that law and the legitimacy of trade unions have been placed in doubt by constant interruptions to the

42 See S. Deery and R. Mitchell (eds.), *op. cit.*, p. 10.

43 A. Jacobs, *op. cit.*, p. 196.

44 See H.W. Arthurs, D.D. Carter, J. Fudge and H.J. Glasbeek, *Labour Law and Industrial Relations in Canada*, 3rd ed., Kultarr, Deventer (the Netherlands), 1988, pp. 44-46.

45 See D. Ayadurai, "Malaysia" in S. Deery and R. Mitchell (eds.), *op. cit.*, p. 65.

46 See C. Leggett, "Singapore" in S. Deery and R. Mitchell (eds.), *op. cit.*, p. 98.

democratic process and constitutional government.⁴⁷ The position in Taiwan was for most of the post-war period complicated by its relationship with the Peoples Republic of China. Collective bargaining law is residual from pre-war legislation, but Taiwan is only now moving to modernise its system.⁴⁸

The second point to be noted is that for much of the 1920's and 1930's, unions were severely disadvantaged by poor economic conditions, high unemployment and, eventually, by the world-wide depression of the 1930's. These conditions characterised the inter-war years during which many of the collective industrial relations systems were finally shaped. According to Jacobs, the First World War marked the decisive turning point in Western Europe towards state recognition of trade unions.⁴⁹ However, the role of trade unions was circumscribed by the economic circumstances noted above, by the rise of fascism in Italy and Germany, and in Britain the unions were decisively beaten in the 1926 General strike. In short, there was no general opportunity throughout Europe or elsewhere to observe how these historic partnerships between governments, unions and employers would operate in buoyant economic times, and in periods of relatively low unemployment.

What this means, of course, is that the Second World War was a watershed period for industrial relations systems in the west.⁵⁰ The key to this is the post-war compromise between capital and labour in the industrialised world. Although the strategies adopted in the implementation of this compromise varied,⁵¹ it had certain common features for all. This included the use of Keynesian economic policies, the maintenance of full employment and an important role for labour and unions in a high wage/mass consumption economy.⁵² Under these sorts of policies unions grew in stature and in power, and came to exercise considerable control in the labour market. Union policies influenced the number of persons in work through the wage/unemployment trade off, the definition of the job (i.e. what was and what was not to be done) by classification, union rules and so on; the attribution of rewards to particular jobs in an essentially de-personalised and aggregated fashion; and even the access to jobs through union membership, trade eligibility and other requirements. For their part, employers, particularly in the industries of mass production, were offering contracts of indefinite duration and increasing real wages. Increasingly

47 See S. Manusphaibool, "Thailand" in S. Deery and R. Mitchell (eds.), *op. cit.*, pp. 242-243

48 See Hwang Yehu-chin, *op. cit.*, pp. 273-284.

49 A. Jacobs, *op. cit.*, p. 225.

50 It is only in the post-World War Two period for example, that the seminal academic studies on industrial relations systems appeared; see particularly J. Dunlop, *Industrial Relations Systems*, Henry Holt and Co., New York, 1958; A. Flanders and H. Clegg (eds.), *The System of Industrial Relations in Great Britain*, Basil Blackwell, Oxford, 1956. Labour Law (being the law of industrial relations) also only emerged as a separate subject in the legal curriculum after the war. Among Western European countries prior to the war, the concept of "labour law" as a separate discipline had currency only in Germany and Denmark, see B. Hepple, "Introduction", in B. Hepple (ed.), *op. cit.*, p. 6.

51 See D. Drache and H. Glasbeek, *The Changing Workplace: Reshaping Canada's Industrial Relations System*, James Lorimer and Company, Toronto, 1992, chapter 2.

52 See D. Drache and H. Glasbeek, *op. cit.*, pp. 11-16; T.A. Kochan, H.C. Katz and R.B. McKersie, *op. cit.*, p. 26; P. Brosnan and J. Burgess "Government Policy on Restructuring the Labour Market in Australia and New Zealand", in M. Bray and N. Haworth (eds.), *Economic Restructuring and Industrial Relations in Australia and New Zealand: A Comparative Analysis*, ACIRRT. Monograph No. 8, University of Sydney, 1993, p. 60 at p. 62.

governments and unions consolidated the concept (particularly in Western Europe and Australasia) of job-ownership or job-property, thereby reducing the capacity of employers to dismiss and discipline workers.⁵³

By the late 1960's and early 1970's it had become evident that trade unions operating in a period of full employment could cause inflation, or at least exacerbate inflation flowing from other economic pressures. Previously held beliefs about the incompatibility of high unemployment and inflation were dispelled. The degree of the problems, and the time of their emergence varied between nations, but led to a questioning in some countries of the tripartism which had characterised the post-war compact.

Drache and Glasbeek identify the beginnings of the breakdown of the compromise in Western Europe as occurring in the late 1960's.⁵⁴ Kochan, Katz and McKersie's research identifies the American employers' commitment (which was always far more fragile) also as being withdrawn from the 1960's onwards.⁵⁵ Prices and income agreements, social contracts, accords and so on all represented the means whereby the partnership with unions could be varied in order to accommodate these pressures. In Britain and Australia a further layer of business/union integration, in the form of institutionalised industrial democracy based on concepts developed in some European countries, was flirted with but abandoned in the 1970's.

In the 1980's, the increasing internationalisation of economic markets, accompanied by serious recession in most of the major domestic economies brought a further set of problems associated with labour costs, and the flexible adjustment of domestic enterprises to deal with international competition. The type of flexibilities sought to be acquired for enterprises include functional flexibility in the use of labour; numerical flexibility allowing for quick variations in the numbers employed, and financial flexibility allowing for greater variation in wage and other incentives.⁵⁶ At the macro-level the need for greater flexibility was concerned with the provision of a downward movement in wages generally, in order to reduce high unemployment and to permit greater variation between sectors thus encouraging the relocation of the workforce into expanding sectors.⁵⁷ The legal and institutional arrangements which sustained the collective industrial relations systems were identified as the primary barrier to these flexibilities, locking employers into long-term commitments to labour, restrictions on the use of casuals and part-time workers, and fixed costs across industries.

The third point to be made is this. Though similar laws and institutions encapsulating industrial relations systems were introduced in the newly

53 D. Drache and H. Glasbeek, *op. cit.*, pp. 12-13.

54 D. Drache and H. Glasbeek, *op. cit.*, pp. 12-13. The authors acknowledge, however, that the role of labour as legitimate partners in economic decision making is still basically observed, at least rhetorically, in Western Europe, *op. cit.*, at p. 15.

55 *Op. cit.*, pp. 45-6.

56 S. Deakin, "Legal Change and Labour Market Restructuring in Western Europe and the U.S.", (1991) 16 *New Zealand Journal of Industrial Relations* 109, at p. 110.

57 *Ibid.*

industrialising countries of Asia, on the whole many of the problems associated with industrial relations in the west were not experienced in these countries.

The principal reason for this is both obvious and straightforward. The industrial relations systems in developing Asian economies have not operated so as to allow unions to function as fully-fledged independent parties to the economic and political processes in the region.⁵⁸ There are various reasons advanced to explain why this is so, some of which were touched on earlier. It has been argued that the legal provisions of the various systems have been adapted to limit the power and role of trade unions.⁵⁹ The close relationship between the union movement and the state in some Asian countries has also been used to explain the limited role of unions.⁶⁰ Generally speaking the role of the labour movement in Asia has been confined to activities which are compatible with the political and economic development of each nation - though in recent years there are signs that a genuine oppositional unionism is on the rise in both South Korea and Taiwan and even in the Peoples Republic of China.⁶¹ It remains the case, however, that in most Asian countries,⁶² the adoption of a legal framework closely based on western concepts has presented no impediment to capital in terms of labour costs or flexibility.

THE PROCESS OF DEREGULATION

This paper has traced the development of industrial relations systems based on legal and institutional frameworks for the recognition of trade unions and the facilitation of collective bargaining. For various reasons, the operation of these systems by the 1980's were seen to be causing undesirable economic problems, and restrictions on the use of productive assets, and, as a result, governments everywhere among the Western industrialised countries came under increasing pressure to undertake a

58 E.g. on South Korea see W. Bello and S. Rosenfeld, *Dragons in Distress: Asia's Miracle Economies in Crisis*, Penguin, London, 1990, pp. 29-34; on Taiwan, the same work, pp. 220-223; on Singapore, the same work, pp. 303-306.

59 See S. Deery and R. Mitchell (eds.), *op. cit.*, pp. 10-12.

60 See, for example, F.C. Deyo, *Dependent Development and Industrial Order*, Praeger, New York, 1981, and the same author *Beneath the Miracle: Labor Subordination in the New Asian Industrialism*, University of California Press, Los Angeles, 1989.

61 See Ho Shuet Ying, *Taiwan - After A Long Silence: The Emerging New Unions of Taiwan*, Asia Monitor Research Centre, Hong Kong, 1990; *Min-Ju No-Jo: South Korea's New Trade Unions*, Asia Monitor Resource Centre, Hong Kong, 1988; *A Moment of Truth: Worker's Participation in China's 1989 Democracy Movement and the Emergence of Independent Unions*, Asia Monitor Resource Centre, Hong Kong, 1990.

62 Hong Kong and Japan remain the exceptions. Collective bargaining through trade unions is a feature of industrial relations in Japan, though it is the case that the radical unions were eliminated after the war and trade unions are reduced in their influence through the highly de-centralised structure of unionism and industrial relations, see Yasuhiko Matsuda, "Japan" in S. Deery and R. Mitchell (eds.), *op. cit.*, p. 171 at pp. 172-174 and p. 195. Nevertheless, collective agreements cover about 25 per cent of the Japanese workforce, which is very high by general Asian standards. Hong Kong is exceptional because its legal framework is not particularly oppressive of trade unions, nor is there apparent institutional or governmental pressure against trade unions or collective bargaining. Notwithstanding this relatively benign environment, collective bargaining in Hong Kong is estimated to cover only about 4 per cent of the workforce; see D. A. Levin and Ng Sek Hong, *op. cit.*, p. 41.

deregulation of their labour market structures and processes.

The process of deregulation has taken a number of forms - but it has two particular manifestations among the English-speaking countries of North America, Western Europe and Australasia.

First, there has been an increasing tendency to bring about a decentralisation of collective bargaining by changing the focus and the location of bargaining to the enterprise level. This has happened, or is in the process of occurring, to a marked degree in countries such as Australia and New Zealand where unions historically were favoured by a highly centralised process through which tens of thousands of employers and employees could be given blanket coverage by awards.⁶³ It has also occurred in collective bargaining countries which were far less centralised in industrial relations process to begin with. In the U.S.A., for example, intra-industry "pattern bargaining" introduced a level of centralisation and industry-wide standards. Since the 1970's this type of bargaining has declined markedly, and a general decentralising thrust has occurred throughout many American industries.⁶⁴ In the U.K., too, there has been a steady increase in the level of plant and company bargaining since the 1970's.⁶⁵

Secondly, governments and employers in some countries have gone further and made a withdrawal from the fundamental tenets of tripartism, basically by stepping away from the principle of trade union recognition. The intention in these systems is to produce flexibility not through direct legislation, but by allowing employers to evade unions entirely, thereby creating the conditions in which flexibilities in costs and practices can occur through unilateral managerialism.⁶⁶

This development, curiously, has been confined largely to Britain, North America and to parts of Australasia. As numerous commentators have pointed out, the countries of Northern and Continental Europe have not made trade unions the special focus of the deregulatory process. Wedderburn, for example, dealing with the British approach, notes the legislated and protected character of deregulation in Italy and Germany by contrast.⁶⁷ Deakin, too, points to the negotiated and collective nature of the deregulation process in Europe generally.⁶⁸ In countries such as Sweden and Germany, according to Dore, "The no-union option is neither sought nor seen as feasible".⁶⁹

63 See, on New Zealand, P. Walsh, "Bargaining Options Under the Employment Contracts Act", (1991) 16 *New Zealand Journal of Industrial Relations* 167 at p. 171. The process is underway in Australia, but much more slowly, see R. Macklin, M. Goodwin and J. Docherty, "Workplace Bargaining Structures and Processes in Australia", in *Workplace Bargaining in the International Context*, *op. cit.*, p. 12.

64 See, e.g. M. Bray, "Decentralised Bargaining in North America and Japan", in *Workplace Bargaining in the International Context*, *op. cit.*, pp. 80,97. See also, D. Drache and H. Glasbeek, *op. cit.*, p. 16.

65 S. Deakin, ., p. 113.

66 See M. Bray, ., p. 117.

67 Professor Lord Wedderburn, "Deregulation and Labour Law in Britain and Western Europe", (1988/9) 4 *International Journal of Comparative Labour Law and Industrial Relations* 191.

68 See S. Deakin, *op. cit.*

69 R. Dore, "Where Are We Now: Musings of An Evolutionist" (1989) 3 *Work, Employment and Society* 425 at p. 437.

Where we observe the rise of the non-union option, then, is principally, though not uniformly, among the English-speaking industrialised nations of the West. We can begin by looking at the U.S.A. The U.S.A., along with Canada, was one of the last of the Western industrialised countries to adopt a legal framework institutionalising trade unions as legitimate parties to the industrial relations process. This acceptance of trade union legitimacy was always more tenuous than in Western Europe and Australasia. Resistance to the new order continued in the U.S.A. throughout the decade following the enactment of the National Labor Relations Act in 1935, and culminated in the Taft-Hartley amendments to the system in 1947. These changes facilitated a shift in bargaining power from union to management, but overall did not obstruct the essential principles of the system.⁷⁰

Collective bargaining developed and stabilised during the 1940's with the National Labor Relations Board and the War Labor Board assisting in this development. According to Kochan, Katz and McKersie, the collective bargaining paradigm still set the context for human resource management in the U.S.A. until the 1970's. Below the surface, however, a different pattern was emerging in U.S.A. industrial relations. Throughout the 1960's and beyond, trade union membership was in serious decline. It had peaked at around 35 per cent in the mid-1950's. By 1984 it was estimated to be around 19 per cent of the workforce. It is now considerably less than that. Much of this decline was due to structural factors - including labour market changes. In addition to this structural decline, however, the old order of managerial hostility towards unions began to re-assert itself with companies finding increased incentives and opportunities to avoid unions. Business increasingly availed itself of the freedom to establish non-union workplaces by shifting operation to protected areas. Illegal activity in the form of bargaining evasion, and legal obstruction and frustration of the National Labor Relations Act's objectives were also part of the pattern. In effect, human resource management based on individualised contracts had gained the ascendancy as a means of regulating the labour market, accompanied by systems based on low wages and the force of managerial authority.⁷¹ This de-unionisation and de-collectivisation had taken place without the need for change to the legal framework of U.S.A. industrial relations.

The position in Canada seems far less severe than in the U.S.A. Collective bargaining, in keeping with trends elsewhere, became increasingly decentralised during the 1980's and 1990's.⁷² On the other hand according to Bray, though some Canadian employers attempted to drive out unions, most pursued workplace change by working within the collective framework.⁷³ Nevertheless, Drache and Glasbeek characterise the Canadian industrial relations system as an "opt-in system of union representation",⁷⁴ and essentially one in which union strategies are fragmented, and unions relatively powerless.⁷⁵

70 T.A. Kochan, H.C. Katz and R.B. McKersie, *op. cit.*, pp. 24-34.

71 T.A. Kochan, H.C. Katz and R.B. McKersie, *op. cit.*, chapter 3.

72 See M. Bray, *op. cit.*, pp. 86-88.

73 M. Bray, *op. cit.*, pp. 101-102.

74 D. Drache and H. Glasbeek, *op. cit.*, p. 227.

75 D. Drache and H. Glasbeek, *op. cit.*, p. 244.

In Britain the deregulating process has focussed principally upon the de-collectivisation of industrial relations. However the British process has differed from the American in that it has relied on formal legal change. Wedderburn has analysed the pattern of labour law in the major statutes of the Thatcher Conservative government from 1980 to 1988 in the following terms.⁷⁶ First, the government attacked many of the legal supports to the collective industrial relations system, including the removal of the Fair Wages Resolution, the weakening of the powers of Wages Councils to declare wages for the low paid, and the repeal of arbitration of minimum conditions for the extension of collective bargaining. Second, employment law was deregulated with gradual diminution of the employment floor of rights concerning maternity, unfair dismissal and so on. Third, the Conservative legislation effected greater regulation over the internal affairs of trade unions, particularly with the introduction of ballots for the continuation of closed shop practices (now abolished outright), ballots for the legitimisation of industrial action, and controls over the conduct of elections for union office. Fourth, legislation brought about the restriction of trade union activities to particular workplaces (e.g. through the ban on secondary industrial action and picketing and the redefinition of industrial dispute). And finally, the government increased the liability of trade unions for their tortious or other activities in the course of industrial action.

The effect of these changes in Britain has seen a greater tendency to the decentralisation of bargaining, and a considerably weakened union movement. Although the level of union membership is still respectable (41 per cent of the workforce), British employers are increasingly able to withdraw from, or refuse, recognition, especially at greenfield sites, and to introduce change without the need for negotiation.⁷⁷ The making of *individually* bargained agreements also appears to be central to present government policy.⁷⁸

Developments in New Zealand and some parts of Australia confirm this de-unionisation, de-collectivisation strategy. It was noted earlier in this paper that unions were closely integrated into the industrial relations system in the compulsory arbitration systems. Registration of unions within compulsory arbitration frameworks usually has extended automatic recognition to trade unions, and a monopoly of organising rights over a sector of the workforce. Like the systems of continental Europe, an extensive floor of minimum rights was characteristic of the Australian and New Zealand systems. Unlike those systems, however, the legal rights of Australasian workers have not been extended by direct legislation but through awards, to which unions are party, and which uniformly cover the workforce, union member and non-member alike. Deregulation of this structure, therefore, depending upon its intensity, could conceivably dismantle both the bargaining and protective aspects of the industrial relations system.

76 Lord Wedderburn, "Freedom of Association and Philosophies of Labour Law", (1989) 18 *Industrial Law Journal* 1, at pp. 17-32.

77 R. Archer, "Lessons from Northern Europe: Collective Bargaining and Economic Performance in Britain, Germany and Sweden", in *Workplace Bargaining in the International Context*, *op. cit.*, pp. 141-142.

78 See M.R. Freedland, "Individual Contracts of Employment and the Common Law Courts", (1992) 21 *Industrial Law Journal* 135.

The two notable examples of extensive deregulation are found in New Zealand and the Australian State of Victoria, though there are aspects of deregulation apparent and underway in other Australian jurisdictions.

In New Zealand the *Employment Contracts Act* of 1991 abolished the system of awards which provided a floor or rights for most workers. There is now a set of legislative minimum terms supporting workers, but these are neither extensive in range, nor generous in content.⁷⁹ It might be said that this is little more than the position which pertains in the U.S.A. or even Britain, but like there, also, the collective industrial relations system which was able to offer workers the protective device of bargained uniform agreements has been largely dismantled. Trade unions in New Zealand no longer have automatic bargaining or representation rights. Employees may choose to be represented by unions, but equally may choose not to. The *Employment Contracts Act* specifically fosters individual rather than collective bargaining, and provides no real assistance to unions seeking a bargaining function. Unions may only have right of access to their members on site once they have been authorised to act as a negotiating agent, and such access is limited to matters concerning that negotiation alone. Union preference, or closed shop arrangements, even by agreement, are prohibited. In the absence now of any union registration or incorporation within the legal structure (there is no reference to "trade unions" in the Act), there is no replacement procedure whereby a union can seek recognition by an employer, and no right to insist that an employer must agree to bargain in good faith over particular matters. The New Zealand approach is without doubt, a comprehensive withdrawal from the collective system of industrial relations, in favour of choices made by individual workers.⁸⁰

This approach to industrial relations was virtually mirrored in the Victorian Government's *Employee Relations Act* of 1992. Although varying in detail from the New Zealand legislation, the Victorian Act also represents a negation of the principles of collective industrial relations, and in terms which in some respects are even harsher against employees. Again simplifying, the award system has been withdrawn, thereby leaving workers with little protective coverage. Though employees may negotiate individual or collective agreements, individual agreements are favoured over collective arrangements. The Act gives very little support to the organisational structure of trade unions. There is no system of registration or other express incorporation of unions within the framework. It is illegal for industrial relations arrangements to extend preference for union members or to permit other forms of union security such as the closed shop. Furthermore, there is an absence of bargaining rights for unions *and* individuals under the Act - the employer is not obliged to recognise a bargaining agent of the employee, nor to bargain in good faith. Finally, the *Employee Relations Act* virtually makes the taking of industrial action unlawful in most instances which are likely to arise. Like the New Zealand system, this Victorian legislation de-collectivises industrial relations - individual

79 See P. Brosnan and D. Rea, "An Adequate Minimum Code: A Basis for Freedom, Justice and Efficiency in the Labour Market", (1991) 16 *New Zealand Journal of Industrial Relations*, 143.

80 G. Anderson, "The Employment Contracts Act 1991: An Employers' Charter?", (1991) 16 *New Zealand Journal of Industrial Relations* 127.

employment contracts are, in the end, the desired outcome of the process, and the law is structured so as to make this a feasible strategy for employers.⁸¹

For reasons which were outlined earlier in this paper a number of countries are undertaking serious systemic reform in their industrial relations structures and processes. The trend everywhere is away from a national or industry-wide bargaining model towards systems which are more closely based on individual business organisations.⁸² In a select group of countries, those of the English-speaking older industrialised nations, the process is more extreme. In these countries the withdrawal of governments and employers from the customary collective and tri-partite arrangements of the past are more pronounced. Though trade unions are not made illegal in this process, or entirely excluded from the labour market, the pattern of regulation set by new legal provisions, and by the decline of trade unions and collective bargaining in North America, is such that trade union representation of the workforce is an option which employers, legally and tactically, can avoid. Government of industrial relations through individual contracts of employment is now clearly the norm in the U.S.A., and a growing practice in Britain, Canada and New Zealand.⁸³

One obvious exception in this emerging cross-national scenario is the Commonwealth of Australia. During the 1980's the Australian federal government has steered a course, in co-operation with the union movement, for the bargained de-centralisation of industrial relations in the Australian federal system.⁸⁴ That approach seems to be similar to that of the governments of continental Europe. Flexibilities are being brought about not through de-unionisation or de-collectivisation of the labour market, but through bargained outcomes at national and enterprise levels involving trade unions. And, statutory limits are still in place controlling the extent of the de-regulatory process. Recent announcements by the federal government indicate, however, that a number of measures designed to increase the de-centralisation of Australian industrial relations, and to decrease the reliance of unions upon compulsory arbitration, are under consideration.⁸⁵ It cannot be taken for granted that these changes will not have long-term deleterious effects for the Australian trade union movement.⁸⁶

81 See generally R. Mitchell, "Notes on the Employee Relations Act 1992 (Vic.)", Department of Management and Industrial Relations, University of Melbourne, Working Paper No. 70, 1993.

82 See R. Dore, *op. cit.*

83 On New Zealand in particular see D. Peetz, D. Quinn, L. Edwards and P. Riedel, "Workplace Bargaining in New Zealand: Radical Change at Work", in *Workplace Bargaining in the International Context*, *op. cit.*, at pp. 235-236.

84 See R. Mitchell and M. Rimmer, "Labour Law, Deregulation and Flexibility in Australian Industrial Relations", (1990) 12 *Comparative Labor Law Journal* 1.

85 See Speech by the Prime Minister to the Institute of Directors, Melbourne, 21 April 1993; and "Bureaucrats back Brereton deal over sanctions", *The Australian*, May 27 1993, p. 2.

86 The evidence from international surveys seems to suggest that there is a positive correlation between decentralised industrial relations systems and weak and fragmented trade union movements, see *Workplace Bargaining in the International Context*, *op. cit.*

DEREGULATION, LEGALISM AND THE FUTURE OF LABOUR LAW

What are the implications of these developments for Australian labour law? Obviously the most important implications concern the course which will be taken in labour law policy in the process of deregulation. Appropriate questions for future consideration would include whether the Australian compulsory arbitration framework is capable of being adequately adapted to an enterprise bargaining system; whether we should establish a new legal framework for collective bargaining; how should the role of trade unions be assured in a decentralised system and so on. This conference, however, has focussed on somewhat different legal issues from these. Its title seems to invite some comments on the issue of "legalism" in industrial relations. I propose also to venture some remarks on the impact I perceive deregulation as having upon the future of Australian labour law as an area of study.

Legalism

For reasons stated earlier, "deregulation" is a misnomer when it is applied to the structures and processes of industrial relations. Even those supporting a purely market-based approach to workplace regulation recognise the need for some form of legal rights and obligations. There are, moreover, reasons to suppose that "deregulation" will bring with it various manifestations of legalism arising from a partial or even total re-regulation.

First, we must remember that even if we are moving back to an individual contract model, based upon the law of property and contract, there is no reason to believe that the common law principles themselves will not be developed in order to accommodate for the lack of systemic protection. Among those who favour a market-based individual contracts system, there is a tendency to eulogise the common law in its nineteenth-century form, and to disapprove of the development of common law doctrine which would seek to protect the weak from unfair contracts.⁸⁷ Such judicial involvement is regarded as undermining the purity of traditional common law principles.⁸⁸ Be that as it may, the common law does respond to emerging social problems, and we might anticipate, therefore, that in the absence of trade union representation, or statutory protection, there will be new rules of fairness, duress, and perhaps notions of a non-contractual status built into the legal relationship between employer and employee.⁸⁹

A second point is that part of the deregulatory process might lead to increased legal controls of a specific kind. An example of this occurred when in the 1980s the Thatcher government legislated for controls over trade union internal affairs which characterise the models of other countries (e.g. U.S.A., Australia) but had hitherto

87 See, for example, P. Brook, *Freedom at Work: The Case for Reforming Labour in New Zealand*, Oxford University Press, Auckland, 1990, at pp. 94-98.

88 P. Brook, *op. cit.*, p. 100.

89 See A. Brooks, "The Contract of Employment and Workplace Agreements", *infra*, ch. 2.

been absent in Britain.⁹⁰ It is possible that we will see, particularly in countries where restriction upon industrial action and rights of representation are politically difficult, a greater emphasis upon regulating the internal decision making processes of unions to achieve restrictive ends.

Thirdly, and most importantly, there will be instances in which deregulation is sought to be achieved through the introduction of a new set of labour laws based upon de-collectivist principles. This has occurred in New Zealand and Victoria - and perhaps it is the more likely response in countries where the culture and the legal system are particularly pro-collectivist and supportive of trade unions.

It seems likely that new legalisms will arise under these new labour law frameworks. It is not difficult to think of examples. Much comment has already been passed on the legal problems inherent in the Victorian *Employee Relations Act*, 1992.⁹¹ We may expect a body of law to develop on what is, and what is not, an employment agreement under the Act. There will be disputes over the relationship between collective and individual agreements, and opting-out of collective agreements in favour of individual arrangements. We can anticipate the development of principles on the determination of damages, or granting of other relief for breaches of agreements. Numerous other examples arise in areas other than agreements; for example the issue of unfair dismissals, and what constitutes a *prima facie* case; the extent of the powers of the Chief Commission Administration Officer to investigate the affairs of unions, and so on.

There are similar implications flowing from the New Zealand *Employment Contracts Act*, 1991. There is no need to detail them here. However, one very good example is found in the provisions of the Act which provide workers with the right to complain of unfair treatment in the course of employment through the personal grievance procedures, and the right to complain that a contract was entered into in harsh or oppressive conditions, or on terms which were harsh or oppressive at the time of making the contract. No doubt a body of legal principles will develop covering these *individual* rights, in place of many of the issues which typically arise in collective regimes.

The Future of Labour Law as an Area of Study.

As our societies have developed collective systems for the regulation of their industrial relations, labour law has developed as a discrete area of study which focuses principally upon the law of those systems - i.e., the law pertaining to collective bargaining, conciliation and arbitration, trade union regulation and industrial action. We have also underpinned our understanding of that collective system upon the contract of employment, because it is that individual relation which gives rise to the collective system. Thus, to a substantial degree, the subject of labour law has an objective - it studies the ways in which the law supposedly

90 See, P. Fosh, H. Morris, R. Martin, P. Smith and R. Undy, "Politics, Pragmatism and Ideology: The 'Wellspring' of Conservative Union Legislation (1979-1992)", (1993) 22 *Industrial Law Journal* 14, at pp. 27-28.

91 See, R. Mitchell, *op. cit.*, and the Special Issue of the *AJLL*, on the Victorian industrial relations system, (1993) 6 *AJLL*, pp. 00-00.

ameliorates the effects of the imbalance of power inherent in the individual contract relation. We also see this amelioration as being the principal objective of governments in pursuing a collective policy. The main focus of labour law, both in terms of policy and from an academic standpoint is, therefore, collective. This does not mean that without a collective framework there would be no "labour" law as a subject in its own right. It would mean, however, that it would be necessary to reconsider the origins and base of the subject.

I suspect that such a reconsideration is already underway - as the recent work of some British labour lawyers indicates.⁹² Certainly the recent emphasis on deregulation of labour markets has demonstrated to labour lawyers how partial our view of the labour market and the province of labour law has been. Our attention is also being increasingly drawn to the way in which labour law as a subject has marginalised the position of certain groups of participants in the labour market.⁹³ Once industrial relations law is stripped away we find hitherto scarcely acknowledged areas of law which are the source of labour market regulation - law which influences the size and quality of the labour force, law which impacts upon the distribution of the labour supply and so on. These issues embrace points of taxation law, immigration law, social security law, as well as direct government involvement in investment and training schemes, employment subsidies and so on.⁹⁴

There are, it is true, many difficulties associated with opening up the study of labour law in this way - chief among them being where to draw the line in one's analysis. This difficulty, however, should not blind us to the importance of locating labour law, and its prescriptions, within a more rounded labour market perspective.

Secondly, it seems obvious that international comparisons of economic, social, legal and political systems will become more frequent and more important in the development of national policies. Australia might not wish to, or be able to, emulate the systems of those with whom we are closely involved in trade and commerce, and regional political matters, but we do need to understand how these systems differ from ours, and in what respects their laws and institutions provide them with advantages or disadvantages over our own. Comparative labour law, particularly with a focus upon the Asia-Pacific region, and an understanding of the internationalisation of labour law standards,⁹⁵ thus becomes, in my view, an increasingly pressing obligation rather than a mere part-time academic specialisation.

Finally, the decline of the collective systems model must surely throw up another challenge to industrial relations and labour law scholars alike. For the time being the argument over the desirability of a deregulated (i.e de-collectivised and de-unionised) industrial relations system appears to have been won by those in favour of deregulation. Among the English-speaking countries only in Australia has the

92 E.g. see H. Collins, "Labour Law as a Vocation" (1989) 105 *Law Quarterly Review* 468.

93 See, R. Hunter, "The Representation of Gender in Legal Analysis: A Case/book Study of Labour Law", (1991) 18 *Melbourne University Law Review*, 305.

94 Some of these issues are introduced in P. Davies and M. Freedland, *Labour Law: Text and Materials* 2nd. ed., Weidenfeld and Nicolson, London, 1984. For a critique see H. Collins, *op. cit.*

95 See, for example, B. Creighton, "Industrial Regulation and Australia's International Obligations", *infra* Ch 9.

radical approach to deregulation been interrupted, and developments underway in the Federal sphere seem to suggest that we are nevertheless moving towards an enterprise-based bargaining system, and the open acceptance of a substantial non-union regulated section in the private sector, particularly in small-business.

However, the debate was lost more by default than on merit. There is a case to be made out - on grounds of economic efficiency and social desirability - of collective regulation of industrial relations. This needs to be rediscovered and explored. It is perhaps ironic that in the U.S.A., a country which embraced collectivity less enthusiastically and abandoned it more speedily than most, there is increasing interest in the role that trade unions can play in workplace reform.⁹⁶ Labour lawyers must begin to expand their horizons by entering into these areas of debate hitherto dominated by economists and social theorists.

96 See, for example, T.A. Kochan and L. Dyer, "Managing Transformational Change: The Role of Human Resource Professionals" in *Human Resource Management - Implications for Teaching, Theory, Research and Practice in Industrial Relations*, Proceedings of the 9th. World Congress of the International Industrial Relations Association, Sydney, 1992, Vol. 3, p. 71 at p. 81; and P.C. Wailer 13, *Governing the Workplace: The Future of Labour and Employment Law*, Harvard University Press, Cambridge (Masschsts.) 1990.

ACIRRT

The Australian Centre for Industrial Relations Research and Teaching (ACIRRT) at the University of Sydney was established as a Key Centre of Teaching and Research in 1989 through a grant from the Commonwealth Department of Employment, Education and Training. The Centre is closely linked with the University's Department of Industrial Relations, which has a long and distinguished history of teaching and research in this area.

ACIRRT's main brief is to improve the quality of industrial relations teaching and research in Australia. This goal is being pursued through a range of activities including seminars, conferences and research projects conducted by members of ACIRRT and researchers from other institutions.