

Glass Houses and Rock Solid Guarantees:

A Legal Analysis of the Commonwealth
No Disadvantage Test

LOUISE WILLANS FLOYD

RARE BOOKS LIB.

The University of Sydney

Copyright in relation to this thesis*

Under the Copyright Act 1968 (several provision of which are referred to below), this thesis must be used only under the normal conditions of scholarly fair dealing for the purposes of research, criticism or review. In particular no results or conclusions should be extracted from it, nor should it be copied or closely paraphrased in whole or in part without the written consent of the author. Proper written acknowledgement should be made for any assistance obtained from this thesis.

Under Section 35(2) of the Copyright Act 1968 'the author of a literary, dramatic, musical or artistic work is the owner of any copyright subsisting in the work'. By virtue of Section 32(1) copyright 'subsists in an original literary, dramatic, musical or artistic work that is unpublished' and of which the author was an Australian citizen, an Australian protected person or a person resident in Australia.

The Act, by Section 36(1) provides: 'Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright and without the licence of the owner of the copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright'.

Section 31(1)(a)(i) provides that copyright includes the exclusive right to 'reproduce the work in a material form'. Thus, copyright is infringed by a person who, not being the owner of the copyright, reproduces or authorises the reproduction of a work, or of more than a reasonable part of the work, in a material form, unless the reproduction is a 'fair dealing' with the work 'for the purpose of research or study' as further defined in Sections 40 and 41 of the Act.

Section 51(2) provides that "Where a manuscript, or a copy, of a thesis or other similar literary work that has not been published is kept in a library of a university or other similar institution or in an archives, the copyright in the thesis or other work is not infringed by the making of a copy of the thesis or other work by or on behalf of the officer in charge of the library or archives if the copy is supplied to a person who satisfies an authorized officer of the library or archives that he requires the copy for the purpose of research or study'.

*'Thesis' includes 'treatise', dissertation' and other similar productions.

Glass Houses & Rock Solid Guarantees:

***A Legal Analysis of the Commonwealth No Disadvantage
Test***

By

Louise Willans Floyd

ABSTRACT:

This thesis argues in favour of the present 'hybrid' Australian system of industrial relations, in which an individualistic enterprise bargaining regime is underpinned by centralised, collective protections in the form of the no disadvantage test, administered by the Australian Industrial Relations Commission, and with the possibility of trade union representation. Such hybrid is adjudged to be the best means of gaining a flexible labour system, which also effectively protects workers. That system is preferred to the alternatives, such as individual contracts, underpinned by statutory minimum conditions.

Whilst the thesis argues in favour of the present system, it further advocates that the employee safeguards must be fortified. In this regard, the weakness of the no disadvantage test is not seen as its inherently discretionary nature, but rather the fact that it requires the Commission to compare the proposed agreement to an award, which may be obsolete at the time of making that assessment. It is submitted the benchmark should be updated, for example, to reflect more recent agreements.

*It was mentioned that the no disadvantage test is a broad discretion administered by the Australian Industrial Relations Commission. As such, the test is codependent on the strength of that institution. **It is argued that the role of the Commission in Australia's labour system should remain central.** Further, analysis of the Commission's application of the no disadvantage test is undertaken to demonstrate that the Commission applies the test so as to ensure it is a **substantive** protection for workers, whilst also allowing for **innovative** agreement making.*

As the no disadvantage test applies to both union and non-union collective agreements as well as individual Australian Workplace Agreements (AWAs), the thesis examines the position of trade unions under the Workplace Relations Act 1996 (so far as that relates to bargaining) and also the role of the Office of Employment Advocate (OEA) in applying the no disadvantage test. Yet again, the view is taken that the efficacy of the test is dependant on the supporting structures. While support is given for the retention of a non-union bargaining stream, the thesis argues in favour of the fortification of the position of responsible unions when attempting to negotiate union agreements. To that end, the thesis supports the interpretation of the freedom of association provisions of the Workplace Relations Act 1996 given by Justice North in Belandra over that of Justice Kenny in the BHP litigation. Further, it is argued that a good faith bargaining jurisdiction should be reintroduced for the Commission. As to the use of AWAs (especially for people in blue collar positions), it is argued that the secrecy of the OEA makes the operation of the no disadvantage test hard to gauge, such that the OEA's jurisdiction should be handed to the Industrial Commission and the option of AWAs limited to only highly specialised employees. It is further submitted that the definition of 'duress' should be amended to prohibit the use of 'take it or leave it' AWAs. By so doing, employers AND employees will make the choice as to the appropriate vehicle to govern their relationship and the no disadvantage test would have more strength. Such an approach would also be more in keeping with the principal objects of the Workplace Relations Act 1996.

It is significant to note that this thesis is grounded on two basic propositions. The first is that there is a power imbalance between worker and employer. The second is that such imbalance justifies intervention in the contract of employment, such as the role provided for the Industrial Commission by the no disadvantage test and scope for involvement of responsible unions. Such arguments are supported by over one hundred years of scholarly writing.

In closing, it is important to note that this thesis deals with collective worker protections and not safeguards, like unfair dismissal laws. That is because the collective, systemic measures have the greatest influence over the day-to-day lives of employees and determine the 'say' they have in actually setting their standards of work. The thesis is also a legal, not socio-legal study. It is of enormous importance to note the legal strength of the systemic protections – it is from those systemic measures that all socio-legal results flow. Likewise, such legal analysis is the starting point for law reform.

DECLARATION:

The work contained in this thesis has not been previously submitted for a degree or diploma at the University of Sydney or any other higher education institution.

To the best of my knowledge and belief, the thesis contains no material written by another person except where due reference has been made.

I also certify that to the best of my knowledge and belief any help received in preparing this thesis and all sources used have been acknowledged in this thesis.

Any portions of this work that have been derived from work previously published by the candidate are noted in the 'Acknowledgments' section (overleaf).

Louise Willans Floyd

8 December 2004.

ACKNOWLEDGMENTS:

I can only start this doctorate one way – by thanking Professor Ron McCallum – my treasure of a supervisor from the University of Sydney Law School. Without him, I would be nothing. He is inspiring, personally and professionally, and his criticisms and insights have made me a better lawyer and person than I ever was before. There are many other people at Sydney Law School I have been blessed to have known. Professor Terry Carney ran wonderful legal research classes that enlightened me to so many different techniques of researching and expressing myself – and he always challenged me to argue the points I hold dear. My thanks also go to my PhD buddy, Professor Jim Jackson, who was such a great and fun friend and fellow PhD student while I was in Sydney. Although it was on an unrelated topic, Jim gave me a copy of his PhD upon submitting it to Sydney University so I could see what a finished doctorate actually looks like. Finally in a Sydney context, I thank Professor Hilary Astor and all my fellow PhD students for their friendship and encouragement.

Outside of Sydney, I thank my friend and mentor, Hon. David Hall, President, Industrial Court of Queensland, for reading the second draft of this thesis and offering constructive criticism. More generally, I note his ongoing contribution to my working life. He has always had a cheerful, down-to-earth disposition. And he has never shied away from giving me honest criticism to my face about my work and fostering my development as a lawyer.

In October 2002, I was blessed to spend a short time as a Visiting Fellow at Cornell University's Centre for Industrial and Labor Relations (ILR) in the United States. I gave an oral presentation of a small aspect of my doctorate to members of the ILR Faculty and student body. I am grateful for the constructive comments provided to me by those who attended. I am also grateful to my sponsor, Associate Professor Michael Gold, for taking the time to welcome me to his place of learning and attend his lectures.

My thanks also especially go to the staff at the charming Southern Methodist University (Dedman School of Law) in Dallas, Texas, where I was a Visiting Scholar during my sabbatical in second semester, 2002. My major sabbatical project was different from the topic of my thesis and culminated in my publishing the article, “Enron and One.tel: Employee Entitlements after Employer Insolvency in the United States and Australia. (Australian Renegades Championing the American Dream.)” (2003) 56 *SMU Law Review* 975-1004. But, some material on the background to the Australian system that is in this thesis was utilised by me in that article. The time at SMU, being a Methodist-based Christian University, proved an ‘oasis’ – where the sense of law being a ‘tool for justice’ was reawakened within me. Indeed, “here on earth God’s work must truly be our own...”¹

I have been fortunate in having the opportunity to publish some material from my thesis in Butterworth’s *Federal Industrial Law*, particularly the commentaries on the “No Disadvantage Test;” “Freedom of Association;” and the “Principal Objects of the *Workplace Relations Act 1996*.” Clearly, working on such a project was a great opportunity for me and exposed me to the knowledge of an editorial board from whom I learnt a lot.

My employer, the University of Queensland provides my income, and I was grateful to be the recipient of its Promoting Women Fellowship in 2001. That award allowed me to enjoy semester one 2001 free from teaching yet on full pay, so I could attend research and writing classes at Sydney Law School and meet with my supervisor. My friend and University of Queensland colleague, Dr Clive Turner [who gave me my start in academic publishing by asking me to write the labour law chapter of *Australian Commercial Law* (formerly Yorston & Fortescue: editions 21-25)] was, as always, a ‘shoulder to lean on’ and ‘sounding board’ for my ideas during my time as a doctoral candidate. The UQ Library staff are some of the loveliest and most efficient one could meet.

¹ John F Kennedy, Presidential Inaugural Address, 20 January 1961 – as published in: (Caroline Kennedy ed) *A Patriot’s Handbook* Hyperion, New York, 2003) 61-64 at 64.

Finally, and most importantly, I thank God, my family and, strangely perhaps, my kidney surgeon. I became severely ill during the writing of this work, requiring three hospitalisations and major surgery to remove a softball-sized growth from what is obviously one of the major organs of the human body. I am grateful to be here, still. It has been a challenging few years. I pray that this work allows me to graduate and give all those who love me something *they* can celebrate – just as I celebrate the good things they have done for me.

I end this foreword, then, with the words that were an inspiration to me throughout the writing of my thesis. American cyclist, Lance Armstrong, who has won the Tour de France five times after having battled cancer, wrote a book I have read time and time again. In it, he speaks of the lessons that we all learn from the upheavals and challenges we face in our lives. They are the sorts of lessons I have learned through undertaking this PhD and suffering ill health (surely the two most testing ‘races’ in my life), and from which I have been able to grow due to the help of everyone above:

“I had learned what it means to ride the Tour de France. It’s not about the bike. It’s a metaphor for life, not only the longest race in the world but also the most exalting and heartbreaking and potentially tragic. It poses every conceivable element to the rider, and more: cold, heat, mountains, plains, ruts, flat tires, high wins, unspeakably bad luck, unthinkable beauty, yawning senselessness, and above all a great, deep self-questioning. During our lives we’re faced with so many different elements as well, we experience so many setbacks, and fight such a hand-to-hand battle with failure, head down in the rain, just trying to stay upright and to have a little hope. The Tour is not just a bike race, not at all. It is a test. It tests you physically, it tests you mentally, and it even tests you morally.

“I understood that now. There are no shortcuts, I realized. It took years of racing to build up the mind and body and character, until a rider had logged hundreds of races and thousands of miles of road. I wouldn’t be able to win the Tour de France until I had enough iron in my legs, and lungs, and brain, and heart. Until I was a man... ”²

Louise Willans Floyd

² Lance Armstrong (with Sally Jenkins) *It’s Not About the Bike: My Journey Back to Life* (Allen and Unwin Publishing, Australia, 2002) at 68-69.

Table of Contents:

Chapter One -

Introduction: Collective Worker Protections and the “Rock Solid Guarantee” (1-21)

- The ‘Rock Solid Guarantee’
- The argument of the thesis
- Scope
- Structure and chapters explained: basic premises; no disadvantage test - development and analysis; structural changes as the real problem for workers
- Originality.

PART A: BASIC PREMISES

Chapter Two -

Power Imbalance between Worker and Employer & the Manner in which it is Addressed (22-51)

- The power imbalance (*The Webbs, Kahn-Freund; Wedderburn; Higgins*)
- Non-intervention arguments (*Hayek, Epstein*)
- Rejection of Hayek
- Consideration of the Third Way (and discussion of *Collins*)
- Argument for intervention, particularly through the Australian Industrial Relations Commission (and also unions).

Chapter Three –

The Australian System and the Need for Change? (52-104)

- Origins and essence of Australia’s system (*The Deakin Settlement and the New Province for Law and Order*)
- Changes afoot – economic, social and political changes and their effect on the Commission system (*Hancock Report and the Business Council of Australia*)
- Scholarly critiques of the Commission (for example, *Isaac, Davis and Lansbury, Rawson, Walker, Mitchell and Rimmer*)
- Some alternative proposals, such as individual contracts (for example *Niland, HR Nicholls Society*)
- Support for the Commission – and why the issue is ‘live.’

PART B
NO DISADVANTAGE TEST – DEVELOPMENT AND ANALYSIS

Chapter Four –

The No Disadvantage Test & the Industrial Relations Reform Act 1993 (105-142)

- Modifications to the conciliation and arbitration system *which retained a vital role for the Commission (and Unions)*
- Development of the no disadvantage test – balancing business interests and flexibility with protection for workers
- The scholarly critiques (for example, *Ross, Bennett, Coulthard*)
- Study of major cases (for example, *EFA Test Case, Toys ‘R’ Us, Tweed Valley and Arrowcrest*)

Chapter Five –

The No Disadvantage Test and the Workplace Relations Act 1996: An Understanding of the Law (143-173)

- Key changes introduced by the *Workplace Relations Act 1996* (for example, award simplification and attendant limits on the Commission’s power; two types of non-union agreement – including AWAs; the Office of Employment Advocate instead of the Commission)
- The new no disadvantage test (including two *diagrams* demonstrating the breadth of the new test and its operation for AWAs as opposed to certified agreements).

Chapter Six –

The No Disadvantage Test and the Workplace Relations Act 1996: A Critical Perspective (174-232)

- The Chapter mainly analyses the no disadvantage test as applied to certified agreements (that is, those with potential union involvement)
- *Criticism of awards as a dated and simplistic benchmark* for the no disadvantage test – and a proposed solution to that problem
- *A Nebulous Discretion?* The thesis studies some of the leading critiques (for example, *Merlo, Judge, Justice Munro*), major cases (for example, the 2004 decision, *Bermkuks*) and central issues (for example, pertaining to public interest and community standards). *It is argued that the breadth of the no disadvantage test discretion is its strength.* The Commission still plays a vital role in applying the no disadvantage test and unions are still important.
- *Question:* Is the efficacy of the test dependant on the Commission and Unions?

PART C
STRUCTURAL CHANGES:
THE REAL PROBLEM FOR WORKER PROTECTION

Chapter Seven –

Grafting Individualism on a Traditionally Collective System – Is Structural Change the Real Achilles Heel? (233-306)

- The strength of the no disadvantage test is, in part, dependant on the strength of its supporting structures
- Chapter traces changes to the principal objects of the Act and the declining role for unions, even in *union* bargaining stream
- *Freedom of Association* – in addition to the removal of union preference, are there further problems for trade union recognition?
- Consideration of the major cases – *Asahi, Weipa, BHP and Belandra*
- Study of major scholarly critiques – *McCallum, Noakes, Naughton*
- Even responsible unions may be vulnerable. Suggestion for Law Reform

Chapter Eight –

Glass Houses: AWAs and Disadvantage... (307-354)

- Critique of the no disadvantage test as applied to AWAs
- *Office of Employment Advocate* – does secrecy preclude accountability?
- *AWA duress* – consideration of *Schanka's Case*
- Discussion of how these questions impact the operation of the no disadvantage test regarding AWAs. Consideration of scholarly works of, for example, *Mitchell*.
- Argument for law reform and rejection of an overly individualistic system

Chapter Nine –

Conclusion: Reinvigorating Collective Labour Law (355-371)

- Present writer's recommendations for law reform
- Summary of thesis and its issues and arguments.
- Cautionary note on how important and *live* these issues are. (Gould's Book of Fish and the lambs 'docile until slaughter').

Bibliography

I. CHAPTER ONE:

Introduction: Collective Worker Protections and the “Rock Solid Guarantee”

The Rock Solid Guarantee and the No Disadvantage Test:

On Monday, 8 January 1996, in a speech to the 28th Convention of the Young Liberals at the Australian National University, Mr John Howard, who was then the leader of her Majesty’s Opposition, uttered these famous words:

“I give this rock solid guarantee. Our policy will not cause a cut in the take-home pay of Australian workers.”¹

This statement, made just prior to the calling of the 1996 Federal election was, by Mr Howard’s own reckoning, a political ‘ploy’ or ‘tool’.² The Liberals had lost the supposedly ‘unloseable’ election of 1993 in some part due to its *Fightback Policy*.³ This latter policy espoused the direct negotiation of terms and conditions of employment between employers and employees. It caused concern that there would be a reduction of

¹ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 5. (Copy supplied by Prime Minister’s Office and on file with author). Speech also cited in: Ron McCallum “Australian Workplace Agreements – An Analysis” (1997) 10 *Australian Journal of Labour Law* 50-61 at 59; and first reported in: Lenore Taylor “Howard’s Guarantee: No Pay Cut” in *The Australian* (9 January 1996) at 1.

² Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 4. Further, in transcript of: the Hon. John Howard, Prime Minister *Speech to the Bennelong FEC* (Sydney, 23 August 1996) 1-7 at 5, the Prime Minister said that the assurance that “any person passing from an industrial award into a workplace agreement...would be entitled to the same take-home pay as he or she would have received if he or she had remained in that award” had “become notoriously known in the trade as a rock solid guarantee about income levels.”

³ Liberal Party of Australia *Fightback! It’s Your Australia* (Online Offset Printers, Canberra, 1992) 1-67 at 38.

entitlements if workers were left to 'fend for themselves' – no express guarantee preventing such reduction having been given.⁴

In 1996, Mr Howard gave that guarantee. But the guarantee was limited. It only protected take-home pay (in the bargain compared to the award). Other conditions of employment and the key structural features of the Australian system were outside its grasp. Indeed, Mr Howard insisted the industrial relations debate *should* centre on *structural change* in Australian industrial relations, which would enable Australians to gain "better work for better pay."⁵

Essentially, Mr Howard was arguing that the decentralisation of the Australian industrial relations system, already in place under the *Industrial Relations Act 1988* enterprise bargaining laws, should be progressed - dramatically. That system already allowed for *direct* agreements between employers and employees, both with unions (certified agreements) or *without union involvement (enterprise flexibility agreements- 'EFAs')*. But the latter were not widely used. Likewise, both types of agreement could only take effect if *certified by the Industrial Relations Commission*. For such to occur, the Commission had to be satisfied that the *erms of the agreement, considered as a*

⁴ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 4; and Lenore Taylor "Bullets removed from IR gun" *The Australian* (Tuesday, 9 January 1996) 1 and 4.

⁵ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 4; and Lenore Taylor "Bullets removed from IR gun" *The Australian* (Tuesday, 9 January 1996) 1 and 4.

whole, did not place the employee at a disadvantage compared to the award ("the no-disadvantage test").

Mr Howard described EFAs as a "total failure"⁶ that were "riddled with inflexibility and complexity."⁷ He saw union involvement generally in the system as "unwanted, uninvited and unnecessary;" and the certification process of the Commission as "cumbersome."⁸ Consequently, he championed systemic change that would develop the use of that non-union bargaining stream, lessen the power of unions and curtail the role of the Australian Industrial Relations Commission.⁹ The *cornerstone* of his new system would be Australian Workplace Agreements (AWAs), in which unions could only represent the employee if such invited them to do so (and could never be a party). AWAs were not to be approved by the Commission. Instead they were lodged with a new body called the Office of Employment Advocate. The outline of the new system was in these terms:¹⁰

"...(Australian Workplace Agreements) will provide a flexible, less complicated, direct mechanism for employers and employees to enter into arrangements between each other which better promote the cause of the enterprise.

⁶ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 5.

⁷ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 5.

⁸ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 5.

⁹ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 4.

¹⁰ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 5.

“They will of course need to observe a number of principles which I will spell out very, very clearly. To start with, take-home pay must not be less than that prescribed under the Award and this will include amongst other things, ordinary time earnings, overtime penalty rates and leave loadings. So that if you worked the same hours during the same time as if under the Award, you cannot be remunerated any less than you would be remunerated under the Award...

“That agreement does not need to be approved by the Industrial Relations Commission. That agreement will not involve a trade union as a party to the agreement, and the only circumstances in which a trade union will be involved in that agreement, or in the negotiation of that agreement will be if the trade union is invited by the employees to participate in the negotiations...

“It is the intention of the Coalition to establish a new office called the Office of the Employment Advocate and the role of that will be to act as a guardian for the rights of employees under workplace agreements. It will also be available to provide advice to employers as well as employees about the operation of industrial relations law generally and most particularly, the operation of the law so far as it applies to the new Australian workplace agreements. All workplace agreements will be required to be filed with the Office of the Employment Advocate and it will be open to any person under a workplace agreement who believes that he or she has in some way been disadvantaged or not paid or remunerated under that workplace agreement in the same way as would have been if that person had been covered by an award.

“It will be open to that person to go to the Employment Advocate and without any expense to the person making the complaint, if there is a case the Employment Advocate will pursue that case on behalf of the aggrieved employee and recover any money that is owing to the aggrieved employee in precisely the same way as money unpaid under the provisions of existing industrial relations awards can be recovered to the benefit of an aggrieved award employee...”

The speech also set out the further significant elements of the proposed raft of reforms. Freedom of Association laws were to be introduced: removing from the legislation the preference afforded to trade unionists; emphasising the right not to join a union; and introducing enterprise unions. Secondary Boycotts prohibitions were to be reintroduced into the *Trade Practices Act* (that is, s45D). The unfair dismissal laws were also to be repealed.

In terms of the justification for these changes, Mr Howard placed the need for labour market reform in the context of globalisation and trade. Despite her rich endowments, Australia, he argued, was falling behind her neighbours in the Asia-Pacific region. Referring to a system he later described as “arthritic, old fashioned...(and) the biggest single impediment...to removing the speed limits on economic growth,”¹¹ Mr Howard spoke of the Australian Industrial Relations system as one that “(owed) its origins to the mores of pre-World War One Australia” and insulted the intelligence of most workers by implying they were not capable of reaching agreements by themselves. What was needed was greater flexibility facilitated by broad ranging reform.¹²

Obviously, Mr Howard did win the 1996 election, and labour law reform was an immediate, legislative priority. But, as Mitchell notes, his labour reform agenda, although advanced, was not fulfilled.¹³

“...In the lead up to the [1996 election] the [Liberal] Party revealed very few specifics on its labour law platform. It made a general promise, however, to the effect that awards would be retained and that ‘no worker would be worse off in overall terms’ as a result of any labour market reforms.

¹¹ Hon. John Howard, Prime Minister *Speech to the Bennelong FEC* (Sydney, 23 August 1996) 1-7 at 4.

¹² Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 7.

¹³ Richard Mitchell “Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia” (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 113- 135 at 122.

“It is necessary to appreciate the practical significance of this latter commitment. The Liberal-National Party Coalition was elected to power in 1996 with an overwhelming majority in the lower house (the House of Representatives), but was in a minority in the upper chamber (the Senate). Consequently, the government’s labour market programme was subjected to close scrutiny by the minor parties in the Senate, and the ‘no disadvantage’ commitment was utilised as the yardstick against which much of its policy and subsequent legislation was judged. As a result the Workplace Relations Act 1996, whilst giving effect to the most far reaching changes ever made to the compulsory arbitration law, was necessarily a compromise measure.”

The Argument of this Thesis:

The “compromise measure” to which Mitchell alludes is the present hybrid system of labour law that we have in this country, today. That system retains many of the key elements of the traditional, centralised system of conciliation and arbitration, but waters them down and grafts onto them fundamental individualistic elements. While such moves were begun under the former *Industrial Relations Act 1988*, the *Workplace Relations Act 1996* advances individualism to a greater extent than any previous reform. Consequently, the current system retains the Australian Industrial Relations Commission, but in a lesser role than it once occupied – it assures minimum standards are upheld, rather than being the main driver behind working conditions. Obviously, the no disadvantage test has been retained, albeit grudgingly, perhaps, and in a revised format, which is broader and easier to pass. Unions still represent their members and can make agreements on their behalf. But, these unions no longer have an enshrined place in the system, as their preference is gone. Most important of all, AWAs and the Employment Advocate have been introduced, but do not occupy the cherished, dominant role the present government had envisaged.

To a critic, the present system is everything and it is nothing. To a supporter, it is a reasonable blend of legislative safeguards and innovations. To others, it might be something in between. But whatever the view of the system itself, it is beyond question that *ours is a system in transition*. The only reason that AWAs dependent on minimum conditions did not take precedence over the award-oriented no disadvantage test was because of political reality in 1996 – the Government had to retain the no disadvantage test to get its legislation through the Australian Senate. The fervor with which the Government held its original views has never evaporated. In fact, in a speech given shortly after the Government was recently returned for its fourth term and *with a majority in both Houses of Parliament*, the Honourable, Kevin Andrews MP, Minister for Employment and Industrial Relations, expressly stated: “the (*Workplace Relations Act* 1996) was never meant to be a definitive statutory framework but **a step towards** a more dynamic and flexible labour market.”¹⁴ But systemic change in labor law is not just a Conservative domain, made redundant by electoral whim. The first moves towards decentralisation were taken by the former Labor government and a response to the present state of things is surely Labor’s quest today. So, the shifting sands of industrial law are yet to settle...

It is for that reason that this thesis has been written. It is to that debate that its contribution is being made. The no disadvantage test is, at once, the means of protecting workers and facilitating change within our labor system. It is also the means by which

¹⁴ Hon. Kevin Andrews MP, Minister for Employment and Workplace Relations “Where To From Here?” An address to the Australian Industrial Relations Commission Centenary Conference, *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 7.

the traditional safeguards and the systemic hallmarks of our arbitration system remain relevant. *This thesis argues that the 'no disadvantage test' and its supporting structures, such as the Australian Industrial Relations Commission, require fortification. It proceeds to recommend the types of legislative changes that would enable such strengthening of these worker protections to occur.*

Scope:

Just as the 'rock solid guarantee' speech pertained to the Federal system, so too this thesis examines the no disadvantage test as it exists under the Commonwealth *Workplace Relations Act 1996*. Such concentration on the national scheme has further academic justification. Many state systems are either modifications of the federal model or reactions against it. Further, there is a strong concentration of workers in the federal system.¹⁵

It is significant, from the outset, to note the topics with which this thesis is not concerned. Whilst it is acknowledged that unfair dismissal laws and anti-discrimination laws are important worker protections, they are not the subject of detailed analysis in this work. The doctorate centres on the *collective structural protections for workers - the systemic safeguards* - by which the key general conditions of working life are determined and protected. That approach has been adopted because the nature of the 'system' itself (that is, whether Australia has a system of individual contracts or one that has an

¹⁵ For a similar justification, refer: Ron McCallum "Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws" (2002) *57 Relations Industrielles* 225-249 at 227-228.

independent tribunal presiding over it) has the most sweeping effect, it is submitted, on workers' day-to-day lives. The *system* is relevant to the setting of most terms governing the employment relationship; *how much of a 'say' workers have in actually settling those terms*; and the manner in which such conditions are enforced. To that latter end, one might well ask: *Do workers stand alone in seeking to redress their grievances or are strong third-party systems in place? Are structures in place to assist workers determining their rights or must employees establish this, themselves?* Surely, the nature of the overarching system of labour law has the most far-reaching effect in redressing power imbalances and making up for worker vulnerability. Dismissal and discrimination laws certainly do safeguard employees (in that they can negotiate knowing they cannot have their employment unreasonably terminated.) But those 'problems' may not befall all workers, and dismissal laws do not govern the ongoing relationship, in any event.

Finally, it must be noted that this thesis is a *legal analysis* of the no disadvantage test and its supporting structures. It is not socio-legal. Whilst it is acknowledged there would be worth in such analysis, *it is submitted enormous importance must be attached to the legal strength or weakness of the actual legal structures from which worker experiences and living standards flow. It is through such a study that law reform changes, necessary to improve workers' lives, might be developed.*

Structure of Work & Chapters Explained:

The thesis is divided into three parts. In Part A (Chapters Two and Three) deal with the basic premises on which the argument is based. Part B, which comprises Chapters Four through to Six, analyses the development and application of the no disadvantage test and offers suggestions for law reform. Finally, in Part C, Chapters Seven and Eight deal with the key structural developments (such as the limitations on unions and the Commission as well as the advent of the Office of Employment Advocate and AWAs) to argue that these are the real problems for worker protection and the operation of the no disadvantage test. Again, suggestions for law reform are discussed.

PART A

BASIC PREMISES

Chapter Two of this thesis establishes two of the basic premises of this work. First, it posits that *there is a power imbalance between worker and employer*. In putting forward this view, reliance is placed on the many scholars that have made that point over the last 100 years: the Webbs;¹⁶ Wedderburn,¹⁷ Kahn-Freund;¹⁸ and Australians, such as

¹⁶ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927; and *The History of Trade Unionism* (Longmans, Green and Co., 1920) 1-784.

¹⁷ Lord Wedderburn *The Worker and the Law* (3rd ed, Pelican Books, England, 1986) 1-1026; "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1 - 38; and "Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition" (2000) 29 *Industrial Law Journal* 1 - 42.

¹⁸ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London 1977) 1-296.

the legendary Justice Henry Bourne Higgins¹⁹ and more latterly authors like Stewart.²⁰ Essentially, their argument is that the power of an employer to deny work to the potential employee (who has bills to pay and food to buy) provides that employer with a superior bargaining position. The contrary view, adopted most notably by Hayek²¹ (as well as Americans, Schwab²² and Epstein²³) emphasises the difficulties faced by entrepreneurs. It suggests that even though some employees might suffer through free enterprise, that system is better and benefits more people, overall. The latter US advocates of that view even argue that employees who take jobs with minimal protections do so because they *want* to. On legal analysis of all of these writings as well as the related discussion of Collins,²⁴ the position of Hayek, Schwab and Epstein is rejected by the present writer; the power imbalance theory being accepted, instead.

Secondly, consideration is given to the related question – what legal measures should be adopted to redress that imbalance? On that issue, this thesis supports the fortification of the present hybrid labour system and its key elements – the no

¹⁹ For example, *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 (per Higgins J).

²⁰ Andrew Stewart “Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation (1992) 5 *Australian Journal of Labour Law* 101 – 134.

²¹ Friedrich Hayek *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569; and *Law, Legislation and Liberty* (The University of Chicago Press, USA, 1973) (Volumes 1-3).

²² Stewart Schwab “Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?” (2001) 76 *Indiana Law Journal* 29 – 48. See, also, the text by the same author: *Employment Law Cases and Materials* (Lexis Law Publishing, USA, 2002) 1-1293 at 7-8.

²³ Richard Epstein “In Defense of the Contract at Will” (1984) 51 *University of Chicago Law Review* 947-982

²⁴ Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484.

disadvantage test with its attendant reliance on the AIRC and potential for union representation – over the alternative of individual contracts underpinned by statutory minimum conditions.²⁵

Having accepted the power imbalance and a role for intervention in industrial relations, **Chapter Three** develops the argument that the Australian Industrial Relations Commission is the most appropriate device to be used in this country to ‘even the odds.’ That argument is made out by tracing the development of the Commission and its purpose – to prevent and settle industrial disputes, while acknowledging both social justice and business efficiency. The Commission was set up 100 years ago by legislation that derived its authority from a specific provision of the *Australian Constitution*, itself. Because it was able to settle disputes of *interests* (*the establishment of new rights*), not just disputes of *rights* (*the interpretation of established rights*),²⁶ the tribunal (with its dual function of conciliation *and* arbitration) developed an important role in Australian labour law. That role was entrenched because the Commission could also have regard to the *public interest* – it was different from a mainstream civil court, which determined disputes between two private litigants – the Commission could look into the effect of its

²⁵ Phillipa Weeks *Trade Union Security Law – A Study of Preference and Compulsory Unionism* (The Federation Press, Australia, 1995) 1-282; and Laura Bennett *Making Labour Law in Australia – Industrial Relations, Politics and Law* (Law Book Company, Sydney, 1994) 1-240.

²⁶ For further discussion of this distinction see, for example: Malcolm Rimmer “The Niland Green Paper – A Critical Review” in (Michael Easson and Jeff Shaw eds.) *Transforming Industrial Relations* (Pluto Press, Australia, 1990) 6-17.

decisions *on society*.²⁷ Acting for peace and fairness relevant to the community and whatever circumstances came before it was, then, part of its charter.²⁸

Some academics, like Niland²⁹ and those who have written for the HR Nicholls Society,³⁰ have viewed the Commission as ill-conceived for that very reason. They also claimed that it was too cumbersome in process and *not responsive enough to the needs of particular businesses as it enshrined the role of often industry-based unions*. They highlight the many social and economic changes that have arisen since the Commission was first formed 100 years ago to advocate *systemic change* to either collective bargaining or a return to the common law contract of employment (underpinned by statutory minimum conditions) by way of reform. However, other scholars are less critical.³¹ Latterday commentators, such as: Isaac;³² Davis and Lansbury;³³ Rawson;³⁴ as

²⁷ See, for example: John Niland *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174, particularly: "The Idea of Public Interest" (Chapter Three) 29 – 34.

²⁸ See for example: Sir Alfred Deakin "Second Reading of the Conciliation and Arbitration Bill 1903" *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) 2864 et seq.

²⁹ John Niland "Process and Strategy in Industrial Relations Reform" (Chapter Fifteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen and Unwin Publishers, Sydney, 1986); "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press, Australia, 1990) 182 – 207; and *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174. There is also consideration of: Kenneth Walker "Compulsory Arbitration in Australia" in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books, USA, 1976) 1-44.

³⁰ HR Nicholls Society *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986). Within that work, refer particularly: Hugh Morgan "The Nature of Trade Union Power" (Chapter One) 24 – 30; Wayne Gilbert "The Queensland Power" (Chapter Two) 31 – 52; and Ian McLachlan "Farmers, Australia's Cost Structures, and Union Power" (Chapter Three) 53 – 63.

³¹ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927; and *The History of Trade Unionism* (Longmans, Green and Co., 1920) 1-784.

well as Mitchell and Rimmer³⁵ have urged *reform of the system, whilst not abandoning the basic notion of a commission*. The present writer accepts that latter view. *It is argued, therefore, that in principle the Commission system should be retained. And that the Commission's need to be flexible and respond to the many social and economic changes of the last hundred years is facilitated by the no disadvantage test.*

PART B

NO DISADVANTAGE TEST – DEVELOPMENT AND ANALYSIS

Chapter Four of the thesis further analyses the advent of globalisation and instantaneous communications and their attendant need for Australian business to become more *flexible*. From those developments stemmed the initial changes to the Australian labor system that paved the way for the system we have today (that is, enterprise bargaining was introduced in a bid to make the Commission system more flexible and in keeping with the times.) The most significant legislation relating to that development was the *Industrial Relations Reform Act 1994*. Under that system, there was a role for unions to bargain for terms and conditions of employment that were *unique to a particular workplace or enterprise*. Alternatively, groups of employees could bargain

³² Joe Isaac "The Arbitration Commission: Prime Mover or Facilitator" (1989) 31 *Journal of Industrial Relations* 407-427.

³³ Edward Davis and Russell Lansbury "Employment Relations in Australia" (Chapter Five) in (Greg Bamber and Russell Lansbury eds) *International and Comparative Employment Relations: A Study of Industrialised Market Economies* (Allen & Unwin, Sydney, 1998) 110-143.

³⁴ Don Rawson "Industrial Relations and the Art of the Possible" (Chapter Sixteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen & Unwin; Sydney; 1986) 273-297.

directly with their employers for an agreement relevant to their workplace. *Although that system was reminiscent of American collective bargaining, the key difference was the retention of a central role for the Australian Industrial Relations Commission. The Commission had to certify all agreements before they could take effect at law. And the test applied by the Commission in addressing that issue was ‘the no disadvantage test’ – a comparison of the proposed agreement against the award and taking into account the public interest. So, Australia developed a hybrid system of labor law – something between collective bargaining and compulsory arbitration.* Such was the way forward that struck a balance between adequate worker protection and sufficient flexibility for business to function in a modern world. Through application of the no disadvantage test, the Commission steered that difficult course and, through an analysis of the leading cases decided at that time and associated academic commentaries, this author demonstrates the efficient role both played.³⁶

From an analysis of the original bargaining regime in Chapter Four, **Chapter Five** goes on to discuss the present system under the *Workplace Relations Act 1996*. As noted in the opening to this thesis, the original Workplace Relations Bill intended to abolish the no disadvantage test, in favour of statutory minimum conditions. Awards were only to be the benchmark for determining whether take-home pay under an agreement was acceptable. That movement away from the Commission and awards for

³⁵ Richard Mitchell and Malcolm Rimmer “Labour Law, Deregulation, and Flexibility in Australian Industrial Relations” (1990-91) 12 *Comparative Labor Law Journal* 1-34.

³⁶ See, for example: *Toys ‘R’ Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22; and *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18.

most conditions of employment was buttressed by further proposed legislative changes, such as the advent of Australian Workplace Agreements (AWAs). *These were agreements negotiated directly between the individual employee and the employer to which unions could never become a party. They would override the award and were administered by a new body called the Office of Employment Advocate.*

As discussed earlier, the political reality (in 1996) of a hostile Senate ultimately forced the government to amend its strategy and re-introduce a *form of no disadvantage test* (that was broader and easier to pass than its predecessor). But, the *forced nature of the abandonment* of the Government's original agenda on minimum conditions as well as the survival of further changes (such as AWAs, the Employment Advocate and limitations on the Commission's jurisdiction and the operation of trade unions), put the no disadvantage test and its supporting structure like the Commission (and unions), in an interesting and vulnerable position. Given the already hybrid nature of a system that was clearly in a process of change, the question surely emerged as to the *extent* to which bargaining would be grafted onto arbitration – could it even predominate? And what was the effectiveness of the no disadvantage test against such a background? The result of the 2004 election has only underlined the importance of these issues.

Chapter Six, then, studies the innate strengths and weaknesses of the current 'no disadvantage test,' as well as its application, particularly to the collective agreements, between either employer and union or between employer and groups of employees. The chapter analyses the statutory provisions of the Workplace Relations Act 1996, which

establish the test; and the relevant case law. Consideration is also given to the leading commentaries of: Justice Munro,³⁷ Omar Merlo,³⁸ James Judge³⁹ and Richard Marles,⁴⁰ which largely focus on the role of the no disadvantage test as an employee safeguard and which, at times, show some circumspection towards the test in this respect. Based on an analysis of all these factors, and with something of a predilection towards the position of Justice Munro, the chapter concludes that this largely discretionary test, with some small amendments, is and can continue to serve as an effective protection for employees in the context of collective agreements. Like all discretions, its protection is not watertight, but, *in real terms, its inherent flexibility may be regarded as its strength. To the present writer, the more fundamental question is the position of the supporting structures on which the no disadvantage test is dependent.* In **Chapters Seven and Eight**, therefore, the present writer addresses what she considers to be the critical problems with the no disadvantage test - the systemic problems relating to the position of unions and the Australian Industrial Relations Commission.

³⁷ Justice Paul Munro "Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test" - lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24. (Copy given to the present writer by her friend and mentor, Hon David Hall, President, Industrial Court of Queensland - on file with author).

³⁸ Omar Merlo "Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining" (2000) 13 *Australian Journal of Labour Law* 207-235.

³⁹ James Judge "Australian Workplace Agreements" (1998) 23 *Alternative Law Journal* 75-77.

⁴⁰ Richard Marles "Predictions and Premonitions - Individual Contracts...A View to their Future" speech delivered to the Queensland Bar Association (Industrial Law Section) Industrial Law Conference 2001 (22 April 2001, Gold Coast, Australia) 1-12. Copy supplied by Mr Marles and on file with author.

PART C

STRUCTURAL CHANGES AND PROBLEMS FOR WORKER PROTECTION

To this end, **Chapter Seven** considers whether employers can simply refuse to bargain with unions and resort to use of individual contracts or AWAs, hence rendering the collective system and its incumbent worker protections (like the no disadvantage test) of theoretical value only. The chapter acknowledges that the principal objects of the *Workplace Relations Act 1996* aim to provide a “framework for *co-operative* workplace relations” rather than “prevention and settlement of disputes,” as has been the case in the past. This diminished concentration on the AIRC’s central role as conciliator and arbitrator is made more conspicuous by the way in which freedom of association is treated under the act. The *Workplace Relations Act 1996* removes the trade union security device of preference and concentrates on the freedom *not* to belong to a union. There is a conflict in the cases as to what this means for bargaining. The important series of decisions in the *Australian Workers Union v BHP Iron Ore*⁴¹ seemed to accept that employers could refuse to bargain with unionists without breaching the freedom of association laws. The more recent decision of *Belandra*,⁴² however, rejects that view. So, there is a conflict in the case law and the present writer argues in favour of the latter

⁴¹ *Australian Workers’ Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J).

⁴² *Australian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 106 *Industrial Reports* 165- 239 (per North J).

interpretation. She also studies the relevant commentaries of Noakes,⁴³ McCallum⁴⁴ and Naughton⁴⁵ to argue for changes to the statute to provide the Commission with a good faith bargaining power which would potentially protect the rights of unions to negotiate for their members where those unions are representative of the employees and not abusing their own position.

In the penultimate chapter, **Chapter Eight**, the thesis examines the application of the no disadvantage test to AWAs - the agreements made directly between the employer and the individual employee, without any necessary involvement of the AIRC. Obviously, in this context, the operation of the Office of Employment Advocate and the position of the Australian Industrial Relations Commission are reviewed. It is argued that the no disadvantage test is inept in the context of AWAs because its application by the Office of Employment Advocate lacks the transparency with which the Commission operates. The fact that the OEA advises both employers and employees compounds this problem, as does the legal position on AWA duress. Currently, the common law definition of duress is fundamentally applied to AWAs – there must be *illegitimate* pressure on an employee to sign such an agreement before it can be set aside at law. Consequently, any pressure stemming from the employee's need for a pay cheque is not to the point and employers can literally offer jobs on the basis of a 'take it or leave it'

⁴³ David Noakes and Andrew Cardell-Ree "Individual Contracts and the Freedom to Associate" (2001) 14 *Australian Journal of Labour Law* 89-96.

⁴⁴ Ron McCallum "Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws" (2002) 57 *Relations Industrielles* 225-249.

⁴⁵ Richard Naughton, "Bargaining in Good Faith – The Asahi Decision" ((1995) 8 *Australian Journal of Labour Law* 166 – 168.

AWA. The legal justification for this stance is said to be that the no disadvantage test, as applied to AWAs, is protection enough for workers. Clearly, having disparaged the no disadvantage test as applied to AWAs, the present writer urges change in the law on AWA duress and a limit on the availability of AWAs, particularly so as to exclude blue collar workers from their purview. The chapter ends by arguing that the Commission and not the Office of Employment Advocate should have the major role in the AWA regime.

The thesis concludes in **Chapter Nine** by summarising that the no disadvantage test with some amendments strikes a fair balance between flexibility and fairness. Most importantly it does this by retaining a structural role for the Australian Industrial Relations Commission (and where representative, trade unions).

Originality:

“Surely there must come a point when everyone in industrial relations is so overloaded with Green Papers, principles and policies that they cease to listen. That risk is a real one...”⁴⁶

This comment, made by Rimmer on the handing down of the Niland Report,⁴⁷ is as true today as it was when made, in 1990. Indeed, the twenty page bibliography of this doctoral essay is a testament to the wealth of material available on Australian labour law, particularly enterprise bargaining. It would be ludicrous, therefore, not to make the obvious point at the start of this thesis – its originality does not lie in its traversing a

⁴⁶ Malcolm Rimmer “The Niland Green Paper – A Critical Review” (Chapter One) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press, Sydney, 1990) 6 – 17.

⁴⁷ John Niland *Transforming Industrial Relations in New South Wales* (NSW Government Printer, Sydney, 1989) 1-270.

brand new 'scholarly frontier.' *Rather, its contribution to academe lies in its original legal analysis of an important part of that 'frontier' so as to contribute to law reform at a time when the law is in a state of flux.*

The thesis legally analyses the 'no disadvantage test' as well as its related structures – the Commission and trade unions. Such a critical appraisal requires a scholarly analysis of many recent developments. The test, itself, is relatively new; as are the Employment Advocate, AWAs and AWA-duress; genuine bargaining, deunionisation and trade union recognition. As alluded to earlier, labour law may seem ephemeral and is, at the very least, under review. So, it might be said that its basic argument for fortification of the existing hybrid system makes a timely contribution to ongoing scholarly debate and it is in that contribution that its originality lies.

Part A:

Basic Premises

II. CHAPTER TWO:

Power Imbalance between Worker and Employer & the Manner in which it is Addressed.

“The provision for fair and reasonable remuneration (as required under the legislation) is obviously designed for the benefit of the employees in the industry; and it must be meant to *secure to them something which they cannot get by the ordinary system of individual bargaining with employers. If Parliament meant that the conditions shall be such as they can get by individual bargaining – if it meant that those conditions are to be fair and reasonable, which employees will accept and employers will give, in contracts of service – there would have been no need for this provision. The remuneration could safely have been left to the usual, but unequal, contest, the “higgling of the market” for labour with the pressure for bread on one side, and the pressure for profits on the other. The standard of “fair and reasonable” must, therefore, be something else: and I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilised community.* (Emphasis added).”¹

These were the findings of Justice HB Higgins in the judgment for which he became famous – the *Harvester Judgment*. His Honour had been assigned a task under the relevant legislation, the *Excise Tariff Act 1906*, of determining what was the amount of a “fair and reasonable” wage, for it was only if such was paid that the employing business concerned would be exempted from duty.² Justice Higgins was hardly precocious about his task. He was all too aware of the breadth of the powers he had been given by the government.³ So, he looked at it simply: “*If A lets B have the use of his horses, on terms that he give them fair and reasonable treatment, ...it is B’s duty to give*

¹ *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 at 3 (per Higgins J).

² *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 at 2 (per Higgins J).

³ *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 at 3 (per Higgins J).

them proper food and water, and such shelter and rest as they need.”⁴ Applying that logic to the treatment of men, His Honour relied on extensive evidence about the cost of living of the day to ensure a comfortable life – and that was the fair and reasonable (living) wage.⁵

Over and above this actual statement of the law, Justice Higgins’ judgment is famous for his acknowledgement with which this chapter begins – that there is a *power imbalance between worker and employer that required some kind of intervention to protect workers from exploitation*.⁶ Indeed, throughout his judgment, His Honour acknowledges the difficulties working people face. There are slightly substandard labourers who will *undercut the costs* of a skilled workman and lower all wage rates.⁷ And, no matter how good hearted an employer may be, there could always be the temptation to *treat the acquisition of labour like the acquisition of any other commodity (such as wood or iron) and pay no more than is necessary*.⁸ Redressing those problems required intervention and one might also consider the need for workers to *combine* against their employer in a bargaining role.⁹

⁴ *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 at 4 et seq (per Higgins J).

⁵ *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 at 3 and 4 (per Higgins J).

⁶ Such is exemplified by the passage above.

⁷ *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 at 14-15 (per Higgins J).

⁸ *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 at 17-18 (per Higgins J).

⁹ *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 at 4 (per Higgins J).

The *Harvester* judgment is almost 100 years old. Perhaps befitting such a pioneering case, the only copy the present author could find to read was on microfilm in an archival library. The pages of the original paper version were ragged and turning to dust. Even part of the film was illegible from where the original page had been taped together – so many had read it over the years...

In a strange kind of way, the physical state of that copy is an allegory for the doctrine written thereupon. The notion of power imbalance has featured prominently in labour law, yet it has also, particularly recently, come under attack or at last had people fraying at its edges. *The purpose of this chapter, then, is to argue that there is a power imbalance between worker and employer and such needs to be redressed.* Obviously, such a stance is important to the overall argument of this thesis. It follows from Chapter One that the no disadvantage test is part of a hybrid system that certainly seeks business flexibility, but not at the expense of worker protection. The test is, then, the means of providing a fair mix between the two. Its operation is both largely informed by the Australian Industrial Relations Commission and unions (or, at least, *collections* of non-unionised employees), and it is the *conduit for the continued participation of those bodies in Australia's labour system, today.*

In advancing the argument that there is a power imbalance, this chapter proceeds to examine and accept the views of Wedderburn,¹⁰ the Webbs;¹¹ Kahn-Freund;¹² and

¹⁰ Lord Wedderburn *The Worker and the Law* (3rd ed, Pelican Books, England, 1986) 1-1026; "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38; and "Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition" (2000) 29 *Industrial Law Journal* 1-42.

Australians – not only Justice Higgins,¹³ but also Stewart,¹⁴ Mitchell¹⁵ and Creighton¹⁶ – to name but a few. The challenge to that view - put most notably by Hayek¹⁷ and also recently by Americans like Schwab¹⁸ and Epstein¹⁹ and the Australian think tank, the HR Nicholls Society²⁰ - is rejected and, again, it is the counter argument of Wedderburn on which particular reliance is placed.²¹ The chapter concludes by noting the views of the more recent scholars such as Hugh Collins²² – which place a lesser emphasis on power imbalance. What is so interesting about Collins' work is that the *possibility* of power imbalance is still acknowledged, likewise the basic subordination of working people is

¹¹ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927; and *The History of Trade Unionism* (Longmans, Green and Co., 1920) 1-784.

¹² Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296.

¹³ *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 (per Higgins J).

¹⁴ Andrew Stewart "Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation (1992) 5 *Australian Journal of Labour Law* 101 – 133.

¹⁵ Richard Mitchell "Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia" (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 113 – 135.

¹⁶ Breen Creighton "Reforming the Contract of Employment" in *Employment Contracts: Their Role in Industrial Relations?* (Fourth Annual Labour Law Conference, University of Sydney, 1996) 16-18.

¹⁷ Friedrich Hayek *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569; and *Law, Legislation and Liberty* (The University of Chicago Press, USA, 1973) (Volumes 1-3).

¹⁸ Stewart Schwab "Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?" (2001) 76 *Indiana Law Journal* 29 – 48. See, also, the text by the same author: *Employment Law Cases and Materials* (Lexis Law Publishing, USA, 2002) 1-1293 at 7-8.

¹⁹ Richard Epstein "In Defense of the Contract at Will" (1984) 51 *University of Chicago Law Review* 947-982.

²⁰ HR Nicholls Society *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986).

²¹ Lord Wedderburn, "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38.

²² Hugh Collins "Labour Law as a Vocation" (1989) 105 *Law Quarterly Review* 468-484.

accepted as a 'given.' What is different is that Collins suggests that organisational structures (for example, hierarchies in workplaces) are the real cause of problems for working people - he, therefore, favours minimum conditions and changes to corporate law as a 'safety net.' That is significant. Most of the major earlier works of Wedderburn placed primary importance on the need for workers to *combine* in order to have a countervailing force against their employers (who usually have superior bargaining power). *The argument advanced in this thesis is at the least sympathetic to that latter view.* As stated above, the no disadvantage test is applied largely by Australia's unique safeguard – the Australian Industrial Relations Commission, often informed on issues by trade unions or *collections* of non-unionised labour. And, on the reckoning of the "Rock Solid Guarantee Speech" it also exists as an *alternative* to individual contracts underpinned by minimum conditions. This chapter concludes, therefore, by noting the shortcomings of legislative minimum conditions and the strength of organisation. It then lays the foundations for the discussion of the crucial and unique safeguard of the Australian Industrial Relations Commission in the following Chapter Three.

The Power Imbalance

The Webbs:

As early as the late 1800s and early 1900s, Sidney and Beatrice Webb conducted a study of trade unionism in Britain.²³ The authors acknowledged the vulnerability of the working class, particularly unskilled labour, when they noted that “free and unfettered Individual Bargaining...(where) each workman makes his own separate contract for each job with his own employer – has been proved, by a whole century of experience, to lead to ‘sweating.’”²⁴ According to the Webbs, whilst employers did *risk* ebbs and flows in profits, working people faced *many more* problems in attaining a fair wage. They may have little skill to use as a bargaining chip; they may have a high level of need even for subsistence items; and they may be inexperienced at bargaining, lacking a knowledge of the sorts of conditions that might be available. Their colourful explanation of the problems inherent in working life is worth quoting at length:²⁵

“...the worst that the capitalist suffers is a fractional decrease of the year’s profit. Meanwhile, he and his foreman, with their wives and families, find their housekeeping quite unaffected; they go on eating and drinking, working and enjoying themselves, whether the bargain

²³ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927; and *The History of Trade Unionism* (Longmans, Green and Co., 1920) 1-784.

²⁴ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927 (Introduction xxi – lvi at xxxv – xxxvi). Similar views are proffered at xl and xli: “The pressing need...(is) a levelling up of the oppressed classes who fall below the ‘Poverty Line’...(T)he unskilled laborers...can never, in our opinion, by mere bargaining, obtain either satisfactory Common Rules or any real enforcement of such illusory standards as they may get set up. We think that experience in this and other countries confirms the economic conclusion that there is no way of raising the present scandalously low Standard of Life of these classes, except by some such legal stiffening as that given by the..law.”

²⁵ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927 at 656 et seq.

with the individual workman has been made or not. Very different is the case with the wage earner. If he refuses the foreman's terms even for a day, he irrevocably loses his whole day's subsistence. If he has absolutely no other resources than his labor, hunger brings him to his knees the very next morning. Even if he has a little hoard, or a couple of rooms full of furniture, he and his family can only exist by the immediate sacrifice of their cherished provision against calamity, or the stripping of their home. Sooner or later he must come to terms, on pain of starvation or the workhouse. And since success in the higgling of the market is determined by the relative eagerness of the parties to come to terms – especially if this eagerness cannot be hid - it is now agreed, even if on this ground alone, that manual laborers as a class are at a disadvantage in bargaining.

“But there is also a marked difference between the parties in that knowledge of the circumstances is requisite for successful higgling. ‘The art of bargaining,’ observed Jevons, ‘mainly consists in the buyer ascertaining the lowest price at which the seller is willing to part with his object, without disclosing, if possible, the highest price which he, the buyer, is willing to give...The power of reading another man's thoughts is of high importance in business.’ Now the essential economic weakness of the isolated workman's position...is necessarily known to the employer and his foreman. The isolated workman, on the other hand, is ignorant of the employer's position. Even in the rare cases in which the absence of a single workman is seriously inconvenient to the capitalist employer, this is unknown to anyone outside his office. What is even more important, the employer, knowing the state of the market for his product, can form a clear opinion of how much it is worth his while to give, rather than go without the labor altogether, or rather than postpone it for a few weeks. But the isolated workman, unaided by any Trade Union official, and unable to communicate even with workmen in other towns, is wholly in the dark as to how much he might ask.”

Intellectual “Soul Mates”: Kahn-Freund; Wedderburn; & some Australian views:

This basic proposition, that workers (especially unskilled workers) are needy and therefore lack sufficient independent ‘clout’ to bargain effectively with employers, has been embraced by later scholars; who have, if anything, argued that imbalance has worsened over the years, as the corporations employing individuals have grown larger than the economies of some countries.

Kahn-Freund:

The classic analysis of the employment contract was undertaken in *Labour and the Law*²⁶ where Kahn-Freund described the power imbalance as “clear and hardly controverted” – an “elementary proposition.”²⁷ There were, he acknowledged, “exceptional cases”, such as “high powered managerial employee(s) with unique experience,...top rank scientist(s), or...highly skilled (craftsmen) whom the employer cannot easily replace” who might be able to pick and choose their terms and conditions of employment and their employers.²⁸ However, typically, the worker has no bargaining power at all. The employer is a *collective entity* in the sense of having an “accumulation of material and human resources.”²⁹ By comparison, the employee is an *individual* who has little, if any, bargaining power and must accept the terms of employment that the *employer* offers. To Kahn-Freund, then, the notion of the *contract* of employment, along with certain consumer contracts, was a sort of ‘legal fiction.’³⁰

“It is the theory of English law that a contract is a freely concluded agreement. The norm postulates an exchange of offer and acceptance. The party who accepts does not express his willingness to be bound by an agreement in the abstract, he gives his legally relevant assent to the precise terms proposed by the offeror. It is an admirable formulation

²⁶ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296. See also Karl Renner: *The Institutions of Private Law and their Social Function* (introduction by Otto Kahn-Freund) (Routledge & Kegan Limited, London, 1949).

²⁷ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296 at 6.

²⁸ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296 at 6.

²⁹ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296 at 6.

³⁰ Karl Renner *The Institutions of Private Law and their Social Function* (Introduction by Otto Kahn-Freund) (Routledge & Kegan Limited, London, 1949) at 39. In fact, in *Labour and the Law*, Kahn-Freund described the contract of employment as the “indispensable figment of the legal mind” - Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296 at 6.

for a process of bargaining between two equal partners, engaged upon an exchange in a market. Precisely this legal institution, however, has been put to the service of monopoly. The monopolist and his client are parties to a 'contract.' A passenger who takes a railway ticket 'accepts' the terms 'offered' by the company. A householder 'contracts' with the local authority or public utility company which supplies him with gas, water, or electricity. The law cannot admit that these acts are acts of submission, that these relations are power relations, it must 'construe' them as agreements, it must press into the form of a contract what has no contractual substance whatsoever. Conditions by which a monopolist excludes or limits his legal liabilities are 'deemed' to have been freely accepted, if 'reasonable notice' was given to the other party, e.g. by the magic formula 'for conditions see back' on a ticket. The customer has 'assented' even if he is blind or illiterate."

Ultimately, then, the contract of employment was merely a *submission by the employee to the predetermined terms and conditions which the employer chose*.³¹

If one accepted that workers required collectivism in order to have a countervailing force for their employer's dominance,³² then, Kahn-Freund continued, the common law created further problems. Such assumed the equality of *individuals*; it dealt with *individuals, not collectives*; and it contained no place for broader concepts such as 'public interest.'³³ Further, contract law was a natural complement for property law. As the days of artisans owning their *own tools and workplaces* had long since past, and the days of ownership of *capital* were entrenched (that is, tools and work places were owned

³¹ Karl Renner *The Institutions of Private Law and their Social Function* (Introduction by Otto Kahn-Freund (Routledge & Kegan Limited, London, 1949) at 28 where Kahn-Freund's oft-cited description of the contract of employment may be found: "...this is a 'contract' without contractual content. It is a command under the guise of an agreement."

³² Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296 at 6. It is important to note that Kahn-Freund did not regard countervailing labour power as synonymous with union power – (at 9).

³³ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296 at 1-2. Kahn-Freund was basically suggesting that labour law was "not the best place to extol the virtues of the common law." He did, however, acknowledge that the faith in individualism and equality was a virtue as well as a vice.

by someone other than the worker who used them), the law further strengthened the position of *business*. That trend was underlined by the growth of *holding* companies (as opposed to *operating* companies) and limited liability for entrepreneurs.³⁴ Finally, Kahn-Freund noted that problems arose for the individual worker even within the collective sphere – for example, one might ask how to protect union members from abuses of power by union officials.³⁵

Lord Wedderburn:

In his classic exposition, *The Worker and The Law*, Wedderburn accepts as luminous the insights of Kahn-Freund – the employer is already a collective force given its aggregation of resources; the individual worker is vulnerable, having only his labour to sell.³⁶ According to Wedderburn, courts interpreted the contract of employment so as to preserve the employer's power to command.³⁷ The common law revolved around private property, and the combination of workers was an idea inimical to that property and to contract law, generally.³⁸ He described the problem in Biblical terms:

³⁴ Karl Renner *The Institutions of Private Law and their Social Function* (Introduction by Otto Kahn-Freund (Routledge & Kegan Limited, London, 1949) at 27-28 et seq; 39 et seq.

³⁵ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296 at 9.

³⁶ Lord Wedderburn, *The Worker and the Law* (3rd ed, Pelican Books; England, 1986) 1-1026 at, for example, 5-9 et seq; 26; 106 et seq. His approval and admiration for Kahn-Freund is a theme that runs through his work, see also, for example: "Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition" (2000) 29 *Industrial Law Journal* 1-42 at 3 et seq, 28-29 et seq; and "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38 at 3.

³⁷ Lord Wedderburn, *The Worker and the Law* (3rd ed, Pelican Books, England, 1986) 1-1026 at 5 et seq.

³⁸ Lord Wedderburn, *The Worker and the Law* (3rd ed, Pelican Books, England, 1986) 1-1026 at 19.

“English judges combine with this instinctive *rapprochement* with the individual, including the individual worker. They understand his claim to protect himself *against* his union, but much less his need to protect himself *through* his union. In labour law judgments the unitary and the individualistic frames of reference often blend together so that, while the union ‘Goliath’ is perceived as threatening central interests of society, the protection of the member ‘David’ assumes the mantle of a shield not just for the members but also for society as a whole. Judges display a dislike for power relationships at the workplace. ..But social and economic power relationships are at the base of labour law. It is ‘sheer utopia’, Kahn-Freund said, to see employment as based on anything other than conflicting interests.”³⁹

There were, Wedderburn argued, numerous methods by which employees could be given rights. Parliament could legislate for such, and had done so in his native England through unfair dismissal laws. But, he hastened to add, such laws merely provided a ‘*floor of rights*’ and significantly such did *not* actually form a part of the contract of employment, itself.⁴⁰ Such contract was, then, not of tremendous advantage to the worker and, as the size of employing companies grew and as fragmented forms of employment (such as part-time employment) grew, the gulf between worker and employer became a chasm.⁴¹ To Wedderburn, then, all questions for labour law are “left stranded” if one basic element is forgotten:⁴²

³⁹ Lord Wedderburn, *The Worker and the Law* (3rd ed, Pelican Books, England, 1986) 1-1026 at 25-26.

⁴⁰ Lord Wedderburn, *The Worker and the Law* (3rd ed, Pelican Books, England, 1986) 1-1026 at 5-6. As to the many methods of dealing with power imbalance, Lord Wedderburn offers diagrams at 14 and 15.

⁴¹ Lord Wedderburn, *The Worker and the Law* (3rd ed, Pelican Books, England, 1986) 1-1026 at 10 et seq. See also: Lord Wedderburn “Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition” (2000) 29 *Industrial Law Journal* 1 – 43 at 28, 29. There, Lord Wedderburn applauds the Webbs for their ‘embryonic thought’ that the growth of corporate entities placed the position of workers at greater risk. Wedderburn also cites Kahn-Freund as noting the advent of the transnational company as something that threatened the very institution of labour law, itself.

⁴² Lord Wedderburn “Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition” (2000) 29 *Industrial Law Journal* 1 – 43, particularly 25.

“It is in *power relationships*, which are rooted in social structure, that we may find a key to understanding...the labour laws of societies which have shared the experience of capitalist industrialisation...And *on the labour side, power is collective power.*”⁴³

Wedderburn then concludes:⁴⁴

“It is in the rejection of this central observation that some theorists minimise collective protection by combination, confining legislation to individual levels, thereby confining the worker to a market dominated by the employer’s conditions of ‘contract’ and ‘employability’.”⁴⁵

The Australians:

This chapter opened with the words of Justice HB Higgins in his landmark *Harvester* judgment – with its acknowledgement of the lack of bargaining power of individual workers and their need to be assisted in gaining the necessities of life. The uniquely Australian industrial tribunal Higgins led, which enabled him to dispense justice, is stridently defended and championed in this doctoral essay. What is interesting

⁴³ Lord Wedderburn “Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition” (2000) 29 *Industrial Law Journal* 1 – 43. In this connection, Wedderburn relies on, respectively, Bob Hepple *The Making of Labour Law in Europe* (1986) at 5; and Otto Kahn-Freund *Labour and the Law* (3rd ed, Stevens and Maxwell, London, 1983) at 17. [Emphasis added; Quotation marks omitted].

⁴⁴ Lord Wedderburn “Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition” (2000) 29 *Industrial Law Journal* 1 – 43 at 26.

⁴⁵ It is interesting to note the review of Lord Wedderburn’s third edition of *The Worker and the Law* – in Keith Ewing “The Death of Labour Law?” (1988) 8 *Oxford Journal of Legal Studies* 293-300, where (at 293) Ewing notes “the rigour with which the judges are criticized, even where morsels are thrown from their table...” Indeed, in recent years, there have been even more ‘morsels’ (in the form of implied contractual rights) ‘thrown’ to employees from the bench, such as the implied term of trust and confidence in *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* [1998] *Appeal Cases* 20-53 (per Lord Steyn) at 46. But even that development was described by the brilliant Scottish academic (on whose writings the court relied), Dr Douglas Brodie, as the basis for further legal development: Douglas Brodie “A Fair Deal at Work” (1999) 19 *Oxford Journal of Legal Studies* 83-98 at 98. Further, Australian scholars have argued that Australian labour law is somewhat exceptional, that is, it is not as generous in its protection of workers as it might be: David Chin “Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism” (1997) 10 *Australian Journal of Labour Law* 257-279 at, for example, 258-259.

for present purposes is to note that the judge continued to write throughout his career about the struggles of workers and the need to assist them gain a basic standard of living as a means ensuring peace between employees and their employers. In his seminal article in the *Harvard Law Review*, "A New Province for Law and Order,"⁴⁶ the judge spoke endearingly of the plight of the working class:

"Yet, though the functions of the Court are definite and limited, there is opened up for idealists a very wide horizon, with, perhaps, something of the glow of a sunrise. Men accept the doom, the blessing of work: they do not dispute the necessity of the struggle with Nature for existence. They are willing enough to work, but even good work does not necessarily insure a proper human subsistence, and when they protest against this condition of things they are told that their aims are too 'materialistic.' Give them relief from their materialistic anxiety; give them reasonable certainty that their essential material needs will be met by honest work, and you release infinite stores of human energy for higher efforts, for nobler ideals, when "*Body gets its sop, and holds its noise, and leaves soul free a little.*"

If the acceptance of power imbalance was implicit in Higgin's lyrical expression, then it has been expressly embraced by many latter day Australian scholars. The relationship of the common law to the *promotion of managerial prerogative* was discussed by Andrew Stewart in his article: *Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation.*⁴⁷ Essentially, the contract of employment was said to promote managerial superiority in three ways:

"The first stems from the now entrenched view of the employment relationship as resting on contractual agreement. This fiction (as it is in all but a few cases) has the effect of authorising the employer to take advantage of what is usually a greatly superior bargaining position to impose its own terms and conditions. Particularly important in this respect is the possibility of securing the worker's commitment, either expressly in the employment contract or through what the courts take to

⁴⁶ Justice Henry Higgins *A New Province for Law and Order* (Government Printer, Melbourne, 1915) 1-24 at 24.

⁴⁷ Andrew Stewart "Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation" (1992) 5 *Australian Journal of Labour Law* 101 – 133.

be tacit agreement, to the employer's 'work rules' or administrative handbook...

Secondly, to the extent that the obligations governing an employment relationship are not exhaustively set out in the terms expressly agreed between the parties, the common law has been more than willing to step in and provide 'default' rules. Most of these do not merely serve to legitimate managerial authority, but also confer considerable latitude on employers in formulating and enforcing mechanisms for directing work performance...

...[The] third prop provided by the common law for managerial prerogative...is the power given to employers to determine the legal status of those whom they hire to perform work: in particular, whether those concerned are to be treated as employees or independent contractors. This aspect of the common law has not merely survived the impact of regulation by tribunals and legislatures, it has actually been reinforced...⁴⁸

In a similar vein, McCallum has intimated there may be a power imbalance even for well qualified employees;⁴⁹ and, in one speech, Creighton referred to power imbalance as almost representing a *fact of life*.⁵⁰

The gist of these scholarly writings was vividly portrayed by the more colloquial approach of the trade unionist, Marles.⁵¹ Considering the position of a star footballer, Marles acknowledged that such a player would expect special praise and rewards. But the

⁴⁸ Andrew Stewart "Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation" (1992) 5 *Australian Journal of Labour Law* 101 – 133 at 105-106. Note that the protections of labour law generally only apply to those properly categorised as "employees" – *Workplace Relations Act* 1996 at s.5. As to the use of workbooks to add conditions of employment and the effect of oral agreements on later written contracts see *Concut Pty Ltd v Worrell* (2000) 176 *Australian Law Reports* 693.

⁴⁹ Ron McCallum "Australian Workplaces, the Rise of Contractualism and Industrial Citizenship" in *Employment Contracts: Their Role in Industrial Relations?* (Fourth Annual Labour Law Conference, University of Sydney, 1996) 1-3 at 2.

⁵⁰ Breen Creighton "Reforming the Contract of Employment" in *Employment Contracts: Their Role in Industrial Relations?* (Fourth Annual Labour Law Conference, University of Sydney, 1996) 16-18.

⁵¹ Richard Marles, "Predictions and Premonitions – Individual Contracts...A View to their Future" speech delivered to the Queensland Bar Association (Industrial Law Section) Industrial Law Conference 2001 (22 April 2001, Gold Coast, Australia) 1-12. Copy supplied by Mr Marles and on file with author.

position of that footballer, he argues, is different from that of a miner, for example. A miner may be easily replaceable – with as many as 10 or 20 other people willing to take their job. A miner’s job performance may be able to be gauged individually, but surely to a much lesser extent than that of the star athlete. Further, the miner is an individual (worth maybe \$50 000 per year) bargaining with a transnational company that has a revenue of \$ 21 million per year. In those circumstances, the miner has little bargaining power. Certainly, individuals deal every day in contracts with large companies – mortgages are made with large banks and may take 40% of salary. But the employment contract alone takes 100% of our salary.

The Contrary Perspective

This thesis robustly accepts the notion of there being a power imbalance between worker and employer. It goes on to champion the role of the Industrial Commission with participation in industrial relations by representative unions as the means of countering that imbalance. Fortifying the no disadvantage test is the means through which this is to be done.

But to advance that view, it is important to acknowledge that the opposite view (at least in terms of power imbalance and consequent intervention) was put forward by Friedrich Hayek in his many works from the 1940s-1970s, especially: *The Road to Serfdom*;⁵² *The Constitution of Liberty*;⁵³ and *Law, Legislation and Liberty*.⁵⁴ The theme

⁵² Friedrich Hayek *The Road to Serfdom* (Routledge and Kegan, London, 1944).

woven through those works was one of individualism; freedom; private ownership; and the rule of law (as opposed to the pursuit of social goals by Government). Trade unions were viewed as coercive and large governments as arbitrary (and therefore undesirable). In essence, the employment contract was no different from any other.⁵⁵

According to Hayek, the growth of an advanced society is only possible through individual freedom. The individual must be free to use their own talents and build their own property. Through individualism alone, can society change and adapt (as the effluxion of time requires it to do).⁵⁶ There may, Hayek acknowledged, be some who are disadvantaged in such a society; for example, they may be required to take a pay cut or change a job they do not like.⁵⁷ But, the answer to their suffering is *not* for the government to intervene on their behalf through, for example, prices and incomes policies and the redistribution of wealth. Such intervention means that the Government is imposing its own arbitrary, changeable will on society; it is choosing between particular, competing interest groups of the day (instead of establishing general rules, as should be

⁵³ Friedrich Hayek *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569.

⁵⁴ Friedrich Hayek *Law, Legislation and Liberty* (The University of Chicago Press, USA, 1973) (Volumes 1-3).

⁵⁵ Friedrich Hayek *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569 at 121. This point was particularly noted by Lord Wedderburn in "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1- 38 at 9. See, generally, Wedderburn's critique of Hayek in that essay (at 7 et seq). Lord Wedderburn's essay is considered in detail later in this chapter.

⁵⁶ Friedrich Hayek *Law, Legislation and Liberty - Volume Three* (The University of Chicago Press, USA, 1973) at 151-152; 93-96.

⁵⁷ Friedrich Hayek *Law, Legislation and Liberty - Volume Three* (The University of Chicago Press, USA, 1973) at 93-96.

its duty).⁵⁸ Such intervention is, therefore, “palliative” – it provides a short term solution, but disrupts market forces, which, alone, are in society’s long term interests.⁵⁹ Likewise, trade unions, which pursue industrial ends, are coercive and may push labour costs so high as to cost jobs.⁶⁰ To Hayek, the “organizability of an interest has no relation to its importance.”⁶¹ The purpose of a trade union, then, should be little more than a friendly society – assisting employees in choosing between jobs offered on the *employer’s* terms.⁶² Employers are, after all, actually the supporters of working people – without their growth and wealth (that purchases the means of production), there would be no jobs at all.⁶³ There is, then, a choice between individualism and collectivism. The two

⁵⁸ In Friedrich Hayek *Law, Legislation and Liberty – Volume One* (The University of Chicago Press, USA, 1973) at 119-121, Hayek supports judge-made law of general application and the doctrine of precedent. He states: “...the outcome of [the judge’s] efforts will be a characteristic instance of [the] ‘products of human action but not of human design’ in which the experience gained by the experimentation of generations embodies more knowledge than was possessed by anyone.”

⁵⁹ Friedrich Hayek *Law, Legislation and Liberty - Volume Three* (The University of Chicago Press, USA, 1973) at 93-96 ; see also *The Road to Serfdom* (Routledge and Kegan, London, 1944) at 24-25 (Chapter III – “Individualism and Collectivism”).

⁶⁰ Friedrich Hayek *Law, Legislation and Liberty- Volume Three* (The University of Chicago Press, USA, 1973) at 93 et seq; and *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569 at 119-121; 124; 275-277; 300-303.

⁶¹ Friedrich Hayek *Law, Legislation and Liberty- Volume Three* (The University of Chicago Press, USA, 1973) at 96.

⁶² Friedrich Hayek *Law, Legislation and Liberty – Volume Three* (The University of Chicago Press, USA, 1973) at 95-96; and *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569 at 275-6

⁶³ Friedrich Hayek *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569 at 118 et seq, 124.

principles are “irreconcilable” and only individualism works.⁶⁴ Hayek’s views may be summed up in this passage from *The Constitution of Liberty*:⁶⁵

“The problem is that many exercises of freedom are of too little direct interest to the employed and that it is often not easy for them to see that their freedom depends on others’ being able to make decisions which are not immediately relevant to their whole manner of life...[T]hey hold views of deserts and appropriate remuneration entirely different from his. Freedom is thus seriously threatened today by the tendency of the employed majority to impose upon the rest their standards and views of life. It may indeed prove to be the most difficult task of all to persuade the employed masses that in the general interests of their society, and therefore in their own long-term interest, they should preserve such conditions as to enable a few to reach positions which to them appear unattainable or not worth the effort or risk...

Freedom does not mean that we can have everything as we want it. In choosing a course in life we always must choose between complexes of advantages and disadvantages, and, once our choice is made, we must be prepared to accept certain disadvantages for the sake of the net benefit. Whoever desires the regular income for which he sells his labour must devote his working hours to the immediate tasks which are determined for him by others. To do the bidding of others is for the employed the condition of achieving his purpose. Yet, though he might find this at times highly irksome, in normal conditions, he is not unfree in the sense of being coerced. True, the risk of sacrifice involved in giving up his job may often be so great as to make him continue in it, even though he intensely dislikes it. But this may be true of almost any other occupation to which a man has committed himself – certainly of many independent positions.

The essential fact is that in a competitive society the employed is not at the mercy of a particular employer, except in periods of excessive unemployment.” [emphasis added.]⁶⁶

⁶⁴ Friedrich Hayek *Law, Legislation and Liberty – Volume Three* (The University of Chicago Press, USA, 1973) at 151.

⁶⁵ Friedrich Hayek *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569 at 119-121.

⁶⁶ As noted above, Hayek believed that the free market provided the only escape from unemployment.

Wedderburn's critique of Hayek:

A scathingly brilliant critique of the Hayekite approach may be found in Wedderburn's seminal work, "Freedom of Association and Philosophies of Labour Law."⁶⁷ In that critique, Wedderburn protests that Hayek's work "is emphatically not based on arguments of empirical inquiry to set against the traditional analysis or to determine the way to 'good industrial relations.' [Hayek's] stance is a total and at times bitter opposition to that analysis as a whole, couched in terms of truth and error."⁶⁸ Further, Wedderburn characterises Hayek's work as lacking the metaphoric 'shades of grey.' "It is not a question of balance", objects Wedderburn, "of organisations being too strong or too weak, or of the vulnerability of the individual employees. Such group organisation is in itself a threat to law and society."⁶⁹

After analysing the main tenets of Hayek's theory, Wedderburn highlights its substantive flaws. Hayek's work is based on a faith in corporations playing a proper role in a competitive market. Wedderburn emphasises that such view is "antique in today's world of pyramid corporate groups, oligopoly and transnational capital."⁷⁰ Whilst such

⁶⁷ Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38 at 3.

⁶⁸ Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38 at 9.

⁶⁹ Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38 at 9. It is interesting to note that Kahn-Freund in *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) specifically notes that regulation of power relationships is a matter of degree (at 7).

⁷⁰ Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38 at 12.

comment raises the obvious spectre of white collar crime and corporate mismanagement and dishonesty, it also highlights the growing power of corporate entities compared to their employees as corporations become *transnational* entities, not simply local concerns.⁷¹ Wedderburn also regards Hayek's faith in freedom of contract (as opposed to state regulation) as "[portraying] an astonishingly naïf belief in the neutrality of the principles of common law."⁷² As Wedderburn notes, the crux of the common law is the protection of property and many common law judges themselves have regarded trade unions as 'sticking in their gorge.'⁷³

⁷¹ In "Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition" (2000) 29 *Industrial Law Journal* 1 – 43: Lord Wedderburn notes that some corporations have become so global and large that even national governments resemble "parish councils" in comparison. He also notes that there seems to be no corresponding globalisation of labor (at 29 et seq).

⁷² Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38 at 11.

⁷³ Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38 at 11-12, 28. Lord Wedderburn's distrust of common law judges on labour law issues has been noted earlier in this chapter. It is also interesting to note Lord Wedderburn's comments in "Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition" (2000) 29 *Industrial Law Journal* 1 – 43 when speaking about early judicial decisions which curbed the rights of trade unions and regarded such organisations as a restraint on trade (at 41): "...For the keenest common law mind the core was not difficult to grasp. In 1923 Lord Justice Scrutton, that honourable, fox-hunting, conservative, intellectually penetrating man, master of charter-parties but pursued by Furies loosed in wartime slaughter, declared: 'It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your class and one not of your class.' He did not speak about personal 'bias'; such dross never touched him; but he recognised the chasm of social division, uncertain of even his ability to bridge it. If today some judges are more aware of social forces behind and below the law, many do not escape the habitual, instinctive support for property and the power relations of the market."

Hayekite Philosophy – and the present writer’s response:

While Lord Wedderburn gave a sparkling critique of Hayek and the problems confronting workers who are faced with burgeoning global capital, the present writer concludes the rebuttal of the Hayekite approach with her own appraisal. The most interesting way in which to undertake that task is by examining those whom Lord Wedderburn calls the “lesser acolytes.”⁷⁴ In other words, the disciples of the free market, laissez-faire view. Although not specifically named by Wedderburn, two such scholars might be Americans, Stewart Schwab and Richard Epstein.

In his article, “In Defense of the Contract at Will,”⁷⁵ Epstein rejects the notion of power imbalance by declaring his preference for the ‘contract at will,’ that is the contract of employment that can be terminated for ‘good reason, bad reason or no reason at all.’⁷⁶ Viewing the contract of employment as something that should embrace individual liberty, Epstein argues:⁷⁷

“With employment contracts we are not dealing with the widow who has sold her inheritance for a song to a man with a thin mustache. Instead *we are dealing with the routine stuff of ordinary life*; people who are competent enough to marry, vote, and pray are not unable to protect themselves in their day-to-day business transactions.” (Emphasis added).

⁷⁴ Lord Wedderburn “Freedom of Association and Philosophies of Labour Law” (1989) 18 *Industrial Law Journal* 1-38 at 11.

⁷⁵ Richard Epstein “In Defense of the Contract at Will” (1984) 51 *University of Chicago Law Review* 947-982.

⁷⁶ Richard Epstein “In Defense of the Contract at Will” (1984) 51 *University of Chicago Law Review* 947-982 at 966.

⁷⁷ Richard Epstein “In Defense of the Contract at Will” (1984) 51 *University of Chicago Law Review* 947-982 at 954.

Likewise, Schwab rejects the power imbalance theory in both his article, “Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?”⁷⁸ and, more colourfully in his text, “Employment Law: Cases and Materials,” where he describes power imbalance as something “intuitively appealing to students” and claims:⁷⁹

“[From the law and economics perspective] workers...are to be in a position analogous to that of consumers in the product market. We would not ordinarily say that even a lone consumer has no power in dealing with a large chain, because we realize that this individual relationship is located amidst a host of supermarkets or other grocery stores competing for patronage of a large number of customers. Thus if a particular shopper does not like the products, services, or prices in one store, he can go elsewhere...”

In the view of the present writer, these statements are as stunning as they are repugnant. They show no acknowledgement at all of the basic truth (discussed earlier) that for a worker, their job is the *bulk of their income* and the *main means by which they can afford to go to the supermarket* – or plan a married life, for instance. There is no acknowledgement that not only recession, but also the fact a person may have family obligations or be in a highly specialised field might preclude them from changing jobs as easily as they would their supermarket. In the view of the present writer, the Hayekite philosophy is to be found wanting. Not only due to the increasing size of corporations, but also to the fact workers may have a harder time satisfying their basic needs than their employers, the present writer accepts the view of the contract of employment as being based on a power imbalance and therefore argues that intervention (of the type offered through the no disadvantage test) is necessary. It is a fair balance between flexibility and fairness – as is argued throughout this work.

⁷⁸ Stewart Schwab “Predicting the Future of Employment Law: Reflecting or Refracting Market Forces” (2001) 76 *Indiana Law Journal* 29-48 at especially 46 et seq.

⁷⁹ Stewart Schwab *Employment Law text and Materials* (Lexis law Publishing USA 1998) at 7.

Another Form of Critique: Collins – and the third way?

Hayek represents an extreme argument against both power imbalance and any extensive government intervention. But, there is a more subtle school of thought that acknowledges the existence of a power imbalance to *some* extent and in *some* instances, but does not accept that there is a “permanent state of disequilibrium.”⁸⁰ On that basis, collective bargaining is not of central importance and further means of alleviating problems for workers, such as minimum conditions, take on significance. Perhaps the best discussion of this approach is that of Hugh Collins in his article, “Labour Law as a Vocation.”⁸¹

In this 1989 work, Collins argues that labour law scholarship is at a crossroads and the wealth of material written on the topic demonstrates both that problem as well as the pathways that might be followed.⁸² For Collins, the traditional route is that of Wedderburn and Kahn-Freund. Its hallmark and its strength is its view of labour law as a “vocation” – as a means of addressing the subordination of workers.⁸³ Importantly, and as reflected in the discussion of those authors at the start of this chapter, the cause of that subordination is said to lie in the power imbalance between worker and employer, and the means of redressing that imbalance is to be found in the collective power of working

⁸⁰ Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484 at 478.

⁸¹ Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484.

⁸² Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484 at 483 et seq.

⁸³ Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484 at 469 et seq.

people.⁸⁴ The latter day alternative view of labour law was exemplified by the more economically driven tact taken by Davies and Freedland in their text, *Labour Law: Text and Materials*.⁸⁵ As Collins neatly summarises that view, labour law was not so much a means of addressing social problems as it was a means of dealing with economic problems – it was a means of regulating the labour market and inflation.

When looking for the internal coherence of the two approaches, Collins sees problems and advantages in each. Freedland's approach allows for a study of law and its effects, but lacks the basic quest or vocation to tie it together.⁸⁶ The traditional route has a strong cohering sense of purpose and vocation, but Collins argues that it inadequately addresses the causes of the subordination it seeks to redress.⁸⁷

It is in this latter connection that Collins' critique of the power imbalance theory becomes crucial and where he advocates worker protections more in the form of statutory minimum conditions.⁸⁸ Collins accepts that there are some instances where workers will be at a tremendous disadvantage to their employers and he hastens to add that "we should not lose sight of Kahn-Freund's analysis altogether."⁸⁹ However, for Collins, lack of

⁸⁴ Hugh Collins "Labour Law as a Vocation" (1989) 105 *Law Quarterly Review* 468-484 at 477 et seq.

⁸⁵ Paul Davies and Mark Freedland *Labour Law: Text and Materials* (2nd ed, Weidenfeld & Nicolson, London, 1984) 1-964 as cited in: Hugh Collins "Labour Law as a Vocation" (1989) 105 *Law Quarterly Review* 468-484 at, for example, 471 et seq.

⁸⁶ Hugh Collins "Labour Law as a Vocation" (1989) 105 *Law Quarterly Review* 468-484 at 481-483.

⁸⁷ Hugh Collins "Labour Law as a Vocation" (1989) 105 *Law Quarterly Review* 468-484 at 484.

⁸⁸ Hugh Collins "Labour Law as a Vocation" (1989) 105 *Law Quarterly Review* 468-484 at 478-481.

⁸⁹ Hugh Collins "Labour Law as a Vocation" (1989) 105 *Law Quarterly Review* 468-484 at 481.

bargaining power stems from problems of supply and demand. While there might be some times when employers have an advantage in that sense:

“...(This) source of inequality of bargaining power should not be exaggerated; most employers are subject to the discipline of the capital market, which requires a return on investment, and employees may find jobs elsewhere at the desired rate of pay. Although we cannot doubt that at times the labour market does exhibit strong features of inequality of bargaining power, these features are contingent upon the particular circumstances of the time and the parties involved. This provides an unsatisfactory basis for a more general claim that individual workers always suffer from inequality of bargaining power, which in turn is the source of their subordination.

“It remains true, of course, that workers can improve their bargaining position by controlling the supply of labour through union membership agreements and collective industrial action. But in the absence of an ability to substantiate the claim that workers necessarily enjoy weaker bargaining power, the effectiveness of collective bargaining to alter bargaining power can be used by governments and employers to support precisely the opposite claim to that intended by Kahn-Freund: that unions upset the pre-existing equality of bargaining power between individual workers and their employers and throw the labour market into disequilibrium, as evidenced by high levels of unemployment. Explanations of the source of subordination of employees, which rely upon the notion of inequality of bargaining power, provide shaky foundations for a conception of Labour Law which sees its vocation in the relief of the subordination of labour.”⁹⁰

According to Collins, there are two sources of subordination that scholars, such as Kahn-Freund, fail to consider adequately. In the first place, the “institution of wage labour” is viewed as oppressive.⁹¹ In return for a wage, the worker offers up his services in accordance with the directions of his employer. In the second place, most businesses are conducted throughout the bureaucracy of a firm. Within that firm or bureaucracy, there is a “hierarchy of employees from the chief executive down to the shop floor worker. On this analysis, even those workers who enjoy considerable bargaining power in the open market because of unique skills and talents become subordinated once they enter

⁹⁰ Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484 at 479.

⁹¹ Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484 at 480.

the ranking order of the institution governing production.”⁹² From this analysis of the problem of subordination, Collins suggests that a fertile field of labour study is the introduction of minimum labour standards; notions of industrial democracy; and corporate regulation (rather than a simple reliance on collective bargaining). To Collins, the emphasis is on subordination, not power imbalance and collectives.⁹³

In a somewhat similar vein, the scholars of the so-called “third way” (said to drive the “new labour” movement), such as Anthony Giddens, also place power imbalance to the periphery of the debate and put greater emphasis on notions of partnership at work and empowerment of workers.⁹⁴

⁹² Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484 at 480.

⁹³ Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484 at 481.

⁹⁴ See for example, Anthony Giddens *The Third Way* (Polity Press, London, 1998) 1-166; and *The Third Way and its Critics* (Polity Press, 2000, UK) 1-189. It is interesting to note that (at 12 of that latter work) Giddens notes that critics of the movement complain that it “offers no strategy for securing a more equitable distribution of income or wealth” and “no reference is made to power.” See also: Tony Blair *New Britain: My Vision of a Young Country* (Fourth Estate, London, 1996) 1-338. Blair discusses partnerships at, for example, 31-32:

“Look around the world today: its chief characteristic is change. The force of change outside our country is driving the need for change within it.

The task of national renewal is to provide opportunity and security in this world of change. That can only be done if we act together as a society, to equip our people and our industry for change, allowing them to prosper through change.

This means taking our historic principle of solidarity, of community, but applying it anew and afresh to the world today. It can’t be done by a return to the past or by staying with the failed policies of the present. We need neither the politics of the old Left nor the new Right but a new left-of-centre agenda for the future – one that breaks new ground, that does not put one set of dogmas in place of another, that offers the genuine hope of a new politics to take us into a new millennium.

Socialism is not some fixed economic theory defined for one time but a set of values and principles definable for all time. This is how we should apply those principles...on the economy, we should replace the choice between the crude free market and the command economy with a new partnership between government and industry, workers and

Hugh Collins' 1989 article is, no doubt, groundbreaking – and its perception of labour law as a “vocation” has inspired even one Australian academic (who is an ardent supporter of the role of unions) to adopt the terminology to describe her own journey through life.⁹⁵ Likewise, the challenge to Wedderburn and Kahn-Freund is bold and thought-provoking. But, in the view of the present writer, there is one passage of Collins' work that is extremely important to this chapter and the advancement of the argument in this thesis. Collins maintains, for example, “(that the) underlying structure of the employment relation, in which workers submit themselves to the direction of others, marks it out as a unique contractual relation, for it establishes a degree of personal subordination only equaled by our ancient marriage laws.”⁹⁶ While Collins uses this example to argue that it is structural problems and not bargaining power (and supply and demand) that cause the subordination of workers, what is crucial is his acceptance of the problems facing working people. Collins is not diametrically opposed to the writings of Wedderburn and Otto Kahn-Freund, rather, the real point of differentiation of his work, so far as this thesis is concerned, is the method he prescribes to redress the problem.

managers – not to abolish the market, but to make it dynamic and work in the public interest, so that it provides opportunities for all.”

Elsewhere, Blair discusses the importance of being able to belong to a trade union as well as the need to have defined minimum conditions of work (at 53-54.) See also Tonia Novitz and Paul Skidmore *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights* (Hart Publishing, Oxford, 2001) (“Introduction”) at 6-7.

⁹⁵ Compare: Phillipa Weeks *Trade Union Security Law – A Study of Preference and Compulsory Unionism* (The Federation Press; Australia, 1996) 1-282, although in this instance refer: “Preface” at xxii.

Conclusion:

This thesis argues in favour of the no disadvantage test as the means of balancing fairness to employees and flexibility for employers in the settlement of terms of employment. That test both invites and, to a large extent, relies upon the jurisdiction of the uniquely Australian Commission system (analysed in the next chapter) as well as the arguments of trade unions and (in the case of the non-union bargaining stream) *groups* of employees before that commission. The no disadvantage test is an *alternative* to individual contracts underpinned by statutory minimum conditions and allows the commission and unions to have an input into the *actual* terms of employment rather than just the basic minimum conditions. In the view of the present writer, the real ‘failings’ of statutory minimum conditions are:

- the pressure they place on employees to know their own rights (irrespective of the education of those employees, the complexity of the task of finding out rights, and knowing the difficulties that might present themselves in any job);
- the fact that statutory minimum conditions can be the bare minimum (depending on the whim of the Government of the day);
- the fact that, in the actual bargaining process, there are many different levels that can exist above the basic floor of rights. How far one’s conditions are above this floor *depends precisely on workers’ capacity to fend for themselves – that is, their bargaining power.*

⁹⁶ Hugh Collins “Labour Law as a Vocation” (1989) 105 *Law Quarterly Review* 468-484 at 480.

- Finally, there is the question of who can advise workers on a multiplicity of issues throughout the life of the working relationship, particularly those matters that go to the problems of the *particular worker* at the *particular workplace*.⁹⁷

These problems *and the importance they place on retaining a role for further bodies like the Commission and representative unions to protect the vulnerable* have been considered by, for example, North QC (as he then was);⁹⁸ and Bennett;⁹⁹ and it was particularly well-encapsulated by Weeks:

“Workers’ interests are pursued both collectively and individually and, while it is evident that unions have been losing the allegiance of workers to the point where they recognise the need to become more responsive to their actual and potential members, collective strategies remain indispensable. *Bennett’s warning that the allocation of rights to individuals against unions leaves employers’ ‘unacknowledged and overwhelming’ rights and powers ‘untouched while stripping unions of rights and impeding the individual employee’s ability to engage in collective action’ ought to be heeded.* (Emphasis added – footnote removed from original text)”¹⁰⁰

One of the earlier studies considered in this chapter was the research of Beatrice and Sidney Webb into power imbalance. An appropriate place to close this chapter and commence the analysis of the early mechanism of the industrial commission (in the following Chapter Three) is to consider the Webbs’ further research into the types of measures that might assist working people. Writing at a time when court decisions had

⁹⁷ There is further discussion of minimum conditions in chapter eight of this thesis.

⁹⁸ AM North QC “Industrial Action – the need for change in the law” [1991] *Law Institute Journal* 608-610.

⁹⁹ Laura Bennett *Making Labour Law in Australia – Industrial Relations, Politics and Law* (Law Book Co, Australia, 1994) 1- 253 at 228.

¹⁰⁰ Phillipa Weeks *Trade Union Security Law – A Study of Preference and Compulsory Unionism* (The Federation Press, Australia, 1996) 1-282 at 263.

severely hamstrung the activities of trade unions and aware of the problems of individual workmen who were geographically isolated, the Webbs saw the worth in a *form of* legislative enactment. Referring to what they colourfully described as the “remarkable...[legislative experiment] in the Britains beyond the sea” (namely the wage boards and arbitration commissions of Australia and New Zealand),¹⁰¹ the Webbs expressed their support for some type of arbitration. As they suggested, such was:¹⁰²

“...a particular form of social machinery by which the conditions of employment can be authoritatively settled, and strikes prevented, whether individual employers or individual workers like it or not. The interesting differences between the systems of New Zealand and Victoria...*show how elastic and how closely applicable to the details of each trade and town the once rigid law may be.*” [emphasis added]

The Australian Industrial Relations Commission is considered in the next chapter and viewed throughout this work as the most crucial protection for workers. As stated, it retains its role in the settlement of terms of employment largely through the no disadvantage test and *opens a channel to the voice of trade unions and other collectives.*

¹⁰¹ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927 (Introduction xxi – lvi at xxii).

¹⁰² Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927 (Introduction xxi – lvi at li. Similar comments are made at xxxvi).

III. CHAPTER THREE:

The Australian System – and the need for change?

“Australia is the home of exotic species – not only the kangaroo and the duck-billed platypus, but also a system of compulsory arbitration for the settlement of industrial disputes unique in the western world.”¹

Brian Napier’s 1989 description of the Australian industrial relations system echoes Walker’s earlier thought that Australia’s labour laws were “an antipodean curiosity as exotic as the kangaroo or the boomerang.”² Apart from demonstrating the acute awareness many labour scholars have of Australian fauna, at the heart of these observations lies one basic truth: this country’s system of industrial law is *different – and unique*.

The crux of that difference begins with its emphatic acceptance that there *is* a power imbalance between worker and employer, such that third party intervention is necessary to ‘even the odds.’³ Traditionally, the intervention came through the advent of what is now the Australian Industrial Relations Commission, before which representative

¹ Brian Napier, “Compulsory Arbitration – The Australian Way?” (Book Review) (1989) 18 *The Industrial Law Journal* 67-68 at 67.

² Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Lowenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books, U.S.A, 1976) 1 – 43 at 1.

³ See, for example: Sir Alfred Deakin, “Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)” in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 30 July, 1903) at 2867-2868. Also, refer: Justice Henry Higgins *The New Province for Law and Order* (Dawsons of Pall Mall, London, 1968). The notion is implicit in many other sources cited throughout this work and, even today, is implicit in some parts of the principal objects of the governing statute the *Workplace Relations Act 1996* s.3(d), where it refers to ensuring an “effective...safety net of fair...conditions...”

bodies, such as trade unions and employer groups, had an enshrined place and gave voice to the claims of their members.⁴ What was remarkable about that Industrial Commission was its dual function of conciliation *and* arbitration. Such a dual role meant the Commission was instrumental in settling disputes as to the *actual terms and conditions of employment* that would govern the ongoing employment relationship. It did not simply deal with disputes arising *out of* an agreement on terms and conditions, which the parties had struck, themselves. Further, the Commission was, and still is, a body that pays regard to the *public interest* – in that sense, it was clearly different from a mainstream civil court, which determined disputes between two private litigants.⁵

As reflected in the conclusion to chapter two of this thesis, scholars, such as the Webbs, from an early age, saw the worth of the Australian system.⁶ Yet within their choice of expression about the “remarkable...[legislative experiment] in *the Britains beyond the sea*”⁷ lay clues as to the criticisms that would meet that very institution, today. Much has changed since the advent of arbitration and the writings of the Webbs about 100 years ago. Economically, technologically and socially, both in Australia and abroad, the world is a different place. We are no longer the “Britain beyond the sea.” Further,

⁴ Philip Bodman “Explaining the Decline in Australian Trade Union Membership” *Department of Economics Discussion Papers - No. 210* (University of Queensland, Australia, 1996) 1-37 at 1 – where the author suggests that the system of conciliation and arbitration “nurtured and even protected” trade unions.

⁵ See, for example, “The Idea of Public Interest” (Chapter Three) in John Niland *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 29 – 34. The notion of there being a guiding light apart from private dispute resolution is also reflected in parts of the principal objects in s.3 *Workplace Relations Act 1996*.

⁶ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927.

⁷ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927 (Introduction xxi – lvi at li. Similar comments are made at page xxii). (Emphasis added)

globalisation has heightened our imperative to compete on an international stage, irrespective of what our traditional and uniquely Australian elements may be.

Such social, philosophical and economic changes have served as the catalyst for a reconsideration of the Commission and its role in Australian labour law. In fact, for some academics, like Walker⁸ and Niland,⁹ there is a question as to whether the Commission should retain a role at all, the institution being regarded as ill conceived - "a ruined giant" of sorts.¹⁰ *The purpose of this chapter, then, is to critically analyse the function of the Industrial Commission.* Such analysis is undertaken through a discussion not only of those (aforementioned) works, but also of such writings as: the authors of the HR Nicholls Society;¹¹ Isaac;¹² Davis and Lansbury;¹³ Rawson;¹⁴ as well as Mitchell and

⁸ Kenneth Walker "Compulsory Arbitration in Australia" (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43. See also: Kenneth Walker *Australian Industrial Relations Systems* (Harvard University Press, Massachusetts, 1970).

⁹ John Niland "Process and Strategy in industrial Relations Reform" (Chapter Fifteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen and Unwin Publishers; Sydney; 1986) 1-456 at 243-272; "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia 1990) 182 – 207; and *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174.

¹⁰ Don Rawson "Industrial Relations and the Art of the Possible" (Chapter Sixteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen & Unwin; Sydney; 1986) 273-297 at 275.

¹¹ HR Nicholls Society *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) - refer particularly: Hugh Morgan "The Nature of Trade Union Power" (at 24 – 30); Wayne Gilbert "The Queensland Power Dispute" (at 31 – 52); and Ian McLachlan "Farmers, Australia's Cost Structures, and Union Power" (at 53 – 63).

¹² Joe Isaac "The Australian Arbitration Commission: Prime Mover or Facilitator" (1989) 31 *Journal of Industrial Relations* 407-427.

¹³ Edward Davis and Russell Lansbury "Employment Relations in Australia" (Chapter Five) in (Greg Bamber and Russell Lansbury eds) *International and Comparative Employment Relations: A Study of Industrialised Market Economies* (Allen & Unwin, Australia, 1998) 110-143.

¹⁴ Don Rawson "Industrial Relations and the Art of the Possible" (Chapter Sixteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen & Unwin; Sydney; 1986) 273-297.

Rimmer;¹⁵ the Hancock Report and Business Council of Australia enquiry;¹⁶ and some of the elegant and amazing speeches of the Commission's recent Centenary Conference, especially those of the Honourable Justice Michael Kirby of the High Court of Australia and the Honourable Kevin Andrews, Minister for Workplace Relations.¹⁷ *The conclusion reached by the present writer is that the Commission still has a vital role to play in Australia's industrial relations (and a role which is both crucial to the no disadvantage test and facilitated by that test).* The difficult problem, which the later chapters of this thesis address, is "winnowing the good from the bad."¹⁸

The Origins of the Australian System – Its Essence

Compulsory arbitration was introduced into this country by the *Conciliation and Arbitration Act 1904* (Cth). That legislation created what is now the Australian Industrial Relations Commission and was originally the Arbitration Court. Significantly, that body was not simply a political creature of statute.¹⁹ Rather, it was founded on the very

¹⁵ Richard Mitchell and Malcolm Rimmer "Labour Law, Deregulation, and Flexibility in Australian Industrial Relations" in (1990-91) 12 *Comparative Labor Law Journal* 1-34.

¹⁶ Keith Hancock *Australian Industrial Relations Law and Systems (Report of the Committee of Review)* (Volume Two) (Canberra Publishing and Printing Co, Fyshwick, 1985) 1-694 at, for example, 178 et seq. See also: Business Council of Australia *Enterprise-based Bargaining Units – A Better Way of Working* (Volume One) (Business Council of Australia, 1989) 1-134 at 10 et seq.

¹⁷ The present writer wishes to thank her former Labour Law student, Ms Amy Lee, who is now an intern with the Australian Industrial Relations Commission, for forwarding to her the speeches.

¹⁸ Malcolm Rimmer "The Niland Green Paper – A Critical Review" (Chapter One) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press, Australia, 1990) 6-17 at 16.

¹⁹ Ron McCallum "Collective Labour Law, Citizenship and the Future" (1998) 22 *Melbourne University Law Review* 42-61 at 56 et seq.

Australian Constitution, itself,²⁰ s.51(xxxv) of that fundamental document providing the Commonwealth Parliament with the power to pass legislation for “conciliation and arbitration for the *prevention and settlement of industrial disputes* extending beyond the limits of any one state”.²¹ The chief object of the *Conciliation and Arbitration Act 1904* and section 51(xxxv) *Australian Constitution* was, then, to establish a tribunal that would prevent strikes and lockouts throughout Australia.²² It would do so by hearing the claims of organisations of employers and employees and arriving at an award or ruling as to what terms and conditions might be. All residual power was left to the States and the prevailing view was that they should be left to deal with their own labour issues as appropriate.²³

The precise reasons why peace was such a preoccupation for the fledgling Australian legislators was noted by MacIntyre and Mitchell.²⁴ Essentially, the legislation

²⁰ Ron McCallum “Collective Labour Law, Citizenship and the Future” (1998) 22 *Melbourne University Law Review* 42-61 at 56 et seq.

²¹ S.51 *Constitution of the Commonwealth of Australia* (emphasis added). That placetum was introduced into the Constitution by Henry Bourne Higgins, Esquire, MLA (representative of Victoria) in the original constitutional convention, refer: *Official Records of the Australasian Federal Convention – Third Session – Volume One* (Melbourne, 1898) at 180.

²² See, for example, the chief objects of the *Conciliation and Arbitration Bill 1903* – clause 4(I) as cited in Sir Alfred Deakin, “Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)” in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) 2858-2883 at 2860.

²³ Refer Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter Thirty Two) in Clive Turner *Australian Commercial Law* (24th ed, Thomson Publishing, Sydney, 2003) 973-1011 at 981 et seq; and Louise Willans Floyd “Enron and One.tel: Employee Entitlements After Employer Insolvency in the United States and Australia (Australian Renegades Championing the American Dream?)” (2003) 56 *SMU Law Review* 975-1004 at 981 et seq.

²⁴ (Stuart MacIntyre and Richard Mitchell eds) *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (Oxford University Press, Melbourne, 1989). See also Laura Bennett *Making Labour Law in Australia: Industrial Relations, Politics and Law* (The Law Book Company Limited, Australia, 1994) 1-253.

was enacted after trade unions had engaged in a series of bloody and violent strikes across the country in the adverse economic conditions of the late 1890s. Although those strikes failed, the fracas and social dislocation they caused prompted even conservative voters to urge on government a system of peaceful industrial dispute resolution - the promotion of investment in the new Australian nation being foremost in their minds. Trade unions, likewise, supported the system, as such gave them the recognition they craved.

The Deakin Settlement – Why Conciliation and Arbitration was Adopted Over Other options & What it Aimed to Achieve:

Although, at that early stage of 1903, Australia was still very much an isolated island continent, the early politicians showed an understanding of international labour law developments and a keen sense of Australia's place in the world as a new nation. Throughout the parliamentary debates, many politicians discussed the labour systems of other nations and why Australia had chosen its atypical approach.²⁵ Particularly, the Australians were aware that compulsory arbitration had been rejected in other countries, such as the United States, where the preferred model was collective bargaining – that is, employers and employees (through unions) using the traditional economic weapons, such as strikes, to bargain for terms and conditions of employment for *themselves*.²⁶ In the

²⁵ Refer: "Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)" *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 1903) at: 2868 et seq (Sir Alfred Deakin); 3185 (Hon. Mr Reid MP); 3210 (Hon. Mr Watson MP).

²⁶ Joseph Loewenberg "Compulsory Arbitration in the United States" (Chapter Five) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books, USA, 1976) 141-172 at, for example, 141-142. But see also: (Patrick Hardin and John Higgins eds) *The Developing*

latter system, compulsory arbitration was regarded as “antithetical to democratic ideals and practices.”²⁷ It was viewed as forcing the will of the State on freely negotiating parties.²⁸

The Australians were not anti-American.²⁹ But to the Australians, the American idea had problems of its own. Unfettered bargaining was said to risk elevating the strength of the bargaining parties above the justice of the issue at the heart of the dispute. Thus, in the Second Reading of the Bill to the Australian House of Representatives, Attorney-General, Sir Alfred Deakin, proclaimed:³⁰

“The Bill marks, in my opinion, the beginning of a new phase of civilisation. It begins the establishment of the People’s Peace, under which the conduct of industrial affairs...may be guided...Hitherto,

Labour Law (Volume One) (4th ed, Bureau of National Affairs, Washington, 2001). Organised labour had a difficult development in the United States around the turn of the twentieth century, see for example, *In re Debs* 158 US 564 (1895). Promotion of unionism did emerge in the form of the *Wagner Act* 29 USC 151 et seq (1937) as a response to the Great Depression, only to be curtailed shortly thereafter by the *Taft-Hartley Act* 29 USC 141-144. For further information on the comparison between the Australian and American systems at the time of the foundation of the Australian system, see, for example, Sir Alfred Deakin Second Reading of the Conciliation and Arbitration Bill 1903 *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 1903) 2858 – 2883 at 2868 et seq. See generally Louise W Floyd “Enron and One.tel: Employee Entitlements After Employer Insolvency in the United States and Australia (Australian Renegades Championing the American Dream?) (2003) 56 *SMU Law Review* 975-1004 at 977 et seq.

²⁷ (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books, USA, 1976) 1-220 at (Introduction) xiii.

²⁸ See, for example, (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books, USA, 1976) 1-220 at (Introduction) xiii; and Joseph Loewenberg “Compulsory Arbitration in the United States” (Chapter Five) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books, USA, 1976) 141-172 at, for example, 141-142.

²⁹ In fact, in Parliamentary Debate before the Australian House of Representatives, a number of members praised the American people and their enterprising nature, for example: Sir Alfred Deakin “Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)” *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2868.

³⁰ Sir Alfred Deakin “Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)” in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2864.

there has been but one method of dealing with strikes and lockouts, and one inevitable result. The strongest party has always prevailed. The cause was not in question, the matter of dispute was not weighed. Give to one side numbers and means now, and it wins. The cause counts for nothing; power counts for everything; might makes right. Under the new system – and here is the revolution – a different aim will operate. Might is not to make right. But, as soon as it can be discerned and determined, right is to make right.³¹

Such a tribunal system obviously depended on *organisations* of employers and employees appearing before it. Indeed, another of the chief objects of the act was “to facilitate and encourage the organisation of representative bodies.”³² But the Australians acknowledged that, in the United States, it was some unions, rather than some employers, who had become autocratic in the pursuit of their ends.³³ So, Deakin noted that arbitration was to apply equally to employers and unions to find peaceful and fair resolution of conflict.³⁴

Deakin also reflected on the need to allow for the free operation of business and the development of Australian trade. Significantly, though, he believed that such cannot

³¹ That such a system should be adopted in Australia owes much to the character of its people. As Walker noted in his analysis of Australian arbitration, the working men who built up Australian trade unions drew on their often bitter experience in Britain. Some of them had been forcibly deported for illegal combination. Others had taken part in radical activities: Irish rebels, participants in the chartist revolt, and other dissidents. “Trade union organisation was a natural growth among such a population, many of whom were sympathetic to wider social reform.” Further, the peoples were pragmatic - and arbitration was a practical attempt to gain peace. Refer: Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 2-3.

³² Clause 4(vi) of the Conciliation and Arbitration Bill as cited in Sir Alfred Deakin “Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)” in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2861.

³³ Refer comments of: Hon Mr Reid MP “Second Reading of the Conciliation and Arbitration Bill 1903” in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 3186.

³⁴ Sir Alfred Deakin “Second Reading of the Conciliation and Arbitration Bill 1903” in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2870.

be meaningfully attained through the exploitation of others. In other words, *the Australians saw social justice and business efficacy as mutually supportive, not mutually exclusive goals*. To use Deakin's words: "Permanent prosperity can only be based upon institutions which are cemented by social justice."³⁵ Consequently, the arbitration commission was to operate free from dogma or dictation; its judgments were to be confined to the facts and the merits of any given case. It was not to be rigidly controlled by Parliament, nor was it to interfere too much in the operations of business or the relationship between the parties. It had as its only direction the requirement that: "in the hearing and determination of every industrial dispute the court shall act according to equity, good conscience and the substantial merits of the case."³⁶

This flexibility in the operation of the Commission tied in with its concern for "public interest," and was viewed as the Australian system's great strength.³⁷ The broad guiding principles of the Commission were likened to the flexibility of an elephant's trunk that could "pick up a pin or lift an enormous load."³⁸ Rather than

³⁵ Sir Alfred Deakin "Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)" in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2868. The language has a strong human rights bent, noting that Australia "did not desire" to become like Ancient Egypt, where the might of the pyramids was built off the "abject misery...of the masses". There is a vision for the type of egalitarian society that he wants Australia to become. However, the surrounding passages of the speech do note an acknowledgment of the needs of business and enterprise, so it is submitted the speech notes the mutual dependence of business and humanitarian prosperity – it is not merely a motherhood statement.

³⁶ See clauses 46 and 47 of the Bill as cited: *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2870.

³⁷ Sir Alfred Deakin "Second Reading of the Conciliation and Arbitration Bill 190") in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2862 and 2865.

³⁸ Sir Alfred Deakin "Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)" in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2866 – see also 2865.

being bound by rigid legislation that “must necessarily be ineffective in dealing with a living society,”³⁹ the court was free to adapt to the innumerable different human circumstances that would come before it. In that way, the State was doing more than simply “keeping a ring” in which warring participants fought.⁴⁰

Higgins and The New Province for Law and Order - the Development of Conciliation and Arbitration:

Sir Alfred Deakin’s Second Reading of the *Conciliation and Arbitration Act 1904* showed the genesis of the belief that arbitration should represent the fusion of dispute settlement, business efficacy and the promotion of social justice, and that such are co-dependent. As noted above, the original vehicle charged with the task of striking that balance was an actual court, the Australian Court of Conciliation and Arbitration. And the original Presidents of such court were Justices of the High Court of Australia.⁴¹

In November of 1915, the second President of the Arbitration Court, Henry Bourne Higgins, wrote the seminal article, “The New Province for Law and Order.” Some of the lyrical passages of that work were considered in the previous chapter for

³⁹ Sir Alfred Deakin “Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)” in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2863.

⁴⁰ Sir Alfred Deakin “Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)” in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) at 2864.

⁴¹ Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 3-4.

their acknowledgement of the problems of working people and the need for society to protect its most vulnerable members. Justice Higgins also used that article to describe the way the court came to its conclusions (within its flexible framework).⁴² Such work, therefore, surely provides an insight into the *development* of Deakin's belief.

To Higgins, conciliation, with the threat of arbitration in the background, encouraged parties to negotiate in a fruitful way – and not to be obstinate.⁴³ There had been strikes throughout the life of the Court, but such were usually not of an interstate nature and, so, outside of the Commonwealth jurisdiction.⁴⁴ Conciliation and arbitration had, therefore, replaced the “rude and barbarous process of strike and lockout” with reason – and it had done so for the public interest.⁴⁵

Higgins noted that the Court had been given but the broadest operational objectives from its governing legislation about how its aims were to be achieved. In Higgins' eyes, the tribunal was to be guided by “no kindly light except from the pole star

⁴² Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) – refer preface at v. It is interesting to note that, even today, some pre-eminent scholars in the field of Australian labour law regard Higgins as their “hero,” refer: Ron McCallum *Address to the Christian Lawyers Convention* (Bond University, Gold Coast, 2002).

⁴³ Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 25.

⁴⁴ Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 35.

⁴⁵ Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 2.

of justice.”⁴⁶ In practical terms, and as reflected in Chapter Two of this thesis, “the normal needs of the average employee, regarded as a human being living in a civilised community” was to be the primary test in ascertaining the minimum that would be ‘fair and reasonable payment’ in the case of unskilled labour.⁴⁷ Industrial peace was inconceivable without this “living wage.”⁴⁸

The essence of the Australian system, then, lay in its acceptance of the views of the Webbs and others like them (discussed in chapter two), namely, that there was a power imbalance between employers and employees in terms of bargaining. The power of an employer to withhold work was a “much more effective weapon” than the power of labour to refuse to work (especially at a time when the latter could lead to starvation).⁴⁹ But as Albert Metin noted, Australian labour law was “Le Socialisme sans Doctrine.”⁵⁰

⁴⁶ Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 2.

⁴⁷ Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 3.

⁴⁸ Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 6. Justice Higgins went on to describe in detail the way the living wage was calculated. Much evidence was deduced from household budgets as to amounts needed to pay for the essentials of life – good accommodation and the like. That constituted the basic wage. An allowance for skill could be added to that where employment required particular skills. Higgins then went on to deny claims that such a system was inflationary in nature. He also noted that the Court would rarely intervene in the way a business was run, except if the employer was acting against the public interest or the wellbeing of workers. Likewise, the circumstances in which the basic wage could be reduced were few (at 4 – 15). See also: *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33.

⁴⁹ Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 19.

⁵⁰ Compare: Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 3: where the author suggests that Australian labour may have had “too many doctrines”, in fact, being influenced by forces as diverse as Chartism through to nationalism (against cheaper Chinese labour)!

There was no express mention of philosophies, but rather a *pragmatic* view of the world. Seeming to confirm Metin's view, Higgins, himself, proclaimed, that his court did not deal with mere theories – “it was not in the “cloud-cuckoo town of Aristophanes”.⁵¹ Rather, it shaped its conclusions on the “solid anvil of existing industrial facts in the fulfillment of definite official responsibilities.”⁵²

Changes Afoot – Economic, Social and Political Change and their Effect on the Commission

What was the Arbitration Court is now the Australian Industrial Relations Commission. It is no longer headed by a Justice of the High Court of Australia. Its members are labour law experts and are drawn from areas as broad as the legal profession, employer and industry groups as well as trade unions – and even academe.⁵³

In terms of the operation of the Commission, itself, this is well documented.⁵⁴ The important development is the *increase, over the years, in the actual jurisdiction of the Commission*, that is, the growth in the types of cases the Federal Commission could

⁵¹ Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 39.

⁵² Justice Henry Higgins *A New Province for Law and Order* (The series of articles from the *Harvard Law Review* now reproduced as a monograph) (Dawsons of Pall Mall, London, 1968) 1-181 at 39.

⁵³ Breen Creighton and Andrew Stewart *Labour Law: An Introduction* (The Federation Press, 2000) 1-500 at 99 et seq.

⁵⁴ Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter Thirty Two) in Clive Turner *Australian Commercial Law* (24th ed, Thomson Publishing, Sydney, 2003) 973-1011 at 981 et seq; and Louise Willans Floyd “Enron and One.tel: Employee Entitlements After Employer Insolvency in the United States and Australia (Australian Renegades Championing the American Dream?)” (2003) 56 *SMU Law Review* 975-1004 at 981 et seq.

entertain. Essentially, throughout the 1900s, the High Court of Australia's interpretation of the elements of s.51(xxxv) of the *Constitution* became increasingly broad. So, the Commission went from having only basic powers that complimented the State systems to having an extensive reach into the lives of working people. Further adding to its jurisdiction and influence in the Federal sphere was the development of the *Commission's practice of using its own decisions as precedents within an industry. Consequently, the Commission established types of industry-wide common rules (even though such were strictly unconstitutional and against the Commission's original charter)*. Finally, the *Commission in the public interest decided test cases* on matters such as redundancy pay, the results of which had broad reaching effect.

While these jurisdictional developments were important in themselves, equally significant was that the actual culture and world in which the Commission operates has changed vastly since the body was first formed. As one commentator noted, "the battles of the 1890s where conciliation and arbitration triumphed over freedom of contract...pre-dated Gallipoli by almost a quarter of a century."⁵⁵ Probably the main developments during those subsequent years go to the deregulation of the Australian economy and associated with that, the rise of globalisation, technology and neo-liberal thought.

During the 1980s and moving into the 1990s, the Hawke-Keating Government took great strides down the path of market deregulation. That era saw the beginnings of

⁵⁵ Ron McCallum ""Australian Workplace, The Rise of Contractualism and Industrial Citizenship" in *Employment Contracts: Their Role in Industrial Relations?* (Papers from the Fourth Annual Labor Law Conference, University of Sydney, 1996) 1-3 at 3.

privatisation of many government assets, such as The Commonwealth Bank. Tarriff barriers were lessened and the Australian dollar was floated.⁵⁶ These leaps of faith into deregulation were made in response to increasing trends towards global competition and trade as well as technological developments.⁵⁷ *Such economic changes ultimately raised questions about Australia's labour system. Concerns were raised as to what effect floating the dollar and trading internationally would have on productivity and Australian wage rates. Likewise, there were fears as to whether the Commission system (with its extensive jurisdiction and industry-wide 'common rules') could adjust and respond quickly enough to the pressures it now faced.*⁵⁸ Underpinning this, in recent years, has been the resurgence of philosophical leanings throughout the world that place primary consideration on the interests of competition and business in the quest for flexibility.⁵⁹

⁵⁶ Keith Hancock *Australian Industrial Relations Law and Systems (Report of the Committee of Review)* (Volume Two) (Canberra Publishing and Printing Co, Fyshwick, 1985) 1-694 at, for example, 178 et seq. See also: Business Council of Australia *Enterprise-based Bargaining Units – A Better Way of Working* (Volume One) (Business Council of Australia, 1989) 1-134 at 10 et seq. See also: Jane Romeyn *The Law Arbitration and Bargaining* (Industrial Relations Research Monograph Number 5, July 1994 – Department of Industrial Relations Canberra) 1-49 at 9-10.

⁵⁷ Ron McCallum "Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws" (2002) 57 *Relations Industrielles* 225-249. See also: David Campling "International Economic Restructuring" (1994) 10 *International Journal of Comparative Labour Law and Industrial Relations* 36.

⁵⁸ Keith Hancock *Australian Industrial Relations Law and Systems (Report of the Committee of Review)* (Volume Two) (Canberra Publishing and Printing Co, Fyshwick, 1985) 1-694 at, for example, 178 et seq. See also: Business Council of Australia *Enterprise-based Bargaining Units – A Better Way of Working* (Volume One) (Business Council of Australia, 1989) 1-134 at 10 et seq. See also: Jane Romeyn *The Law Arbitration and Bargaining* (Industrial Relations Research Monograph Number 5, July 1994 – Department of Industrial Relations Canberra) 1-49 at 9-10.

⁵⁹ Ron McCallum "Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws" (2002) 57 *Relations Industrielles* 225-249.

The Hancock Report – The Federal Government ‘takes stock’ of the system

The first major Government review of the arbitration system since the early 1900s was the Hancock Report of 1985.⁶⁰ Although cognisant of both the changing economic and social tide (outlined above), the committee stood firmly behind the arbitration system, rather than being tempted by any alternative systemic change. The committee looked at the question in these terms:⁶¹

“While recognizing the need to consider the case for fundamental change, we cannot ignore the fact that Australia, for 80 years or more, has pursued an approach to the resolution of industrial conflict which is based on conciliation and arbitration. This approach, for better or worse, imports a third-party involvement in industrial relations and in the resolution of industrial disputes. We do not start with a clean slate: the system has proven to be durable and is deeply entrenched in society. To judge from the views expressed to us, reforms within the current framework may gain the necessary degree of support. There is much less ground for confidence that the necessary support exists or can be engendered for a drastic change to the basic framework of the system. This would be a sufficient reason for us to discuss proposals for modifying the present system, even if we were convinced that the better course would be to replace it with a different kind of industrial relations system.”

Likewise, the report saw continuing currency in the notions of “public interest” and “power imbalance” yet also acknowledged a growing role for co-operation between employers and employees:⁶²

“We think that the principle underlying the concept of public interest – of looking beyond the concerns of the immediate disputants – is important and that the term itself is a good means of giving expression to it. We are unsympathetic to the suggestion that the ‘public interest’

⁶⁰ Keith Hancock *Australian Industrial Relations Law and Systems (Report of the Committee of Review)* (Volume Two) (Canberra Publishing and Printing Co, Fyshwick, 1985) 1-694 at, for example, 178 et seq.

⁶¹ Keith Hancock *Australian Industrial Relations Law and Systems (Report of the Committee of Review)* (Volume Two) (Canberra Publishing and Printing Co, Fyshwick, 1985) 1-694 at 4.

⁶² Keith Hancock *Australian Industrial Relations Law and Systems (Report of the Committee of Review)* (Volume Two) (Canberra Publishing and Printing Co, Fyshwick, 1985) 1-694 at 11 et seq.

(as the term is used in conciliation and arbitration) should be more precisely defined. First, we emphasise the wide diversity of situations with which the conciliation and arbitration system has to deal and the consequent risk that a more precise criterion would restrict the tribunals in unintended and undesirable ways...

In the foreseeable future, the economic dimension of the public interest is likely to be especially important. The industrial relations system must be capable of coping with a changing economic environment and labour market. Restoration of full employment, if it is to be achieved, requires consistent productivity growth and stability of prices and wages. The industrial relations system should, so far as possible, produce results which do not aggravate economic difficulties.

It is impossible to define a role for an industrial relations system without reference to the occurrence of conflict. Nevertheless, we think that an assumption can be made which will define the boundaries of that conflict. This is a relevant consideration in looking at how an industrial relations system might be structured to reinforce the positive features of industrial relationships and to minimise the negative features. The assumption is that while management and unions do not have a commonality of purpose, they have areas of common interest in the preservation of the organisation and its jobs. Perceiving this common interest, the conflicting parties limit their actions accordingly. They may do so by pursuing a measure of agreement or accepting solutions prescribed by third-party intervenors rather than jeopardise the continuity of the enterprise. This assumption does not always hold good... We think, however, that the assumption is generally right. The area of common interest which exists is the basis of a measure of co-operation and facilitates the resolution of conflict."

Despite that reference to cooperation and the economic dimensions of 'public interest,' *the main recommendations of the Hancock Report were about improving the practical operation of the arbitration system, rather than pursuing systemic change.* In the event, suggestions were made as to streamlining the Commonwealth and State systems, *and particularly issues of trade union regulation and amalgamation.*⁶³

⁶³ Keith Hancock *Australian Industrial Relations Law and Systems (Report of the Committee of Review)* (Volume One) (Canberra Publishing and Printing Co, Fyshwick, 1985) Recommendations for Change: 1-44.

Business Council of Australia

With Hancock's insistence on maintaining the industrial relations status quo in an otherwise changing world, it is perhaps unsurprising that business groups undertook studies of their own into labour relations issues relevant to global trade and technological advancement. Foremost amongst these, in 1989, the Business Council of Australia published its groundbreaking study, *Enterprise-based Bargaining Units – A Better Way of Working*.⁶⁴ *The crux of that study was the BCA's call for a change in industrial relations thinking and systems from a conflict-based model that concentrated on uniformity of terms and conditions of employment (through industry-wide common rules) to one which concentrated on co-operation at the workplace level.* Essentially, it was argued that for Australia to compete in a global market, there would have to be an acknowledgement that *consumers and markets* were the most important asset of a business – without them how could any employer or union survive? *The best way to respond to market pressure was to model workplace relations at the enterprise so that business could respond quickly to consumer demand.*⁶⁵

“The enterprise is the right economic unit for winning in competitive markets because it is able to shape itself to the needs of those markets. The great strength of enterprises is that their shape and composition is constantly changing. When consumers' tastes change, or technology improves or costs vary, activities are grouped or regrouped, added or deleted, contracted or expanded. Reorganisation of the process or creating goods and services is a continuing part of successfully serving changing customer needs. *Industries are likely to be far too cumbersome and slow-moving to do this well.* Some firms will be the

⁶⁴ Business Council of Australia *Enterprise-based Bargaining Units – A Better Way of Working* (Volume One) (Business Council of Australia, 1989) 1-134.

⁶⁵ Business Council of Australia *Enterprise-based Bargaining Units – A Better Way of Working* (Volume One) (Business Council of Australia, 1989) 1-134 at 3-4.

same. A well-defined enterprise is the business unit that is going to do this best. (Emphasis added)⁶⁶

The protection afforded the public interest was acknowledged by the BCA report, but the BCA insisted that the enterprise model did “not imply a ‘free-for-all’ or a return to ‘the law of the jungle,’” just a major shift in thinking:⁶⁷

“...The central premise of the current approach is that relations at work are inherently adversarial. On that assumption, the regulatory framework has been directed at ‘protecting’ the public interest from the consequences of unconstrained conflict...

In an employee relations world, therefore, protection of the public interest in the traditional sense would give way to a broader, more positive goal of enhancing the public interest. *This means ensuring that the legislative framework supports effective working relationships and provides the maximum possible incentive to individual employers, their employees and, where they have a role, representative employee organisations to develop together and to self-regulate working relationships that allow for the smooth handling of conflict and change at the workplace and encourage adaptation rather than resistance to evolving economic realities without recourse to third parties.*” (Emphasis added)⁶⁸

The Changing Nature of the Commission and the Academic Appraisals:

If the Hancock Report and the BCA Enquiry represented the debate, even schism, between sections of Government and sections of industry who favoured arbitration or systemic reform, then such questioning surely invited academic commentary. And, indeed, such flowed. From the 1980s (and even before that in some cases) three schools

⁶⁶ Business Council of Australia *Enterprise-based Bargaining Units – A Better Way of Working* (Volume One) (Business Council of Australia, 1989) 1-134 at 4.

⁶⁷ Business Council of Australia *Enterprise-based Bargaining Units – A Better Way of Working* (Volume One) (Business Council of Australia, 1989) 1-134 at 7.

⁶⁸ Business Council of Australia *Enterprise-based Bargaining Units – A Better Way of Working* (Volume One) (Business Council of Australia, 1989) 1-134 at 7.

of thought emerged in academic writings as to the shape Australian labour law should take. There were:

- those who wanted arbitration retained, but possibly modernised, with a more enterprise 'bent' (that is the hybrid system Australia has at present and which this thesis supports);
- those who wanted collective bargaining along side arbitration; and
- those who wanted a wholesale move to individual contracts.

The main academic commentaries are considered below, before the hearty defence of the hybrid system that is undertaken in the conclusion to this chapter. It is obvious that the no disadvantage test both embodies and facilitates the hybrid labor system. That test and the legislative changes that actually introduced it are analysed in detail in chapters four and following.

The Friends of the Commission:

Isaac

In "The Arbitration Commission: Prime Mover or Facilitator?",⁶⁹ Isaac reflected on the generality of the main guides for the Commission, namely the promotion of the public interest and concern for industrial peace and economic wellbeing. He surmised that the approach of the Commission to these concepts had changed over time, but

⁶⁹ Joe Isaac "The Arbitration Commission: Prime Mover or Facilitator" (1989) 31 *Journal of Industrial Relations* 407-427.

usually this was a *response* to changed community and economic circumstances, rather than an assertion by a tribunal member of their will on those before the Commission. According to Isaac, this responsive nature of the Commission was its strength. It had evolved; it was not an anachronism.

Isaac traced the various approaches of the Commission to illustrate his point. Higgins found ample precedent for his 'basic' or 'living' wage through the Deakin Settlement (discussed earlier), so he viewed his judgment not as revolutionary, but as the assertion of what was right – a reflection of the law.⁷⁰ Overtime, the tribunal became less a means of protecting the weak, and in fact, became an adjunct to collective bargaining and economic policy.⁷¹ It had done so not through its own foibles or on its own whim, but, again, in response to changing community standards. So, for instance, then President, Sir Richard Kirby took the view that industrial relations required compromise. The Commission was not simply a legal institution but the cornerstone of the industrial relations system. Within that system, employment relationships were ongoing. A solution put forward by the Commission may not be the solution sought by either or both of the parties, but it should be acceptable to both, for without that mutual acceptance, the economic cooperation necessary for employment and production would be destroyed. To that end, *there might even be room within the system for a degree of bargaining.*

⁷⁰ Joe Isaac "The Arbitration Commission: Prime Mover or Facilitator" (1989) 31 *Journal of Industrial Relations* 407-427 at 408.

⁷¹ Joe Isaac "The Arbitration Commission: Prime Mover or Facilitator" (1989) 31 *Journal of Industrial Relations* 407-427 at 423.

The purpose of Isaac's analysis of the evolution of the Commission was to demonstrate that its changing approaches to its role were dictated by changing community standards. *The only way the Commission could serve its charter was to change with the times. This it did, but in such a way as to give all parties a fair hearing, not only, for instance, stronger parties.*

Davis and Lansbury

Davis and Lansbury⁷² traced the evolution in the approaches of the Commission to the issue of wage fixation. Over the years, the Commission had changed its approach from indexation through to the advent of consent awards and the period of collective-style bargaining (during the energy boom). Such developments demonstrated the flexibility available within the compulsory arbitration system. The authors argued that the Commission had changed its approach as appropriate in the prevailing circumstances even where such change actually lessened the authority of the Commission (as was the case with the allowance of collective bargaining during the energy boom).⁷³

If there is rigidity within the compulsory arbitration system, the authors argued such may well be the result of the trade union security measures that are a feature of the system. For example, trade unions are often organised as branches, but these branches

⁷² Edward Davis and Russell Lansbury "Employment Relations in Australia" (Chapter Five) in (Greg Bamber and Russell Lansbury eds) *International and Comparative Employment Relations: A Study of Industrialised Market Economies* (Allen and Unwin; Australia, 1998-1999) 110-143.

⁷³ Edward Davis and Russell Lansbury "Employment Relations in Australia" (Chapter Five) in (Greg Bamber and Russell Lansbury eds) *International and Comparative Employment Relations: A Study of Industrialised Market Economies* (Allen and Unwin; Australia, 1998-1999) 110-143 at 122 et seq.

may cover an entire state. Perhaps it is those sorts of matters that complicate the quest for flexibility in the industrial relations system, the authors argued.⁷⁴

Rawson

Further support for the compulsory arbitration system may be found in the writings of Rawson.⁷⁵ In his view, there had been an evolution from Higgins' "province of law and order" and that such province was inherently flawed because it required an analogy between strikes and quasi-criminal acts.⁷⁶

"Strikes should be prevented and where they could not be prevented, they should be suppressed by the common criminal penalty of heavy fines. Given that approach, there was an essential and consistent role for conciliation and arbitration courts and for the judges who preside over them.

This was rightly seen as quite a new endeavour. Courts of one kind or another stand behind most aspects of social life, but 'stand behind' is indeed a appropriate term. The conflicts of business life, with their accompanying gains and losses, are in one sense regulated by the law. *Companies Acts* and *Trade Practices Acts* exist and there are courts which will enforce them. But their purpose is not to resolve conflicts between competing businesses, except in unusual circumstances where particular predetermined rules of the game are being flouted. Where there is 'ordinary' conflict between business enterprises, the courts generally speaking stand back and let the competitors get on with their conflict, even though they may lead to the defeat or the elimination of the less successful.

The arbitration systems sought to do something much more ambitious than this. Their purpose was to provide courts that would be available to determine day-to-day economic conflicts between employers and employees, and to enforce their decisions on the parties. In this they failed; and it is important to note, failed at an early stage."

⁷⁴ Edward Davis and Russell Lansbury "Employment Relations in Australia" (Chapter Five) in (Greg Bamber and Russell Lansbury eds) *International and Comparative Employment Relations: A Study of Industrialised Market Economies* (Allen and Unwin; Australia, 1998-1999) 110-143 at 117 et seq.

⁷⁵ Don Rawson "Industrial Relations and the Art of the Possible" (Chapter Sixteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen and Unwin; Sydney, 1986) 273-297.

⁷⁶ Don Rawson "Industrial Relations and the Art of the Possible" (Chapter Sixteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen and Unwin; Sydney, 1986) 273-297 at 276-277.

Rawson concluded by noting that there have been many times during the life of the arbitration system where there have not been strikes and that laws seeking to outlaw all strikes will not work because they deny a right most unions regard as fundamental. Even if unionists do not overtly strike, they may, for example, 'go slow' in their work or only perform certain limited duties – industrial action which is more subtle than a full-blown strike. The question, then, is what to do with the system knowing that it has strengths, but that it should not be judged incorrectly against a judicial standard.

According to Rawson, the option that should be adopted is to retain the arbitration system but to regard it as a 'corporate model'. In other words, a model in which all relevant parties, be they the commission, the unions, or the employers have a 'voice' and work together for a result that works best for all parties concerned. He states that such evolution is appropriate and may well achieve some of the original goals of the system, such as safeguarding the weak. In this context, Rawson notes that unions no longer only represent the working class. In fact, the Australian Public Service is reasonably affluent but is disproportionately unionised and hence governed by decisions of the Commission. He also states that the real 'downtrodden' may well now be those who are unemployed, especially the long-term unemployed, yet they are excluded from union coverage and are not effectively represented at all. His final acknowledgment is that the Australian Constitution may have caused problems for the Commonwealth Government in outstretching its powers in industrial law in the past, but that such powers are now being read more expansively by the High Court of Australia and, therefore, may allow for a

more consistent flow of legislation henceforth.⁷⁷ Just because the Commission is a tribunal of longstanding does not mean that it is inflexible or without worth.

Some Further Views:

Walker:

Professor Kenneth Walker⁷⁸ examined Higgins' new province for law and order and considered that the "new province" had little to do with dispute settlement, and far more to do with wage fixation and policy.⁷⁹ This was the natural consequence of the nature of the Commission – it was quasi-legislative, not judicial in character.⁸⁰ For Walker, much emphasis had to be placed on the fact that the Commission could determine disputes of interests, not merely rights.⁸¹ *It was establishing the terms by*

⁷⁷ Don Rawson "Industrial Relations and the Art of the Possible" (Chapter Sixteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen and Unwin; Sydney, 1986) 273-297 at 287 et seq.

⁷⁸ Kenneth Walker "Compulsory Arbitration in Australia" (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43.

⁷⁹ To Walker, the idea of abolishing strikes and lock outs was "Utopian:" "Industrial disputes may involve conflicts so deep as to render adjudication by an independent third party unacceptable. Industrial disputes machinery cannot be expected to eliminate disputes that are essentially contests for power." [Refer: Kenneth Walker "Compulsory Arbitration in Australia" (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 35-36.] Walker noted that some industries were more strike prone than others, and that some of the strikes that had occurred had not been interstate and, therefore, had been outside the realm of the Commonwealth Commission. However, he still observed that Australia had a relatively high rate of strikes by international standards (at 24).

⁸⁰ Kenneth Walker "Compulsory Arbitration in Australia" (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at, for example, 24-25, 26.

⁸¹ Kenneth Walker "Compulsory Arbitration in Australia" (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 24-25.

which parties to the employment relationship would operate – it was not simply deciding questions arising out of pre-existing agreements as to the conditions of work. The inherently quasi-legislative character of such an approach was intensified by the other key features of the Australian system. Conciliation was combined with arbitration before the Commission – much negotiation between employers and employees took place under the sway and dominion of commission members – “under the shadow of the tribunal,” as it were.⁸² There were few statutory guidelines as to how the Commission should operate. That combined with the importance of the nebulous concept of “public interest,” meant that the Commission itself, determined much of what these concepts meant and how proceedings should be conducted before it.⁸³ The fact that the Commission was permanent and not ‘ad hoc’ meant that Commissioners had to live with the effects of their decisions, so some sort of ‘policy element’ to proceedings and decisions was not unlikely.⁸⁴ In short, Walker viewed that Commission system as a “tripartite industrial legislature” (for wages and the promotion of wages policy).⁸⁵ His position was encapsulated in the following words:⁸⁶

⁸² Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 23.

⁸³ Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 22-23, and 29 et seq.

⁸⁴ Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 22, 24-25 and 4.

⁸⁵ Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 35 et seq, especially 36.

⁸⁶ Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 24-25.

“Although arbitration was undoubtedly introduced into Australia in the hope that it would prevent industrial conflict and eliminate strikes and lockouts, it rapidly evolved into an institution in the practical operation of which the settlement of such conflicts plays a relatively minor role. It is true that where the parties reach a deadlock, the arbitrators make a decision which is legally imposed upon the parties. However, the element of conciliation in the system, combined with the extent to which the parties reach agreement by negotiation in the course of procedures before the tribunal or with its aid, gives Australian industrial arbitration a quasi-legislative character. The practice of compulsory arbitration is an intertwining of negotiation, agreement-making, and arbitration. This is essentially a process of legislation in which the parties participate as far as they can, shaping the outcome as closely as possible to their objectives. It is quite different from the arbitration of disputes arising from an established contract, involving as it does the drawing up of a new contract on terms much influenced by the arbitrator, within certain wide limits laid down by the legislation or constitution.”

And again, he asserted:⁸⁷

“The typical Australian award is something in the nature of a code of employer and employee collective obligations of general application within the particular industry or craft. Juridicially, it is of legislative not an interpretive or judicial nature though the process by which it is arrived at is judicial in form.

“When Australian awards and determinations are seen in this perspective, rather than as the by-product of *ad hoc* adjudications in a number of industrial disputes, their impact upon the general conduct of Australian industrial relations appears considerably more significant. The earlier awards and determinations, like the early collective agreements in other countries, were relatively simple documents, specifying little other than minimum wages, hours of work, etc. A modern award is a complex document, covering many detailed aspects of the employment conditions. Thus, despite the varying impact of the tribunals upon the power relations between the parties in different industries, the gradual proliferation and elaboration of awards and determinations have tended to standardize employment conditions much more than might otherwise have been the case. It is, perhaps, in this sense that Australian compulsory arbitration has succeeded in establishing “a new province for law and order.”

⁸⁷ Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 26.

In terms of his appraisal of the Commission and his prognosis for the institution, Walker was perceptive.⁸⁸ There had been a widening of the bargaining units. Many Commission principles had been applied across *industries*. So, unions tended to pursue questions on an industry-wide basis. Further, there were positives in the notion of a national wage case (that is the yearly hearing by which the Commission decided a basic level of increase across an assortment of industries). Such surely enabled all workers to enjoy a portion of the national product. What was certain, according to Walker, was that parties were increasingly likely to negotiate – not simply through processes of conciliation, but to gain entitlements over the conditions of awards – which were regarded by many as a floor of entitlements.⁸⁹ This tendency or trend would continue.

⁸⁸ Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 35 et seq. Note that Walker did raise some attitudinal questions. For example, what was the effect of arbitration existing along side conciliation in one Commission? Did such lead to intransigence or make parties protect their position during conciliation in case the matter went to negotiation?

⁸⁹ Kenneth Walker “Compulsory Arbitration in Australia” (Chapter One) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books; Massachusetts; 1976) 1-43 at 39-40. It is interesting that Walker states he could not see the Commission system being abandoned due to such factors as political inertia; requirements of trade union security and the nature of the Australian Constitution. Obviously, 20 years before the days of *Victoria v The Commonwealth* (1996) 187 CLR 416, it would have been difficult for Walker to prophesy the use of the external affairs and corporations powers. Likewise, it would have been hard to predict the determination of later governments to change the system. The seemingly universal acceptance of the Commission system was reflected in the signature speeches of the two major Australian political parties. In *The Light on the Hill* (14 November 1949), Prime Minister Ben Chifley said, in launching the Labour Federal election campaign:

“We affirm for every man the right to receive a fair return for his labour, enterprise, and initiative. But we do say that it is the duty and the responsibility of the community, and particularly those more fortunately placed, to see that our less fortunate fellow citizens are protected from those shafts of fate which leave them helpless and without hope. That is the objective for which we are striving. It is...the beacon, the light on the hill, to which our eyes are always turned and to which our efforts are always directed.”

Sir Robert Menzies in his 1942 *Forgotten People* speech reflected Deakin’s metaphor of the market as a “ring” (pamphlet published by Robertson & Mullens and reprinted in full in Brett J *Forgotten People* Macmillan Australia 1992 at 14):

“If the new world is to be a world of men we must be not pallid and bloodless ghosts, but a community of people whose motto shall be *to strive, to seek, to find, and not to yield*. Individual enterprise must drive us forward. *That doesn’t mean that we are to return to*

According to Walker, the Commission's role would become something of a framer of broad principles of negotiation, with parties taking greater responsibility for industrial relations themselves. The Commission would also play a role in wages policy and in dealing with unfair labour practices.

Mitchell and Rimmer

In their examination of the arbitration system and its effects on productivity, Mitchell and Rimmer⁹⁰ contemplated whether removal of the legal and institutional “shackles” on the hiring and using of labour would assist Australia in dealing with economic crises. The problems identified by Mitchell and Rimmer included the trade union security devices such as preference given to unions; the fact that the compulsion of the system leads to the creation of de facto common rules; and the continued existence of strikes in a system. All these factors of primary regulation may lead outsiders to believe that the system is weighted in favour of organised labour and against the employer. This ‘trend’ may well be re-enforced by the secondary means of regulation, namely the content of awards. Prior to award restructuring,⁹¹ they were largely concerned with

the old and selfish notions of laissez faire. The functions of the State will be much more than merely keeping the ring within which the competitors will fight. Our social and industrial obligations will be increased. There will be more law, not less. But what really happens to us will depend on how many people we have who are the great and sober and dynamic middle class – the strivers, the planners, the ambitious ones. We shall destroy them at our peril.” (emphasis added)

⁹⁰ Richard Mitchell and Malcolm Rimmer “Labour Law, Deregulation and Flexibility in Australian Industrial Relations” (1990) 12 *Comparative Labor Law Journal* 1-34.

⁹¹ Award restructuring was part of the early moves to update Australia's original laws and orient them more to productivity. Further details regarding legislative and other developments within the system are discussed in chapter four of this thesis.

employee rights, not the rights of the employer. They also dealt with payment only on grounds of time and not on the basis of job performance. Finally, the classifications of employees (prior to award restructuring) was based on sometimes decades-old job descriptions that may not be relevant and may not have added to flexibility in the workplace.

Mitchell and Rimmer note that Australia is the only country on earth to deal with the issues of deregulation from within a juridified system. Part of this may be because of constitutional concerns. Other factors could be the attitude of Australians towards workers rights and finally, and most importantly the flexible attitudes of the Commission and the unions themselves were an enormous help.

The Alternatives:

Collective Bargaining (Niland):

While some scholars critiqued the system and argued for reform from within, others took a more radical approach. Niland proposed a dual system of industrial relations, where conciliation and arbitration survived, but the option of *collective bargaining (supported by minimum conditions) was the preferred model.*⁹² Such was necessary, he argued, to provide a flexible system that fostered efficiency in the workplace. Niland acknowledged that, in the 1980s, trade unions had been instrumental

⁹² See, for example: John Niland *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174 at 92 et seq.

in pursuing innovative workplace agreements, and they had done so within the conciliation and arbitration framework.⁹³ In fact, he viewed *management* as not pursuing productivity strongly enough. However, he maintained that the *structure* of conciliation and arbitration was a barrier to further productivity gains. He explained the crux of his approach in his article, *The Light on the Horizon*, namely that the emphasis placed on egalitarianism and the 'public interest' possibly skewed the importance of seeking reform until such became a matter of national survival. In Niland's view, management really lacked the incentive to be bold until it was almost too late. The 'light'⁹⁴ Niland saw was not of Chifley's ilk, but rather one shining from foreign collective bargaining systems.⁹⁵

The alternative Niland championed, he was at pains to point out, involved the *re-regulation of the system, not its deregulation* - he sought to establish the structures that would promote an enterprise focus and allow for sustained change.⁹⁶ The basis of his

⁹³ John Niland "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 187 - 188. Niland recounts the *National Wage Case* decisions of the 1980s in which the Commission laid down wage fixation principles that allowed for and facilitated productivity bargaining and enterprise negotiations. That was a sharp contrast to the earlier Commission approach that productivity must be distributed uniformly and under central control. As indicated elsewhere in this chapter, the actual legal and other legislative steps towards the hybrid system are discussed in chapter four. The purpose of this chapter is to outline the scholarly debate behind those developments.

⁹⁴ John Niland "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 192.

⁹⁵ John Niland "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 185-186.

⁹⁶ John Niland "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 183-184. Other commentators have made the same point about the juridified nature of the Australia system, for example, Richard Mitchell "Juridification and Labour Law: A Response to the Flexibility Debate in Australia" (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 113 - 135.

system involved the distinction between disputes of interests and those of rights.⁹⁷ The former were to be negotiated through collective bargaining with trade unions that considered enterprise considerations, not industry-wide concerns. The latter were to be solved by internal workplace grievance procedures. The effect of such division would be to both limit strike action to confined periods (after which the sanctity of the agreement was beyond question); and to place greater importance on cooperation at the workplace level.

The benefits of this system were, to Niland, many and varied. It would assist in curbing inflation. If pay increases were limited to productive areas of the workforce, rather than industry-wide phenomenon, there would be no 'flow on' of benefits to less productive workers.⁹⁸ Many strikes were, he contended, related to the discontent of workers at the shop floor, not at industry level. By focusing on the workplace, these grievances might be addressed and there would be less disruption to industry.⁹⁹ Inroads might also be made concerning the overly high number of unions in Australia and the disruptive demarcation disputes that inevitably followed; and restrictive work practices by unionists might be addressed.¹⁰⁰ The change in the system would have important

⁹⁷ John Niland "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 192 et seq.

⁹⁸ John Niland "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 197 and 201; and *Collective bargaining* at 64.

⁹⁹ John Niland *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174 at 51-52.

¹⁰⁰ John Niland *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174 at 32, 71-72.

attitudinal change.¹⁰¹ Parties would have actually decided their working conditions for themselves. They would have no 'scapegoat' and, hence, possibly be more likely to compromise and build a relationship for the future.¹⁰²

To assuage doubters, Niland stressed that Government *could* have a role in collective bargaining. He was not simply transplanting the US system to Australia, but developing a form of collective bargaining suitable to this country's needs.¹⁰³ Harking back to Deakin's original fears, *might*, insisted Niland, *would not make right*. Rather power imbalances (between employer and employee; *and* between large unions and weaker ones) could be manipulated in collective bargaining, for example, through the legislative framework determined by government.

While that was an outline of the system itself, equally important was the nature of the social safety net it was to contain. Such was to be provided by means of minimum conditions that would cover all employees. As Niland put it: "With such a provision, the tribunals have no real vetting role and the industrial parties face a less bureaucratised

¹⁰¹ John Niland *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174 at 36-39; and "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 192 et seq.

¹⁰² John Niland *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174 at 36-39; and "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 192 et seq.

¹⁰³ John Niland "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 183; and *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174 at 70.

system because they simply file for the public record their negotiated agreements.”¹⁰⁴ *It seemed a far cry from Deakin’s original vision – making good use of a court that had the flexibility of an elephant’s trunk to deal with the innumerable different circumstances and problems that might be brought before it. In such a system, the “long shadow” of the conciliation and arbitration system and the 1890s strikes by which such was inspired was no more.*¹⁰⁵

Master and Servant Common Law Contract (Bjelke-Peterson; the SEQEB Dispute & the HR Nicholls Society):

Although Niland was critical of the Commission, he saw some sort of role for unions in collective bargaining and envisaged a dual system in which conciliation and arbitration was an option – albeit, not the preferred one.

The radical approach to reform was to embrace the replacement of the Commission system and its attendant unions, with a return to the individual common law contract of employment and recourse to civil court sanctions for enforcement. This approach was adopted in what was called “the Pioneer State”, Queensland, with the

¹⁰⁴ John Niland “The Light on the Horizon” (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 203-204.

¹⁰⁵ John Niland “The Light on the Horizon” (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia, 1990) 182-207 at 184-185. He did, however, clearly see a role for trade unions and acknowledged that some parties could prefer conciliation and arbitration and, in fact, such might be appropriate for them – hence it should remain as an option. Note the idea of separate bodies for conciliation and arbitration as opposed to direct and unlimited access from one to the other.

Bjelke-Petersen Government's approach to the SEQEB (electricity) dispute.¹⁰⁶ As a consequence, Queensland became the exemplar of the "New Right", the HR Nicholls Society.¹⁰⁷

In the inaugural proceedings of the think tank, Wayne Gilbert, the general manager of SEQEB since just prior to the 1984-85 dispute, described the dispute through his eyes.¹⁰⁸ Essentially, the South East Queensland Electricity Board (SEQEB) was in dispute with the state Electrical Trades Union (ETU) over the use of private contractors on certain projects. The ETU representatives dealing with SEQEB management had reached an agreement (the "draft negotiated agreement"), but such was rejected by the State council of the union. Interestingly, Gilbert, himself, acknowledged that he had "deliberately held up four essential community projects," namely transmission lines and a substation, at this same time.¹⁰⁹ Ultimately, the projects fell so far behind that Gilbert decided he "had no alternative but to put them to contract" (although no agreement with the union on the use of private contractors had been reached).¹¹⁰

¹⁰⁶ David Hall "Deregulating the Labour Market in the Pioneer State" (Legislative Comment) in (1988) 1 *Australian Journal of Labour Law* 59 – 69.

¹⁰⁷ Wayne Gilbert "The Queensland Power Dispute" (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52.

¹⁰⁸ Wayne Gilbert "The Queensland Power Dispute" (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52.

¹⁰⁹ Wayne Gilbert "The Queensland Power Dispute" (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52 at 32.

¹¹⁰ Wayne Gilbert "The Queensland Power Dispute" (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52.

As a consequence, work bans and limitations were put in place by the union. A number of conferences were held before the Queensland Industrial Relations Commission. The Commission ultimately recommended the draft negotiated agreement be accepted, but the union refused once more. The general situation was exacerbated by the occurrence of one of the worst storms in Brisbane's history, which left a quarter of a million Queenslanders without power supply. Although the ETU workers, on Commission instruction, eventually agreed to return to work to repair storm damage, the SEQEB management pushed ahead with its contract option, regarding the union as intransigent and the prospect of reaching agreement minuscule. More strikes followed, with some Queenslanders being left without power for a week. At this stage, SEQEB began to openly question the Commission system, itself. To use Gilbert's words:¹¹¹

"The State Industrial Commission steadfastly refused to arbitrate, despite being pressed for arbitration by the Government and the Industry – the Government for its part guaranteed it would abide by arbitration – the State Industrial Commission knew that the ETU would repudiate any "unacceptable" arbitration.

"As the ETU became more intransigent, the State Industrial Commission became weaker. When the ETU defied an order, the State Industrial Commission put the reverse order on SEQEB, a peace at any price philosophy, which avoided the issues. This policy penalised the reasonable and rewarded the use of muscle. The last back flip by the State Industrial Commission was too much for the Government who, faced with large numbers of consumers without power, a State Industrial Commission that was worse than impotent, declared a State of Emergency and withdrew the electricity industry from the jurisdiction of the State Industrial Commission."

The removal of the electricity industry from the Commission's jurisdiction saw the State Government issue Orders in Council pursuant to the *Transport Act*, inter alia, for striking SEQEB workers to return to work or be dismissed. One thousand did not

¹¹¹ Wayne Gilbert "The Queensland Power Dispute" (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52 at 33-34.

and, in the view of Gilbert, “dismissed themselves.”¹¹² Writs were served by SEQEB, pursuant to the *Industrial (Commercial Practices) Act 1984*, on 200 power station operators (who had reduced power output in support of striking SEQEB workers). As Gilbert recalls:¹¹³

“...before this matter was heard in the Supreme Court of Queensland in Brisbane, full power was restored and load shedding ceased. Why?”

It is interesting also to note that, whilst the unions treated the State Industrial Commission with impunity, with contempt, they certainly did not when actions were taken in the Supreme Court of Queensland under the *Industrial (Commercial Practices) Act of 1984*. The main relevance, of course, in that respect, was that SEQEB was seeking pecuniary damages and penalties that are available under that Act...”

Thereafter, further legislation came into play, which strongly regulated union conduct and which effectively set up the infrastructure for non-union, non-commission industrial relations – in the electricity industry, at least. The *Electricity (Continuity of Supply) Act 1985* contained a power to *direct* that workers return to work. This was said to be necessary as some workers alleged the ETU was threatening the welfare of their *families* if the workers returned to work of their own volition.¹¹⁴ Similarly, the *Industrial Conciliation and Arbitration Amendment Act 1985* allowed members to resign from unions without having to give notice (hence avoiding the payment of further membership dues). A new Electricity Authorities Industrial Causes Tribunal was established to

¹¹² Wayne Gilbert “The Queensland Power Dispute” (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52 at 34.

¹¹³ Wayne Gilbert “The Queensland Power Dispute” (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52 at 34-35.

¹¹⁴ Wayne Gilbert “The Queensland Power Dispute” (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52 at 35-36.

replace what Gilbert described as the “impotency of the State Industrial Commission.”¹¹⁵ In particular, that Tribunal was to deal with industrial causes in the electricity industry and take into account “the prosperity of the economy, the economics of the electricity consumers’ interests, the effect on other industries in Queensland, and the management of the Authorities.”¹¹⁶ The workers employed by SEQEB formed a trust that was said to oppose the previous union, desire close ties with management and support the new Tribunal completely.¹¹⁷ Finally, the Government empowered Gilbert to sign individual common law contracts with electricity workers, which contained a ban on all strikes and union preference, and “recognition of *managerial prerogative*, and other things which give the employer flexibility in managing its own operations.”¹¹⁸

The basic tenor of the SEQEB approach became the mainstream Queensland Government policy in the *Industrial Conciliation and Arbitration Act and Another Act Amendment Bill 1987*. That act facilitated the making of ‘voluntary agreements’ through which employers and employees could absolutely exclude award provisions (except in

¹¹⁵ Wayne Gilbert “The Queensland Power Dispute” (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52 at 37.

¹¹⁶ Wayne Gilbert “The Queensland Power Dispute” (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52 at 37.

¹¹⁷ Wayne Gilbert “The Queensland Power Dispute” (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52 at 38.

¹¹⁸ Wayne Gilbert “The Queensland Power Dispute” (Chapter Two) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52 at 39. (Emphasis added)

relation to minimum rates of pay and leave entitlements) if 60% of staff approved.¹¹⁹ The Commission only served to *register* these agreements, which it would do unless the agreement contravened a law or was not in the public interest. Hall noted at the time that the “public interest” had more to do with upholding the basic minimum conditions than with determining whether the 60% rule had been complied with.¹²⁰ Interestingly, the Commission only *conferred* with parties – it did not conduct a formal, public hearing into the matter.¹²¹ Civil sanctions were available as enforcement measures.¹²² In assessing what the Queensland Government in 1988 regarded as its “pioneering legislation”¹²³ Hall pondered:

“The fair (and anxious) question is, ‘Just what promised land does the Government have in view?’

“...until the pioneers announce where they are going, the climate of fear will persist. Unlike Pooh Bear the unions will not be content to know where they are going when they get there.”

The SEQEB dispute is long over and the Queensland Industrial Commission exists to this day, but the notion of a return to the common law ‘master and servant’ position was embraced by some industrial lawyers elsewhere in Australia from the moment the Queensland Government heralded its return. *Indeed, the “promised land” of*

¹¹⁹ David Hall “Deregulating the Labour Market in the Pioneer State” (Legislative Comment) in (1988) 1 *Australian Journal of Labour Law* 59 – 69 at 59 – 60.

¹²⁰ David Hall “Deregulating the Labour Market in the Pioneer State” (Legislative Comment) in (1988) 1 *Australian Journal of Labour Law* 59 – 69 at 66.

¹²¹ Sections 94D et seq *Industrial Conciliation and Arbitration Act and Another Act Amendment Bill* 1987.

¹²² See, for example: s.97 *Industrial Conciliation and Arbitration Act and Another Act Amendment Bill* 1987.

¹²³ Compare: David Hall “Deregulating the Labour Market in the Pioneer State” (Legislative Comment) in (1988) 1 *Australian Journal of Labour Law* 59 – 69 at 691.

individual contracts represented to the HR Nicholls Society (HRN) the template for industrial relations in Australia.

The supposed ‘reasoning’ of some of the earlier writers of the HR Nicholls Society ranged from rejecting the theory of power imbalance through to an appeal to family values. One of the papers in HRN’s inaugural 1986 proceedings was entitled, “The Nature of Trade Union Power.”¹²⁴ In this work, Hugh Morgan regarded the suggestion (underpinning Australian labour law) that employees were powerless against their employer as “an attack on the dignity and worth of the individual.”¹²⁵ Clearly, Morgan had little time for the arguments of scholars like Kahn-Freund, that unskilled labour actually held few bargaining chips (discussed in Chapter Two of this thesis). He did not view the intervention of the law in the labour area as improving the lot of the vulnerable and helping them attain conditions they might not otherwise be able to achieve. More disturbing, however, was Morgan’s characterization of the union movement, itself. Viewing unions as simply “charismatic,” he found them to be irrational and self-serving – as showing no conception of rational rules or economic principals.¹²⁶ He made his strongest pitch in these terms:¹²⁷

¹²⁴ Hugh Morgan “The Nature of Trade Union Power” (Chapter One) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 24-30.

¹²⁵ Hugh Morgan “The Nature of Trade Union Power” (Chapter One) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 24-30 at 25.

¹²⁶ Hugh Morgan “The Nature of Trade Union Power” (Chapter One) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 24-30 at 26.

“As Weber has so clearly described, charismatic movements whether led by St. Francis of Assisi, or Karl Marx, or Lenin, are profoundly hostile to the institution that is, *sui generis*, anti-charismatic, that is the family.

“An incident from the British coal miners strike of 1984 illustrates this fundamental hostility. A father and son worked together in a mine that was the life blood of, what was always referred to in the British intellectual press as, a close knit village community. The father decided, after nine or more months of fruitless unemployment, that he'd had enough and was going to accept the British Coal Board's offer of a return to work on generous terms.

“His son called him a scab, and refused to let him see his grandchildren or give them birthday presents.

“The bonds that reach across the generations were thus broken in a particularly humiliating way.

“This poignant incident illustrates the power of charismatic leadership and its ability to disrupt human relationships, those between father and son, between grandparents and grandchildren.

“The family is not the only institution to which trade unions are hostile...”

The flaws in that reasoning are obvious. Many family members bicker – many take strong views about issues that divide. But none of that is the exclusive domain of the union movement. Rather, other factors contribute to the sad forming of such family schisms - factors that go to the make-up of the family, the poignancy of the issues and the resilience of individual relationships.

More reasoned, perhaps, was HRN's acceptance as 'gospel' of Gerard Henderson's essay, "The Industrial Relations Club,"¹²⁸ which portrayed the Australian

¹²⁷ Hugh Morgan "The Nature of Trade Union Power" (Chapter One) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 24-30 at 27.

¹²⁸ Gerard Henderson "The Industrial Relations Club" (1983) 27 *Quadrant* 21-29. For the HR Nicholls 'acceptance' of such work, refer: Hugh Morgan "The Nature of Trade Union Power" (Chapter One) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 24-30 at 25. Although, in the view of the present writer, some

industrial relations community (lawyers, journalists, unionists and government advisers) as a fraternity. The essence of Henderson's 1983 critique was, as he described it, the Commission's "tendency to regard industrial relations as some kind of 'art' or 'science' with a life independent of economic realities or government policies..."¹²⁹ He relied on the judgment of Justice Moore in the 1965 *National Wage Case* to argue that the Commission pursued human rights issues at the expense of economic management, and that such approach would damage the economy and consequently jobs growth and standards of living.¹³⁰ Henderson opined that the awards of some of the most non-competitive industries were being used as templates for other sectors of the economy. This, he suggested, stifled economic reform and added to inflation.¹³¹ He argued that the *Boilermaker's case*¹³² made enforcement of Commission decision impossible and this

parts of the article are petty. For example, Henderson seems to view the International Labour Organisation (ILO) as a Swiss paradise (at 22), yet does not note that many ILO employees work in South East Asia trying to reform 'sweat shops' (see <http://www.ilo.org>). He describes the industrial commissioners, themselves, as the alleged IR Club's "high priests" who held "the most glittering prize of all" (at 21 and 26), yet does notice that some decisions were overtly economically inclined and does not emphasise the position of working people without a commission. He refers to the alleged "emphasis on wine and song" in the male dominated field of Australian labour law (at 21). This may well be true and in need of reform. But, sadly, many aspects of Australian life and law are male dominated. See for example, "No Job for a Woman" *Four Corners* (ABC Television, Australia, 1984). Finally, it is interesting to note, in this context, that Henderson gave a similar speech at the inaugural HRN conference, see: Gerard Henderson "The Fridge Dwellers – Dreamtime in Industrial Relations" (Chapter Eleven) in *Arbitration in Contempt (The Proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 159-166.

¹²⁹ Gerard Henderson "The Industrial Relations Club" (1983) 27 *Quadrant* 21-29 at 23.

¹³⁰ Gerard Henderson "The Industrial Relations Club" (1983) 27 *Quadrant* 21-29 at 23. In the *National Wage Case*, Moore J was quoted as saying: "It is a question of competing priorities; whether the Commission should act as if its primary function were to attempt to create or sustain a favourable economic climate and its secondary function were to attempt to resolve problems of industrial relations or whether the last is the Commission's primary function and the first its second. In my view, the Commission should always give priority to problems of industrial relations."

¹³¹ Gerard Henderson "The Industrial Relations Club" (1983) 27 *Quadrant* 21-29 at 27 et seq.

¹³² *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 *Commonwealth Law Reports* 254.

leant heavily against employers and in favour of unions.¹³³ He considered it arrogant to regard the Commission as the only body capable of determining what was reasonable.¹³⁴

However, he did acknowledge that wage determination is generically a problem:¹³⁵

“On the wages front there can be no panacea. Over the years virtually all systems of national wage determination have been tried and found wanting. The current debate over the virtues or otherwise of centralised wage fixing misses the point. What matters is not so much who makes wage decisions, but whether they are made according to tough-minded economic criteria.”

By 1989, more attention was being paid overtly by HRN to the relationship between the structure of the Australian labour market and the then poor state of the Australian economy. In clearly bitter terms, Geoff Carmody, writing for the Society, condemned the Australian Industrial Relations Commission as a form of cancer which would “prove robust and difficult to excise from the body politic.”¹³⁶ Basically, Carmody saw the AIRC as placing too great an emphasis on the submissions of the federal Labor Government and the ACTU (through their Accord) in determining the National Wage Case – and not enough emphasis on the economy and the submissions of business. He saw this as detrimental to the nation’s standing.¹³⁷

¹³³ Gerard Henderson “The Industrial Relations Club” (1983) 27 *Quadrant* 21-29 at 24.

¹³⁴ Gerard Henderson “The Industrial Relations Club” (1983) 27 *Quadrant* 21-29 at 23.

¹³⁵ Gerard Henderson “The Industrial Relations Club” (1983) 27 *Quadrant* 21-29 at 29.

¹³⁶ Geoff Carmody “The Industrial Relations Commission in Terminal Decay?” (Chapter Three) in *The Legacy of the Hungry Mile* (*The Proceedings of the Seminar of the HR Nicholls Society*) (Melbourne, 19 August, 1989) 13-17 at 13.

¹³⁷ Geoff Carmody “The Industrial Relations Commission in Terminal Decay?” (Chapter Three) in *The Legacy of the Hungry Mile* (*The Proceedings of the Seminar of the HR Nicholls Society*) (Melbourne, 19 August, 1989) 13-17 at 14 et seq. Similar views were put forward in the earlier HRN paper: Andrew

Even more emphatic was the Society's 1996 objection to what is now the *Workplace Relations Act 1996* (Cth) – on the basis that the statute provided an ongoing role for the AIRC. Written at a time of record unemployment in this country, the Society described the Commission as a near Communist body that stopped labour supply and demand principles from operating. The HRN submission stated:¹³⁸

“...The AIRC is at the heart of the problem...It is a failure of the...Bill that the AIRC survives, albeit in slightly diminished form. The *sine qua non* of a rapid end to our unemployment scandal is the extinguishment of the AIRC. There has been a failure of leadership not just within political parties, but within business, the churches, the academies, and particularly the media on this issue. Every new impost on the direct cost of employing someone; every new regulation which increases the constraints which legally apply to contracts...act to force those workers who operate at the margin of profitability to become unemployed...”

It seems like ‘vintage’ Heyek, and yet all the while, the Society never ponders the worth of a job which does not pay a sustaining wage, nor the problems caused by deplorable conditions on workers and their families. Likewise, there is never a thought that the widespread support of the Industrial Commission amongst academics and the clergy might be because the system has essential qualities, even if in need of some reform.¹³⁹

Brown “Voluntary Agreements Between Employers and Employees in Queensland” (Chapter Four) in *The Light on the Hill (The Proceedings of the HR Nicholls Society)* (Mooloolaba, 6-8 June, 1987)25-29 at 25.

¹³⁸ *Submission to the Senate economics references Committee: The Workplace Relations and Other Legislation Amendment Bill (The Reith Bill)* – 1-9 at 4 et seq.

¹³⁹ This is not an economics thesis, but what the present writer seeks to underline is that these criticisms were written *before* the present hybrid system of labour relations that now exists in this country came into being – and it is that very system that this thesis defends. Further, whilst the Australian economy has improved under the present system, there is still widespread debt – and that stems from a range of considerations, such as loans for investment properties – not from the cost of labour alone.

CONCLUDING REMARKS:

In 1998, Ronald Howatson, a former Commissioner of the Queensland Industrial Relations Commission, finished the work that had been commenced by former Commission Kevin Edwards – *A Chronicle of Events relating to Industrial Relations Tribunals in Queensland to 1960*. Using the vernacular of the State of Queensland, the book was published as *They'll Always be Back*.¹⁴⁰ Such words were actually those of former Industrial Registrar, PJ Wallace shortly before his retirement on 19 September 1949, when he said that: “the industrial court had the confidence of both employers and employees and its future was assured...(Some) unions had been prepared to do without the court when things went their way but they always had and always would come back.”¹⁴¹ To this, Howatson added: “Events in this book suggest that these words have applied at various times to employers and indeed government as well as to employee unions.”¹⁴²

Yet the discussion in this chapter demonstrates that the words “they’ll always be back” may not be a true reflection of the sentiments of a number of those parties, today. The scholarly, governmental and business studies analysed in this chapter and spawned

¹⁴⁰ Ronald Howatson *They'll Always Be Back – A Chronicle of Events Relating to Industrial Relations Tribunals in Queensland to 1960* (Industrial Court of Queensland, Brisbane, 1998) 1-435. The present writer wishes to express her thanks to her friend and mentor, Hon. David Hall, President, Industrial Court of Queensland, for giving her a copy of the work - on file with author.

¹⁴¹ Ronald Howatson *They'll Always Be Back – A Chronicle of Events Relating to Industrial Relations Tribunals in Queensland to 1960* (Industrial Court of Queensland, Brisbane, 1998) 1-435 at iii.

by the 1980s deregulation of the Australian economy, and the rise of globalisation and instantaneous technology, as well as neo-liberal thought, all show that *systemic change* to Australian labour regulation is a *live issue*.

The argument of this thesis, which unfolds in the following chapters, supports the present system. That system is one that takes into account the many economic changes and scholarly critiques outlined in this chapter *to graft onto conciliation and arbitration* features which make the most of enterprise culture and increase productivity, yet not at the expense of fairness. It is a hybrid system of which the no disadvantage test is the centrepiece, and the nature of that test and system is legally analysed at length in the body of this work.

But it must be remembered that there is a real urgency and purpose to that argument. The government's 'rock solid guarantee' speech favoured the virtual dismantling of conciliation and arbitration. The enduring nature of the Government's commitment to that quest was reflected in the speech of the Honourable Kevin Andrews MP, Minister for Employment and Workplace Relations, to the Centenary Conference of the AIRC, *The Centenary Convention: The Conciliation and Arbitration Journey*.¹⁴³

¹⁴² Ronald Howatson *They'll Always Be Back – A Chronicle of Events Relating to Industrial Relations Tribunals in Queensland to 1960* (Industrial Court of Queensland, Brisbane, 1998) 1-435 at iii.

¹⁴³ Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here? An address to the Australian Industrial Relations Commission Centenary Conference The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9; and Justice Michael Kirby *Industrial Conciliation and Arbitration in Australia – A Centenary Reflection* An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-35. The present writer thanks her former student and intern with the Australian Industrial Relations Commission, Ms Amy Lee, for sending her all the conference papers delivered at that magnificent conference (on file with author).

The Minister, Honourable Kevin Andrews, did foreshadow a continuing role for the Commission in Australian labour law when he said:¹⁴⁴

“Since 1904 the Australian Industrial Relations Commission and its predecessors have been inseparably linked with the destiny and attitudes of the Australian community. Over this period the Commission and its predecessors have adapted and evolved according to changing conditions and national requirements. *Change is constant. Australia’s future is inextricably linked to economic change. All institutions will have to continue to adapt to a changing economic environment. I am confident that the Commission will meet this new challenge in our national journey.*” (Emphasis added).

Likewise, there were other reassurances – about the “guaranteed *award* safety net (being) central to Australia’s workplace relations system;”¹⁴⁵ about Australian wage rates being amongst the highest in the OECD;¹⁴⁶ and that the Commission still has an important role in Australia’s labour system, especially through its “*widened responsibility to encourage positive outcomes by facilitating the making and certification of agreements.*”¹⁴⁷

But other statements made by the Minister may well fill the spine with a cold feeling of foreboding. The Minister was at pains to emphasise that other constitutional

¹⁴⁴ Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here? An address to the Australian Industrial Relations Commission Centenary Conference The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 9.

¹⁴⁵ Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here? An address to the Australian Industrial Relations Commission Centenary Conference The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 7.

¹⁴⁶ Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here? An address to the Australian Industrial Relations Commission Centenary Conference The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 7.

¹⁴⁷ Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here? An address to the Australian Industrial Relations Commission Centenary Conference The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 7. (Emphasis added).

heads of power, such as the corporations power have already been used in Australian labour law and that “(mechanisms) other than conciliation and arbitration could equally have been chosen to resolve the issues pressing on the Constitutional founders, as occurred in other nations.”¹⁴⁸ But even more interesting was the distance the Minister placed between himself and the earlier, legendary members of his own party, the Liberal Party of Australia, who had supported conciliation and arbitration. Of the Father of Liberalism, Hon Sir Robert Menzies, Minister Andrews said:¹⁴⁹

“The reality of change is obvious when we recall that as late as 1967, after he had retired from office, Sir Robert Menzies told an American audience that wage levels in Australia were determined by a special tribunal because ‘such grave and weighty matters were too important to be dealt with in another fashion.’ Few would share that view today.”

Of the Deakin Settlement, much cherished by the present writer and outlined in some detail earlier in this chapter, Minister Andrews stated:

“Of all the pillars of the ‘Australian Settlement,’ industrial arbitration is the only one which has not been consigned to history and which has any realistic prospect of surviving into the next century.” (Emphasis added).

Minister Andrews ended his speech with a discussion of the need to ensure all Australians can obtain a job and that such a consideration should be taken into account

¹⁴⁸ Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here?* An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 4, 6.

¹⁴⁹ Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here?* An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 3.

when the Commission undertakes its work of setting wages and the like.¹⁵⁰ The emphasis of the Commission had to move from awards and dispute settlement to economic considerations.¹⁵¹ He also noted, as acknowledged in chapter one of this thesis, that the *Workplace Relations Act 1996* “was never meant to be a definitive statutory framework but a step towards a more dynamic and flexible labour market.”¹⁵²

In the view of the present writer, the Minister’s speech, although in parts ambivalent, leaves one very distinct possibility – that the original “rock solid guarantee” speech agenda will be pursued in the coming term (and by a Government that now has a majority in both Houses of Parliament). By that agenda, the Commission’s place within the Australian labour system will be almost reduced to naught. What also strikes the present writer about the Minister’s speech is the ‘icy chill’ of its omissions. The speech paints the Commission as one that is largely about national strikes and rigid awards, and the Deakin Settlement as an anachronism. Nowhere does the Minister undertake the exercise conducted at the start of the present chapter of this thesis, which notes *the compatibility of the economic and social objectives of the Commission and the inherently flexible structure of a Commission of experts that, through hearings, could arrive at different decisions, just as an elephant’s trunk could lift a pin or pick up an enormous*

¹⁵⁰ Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here?* An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 8.

¹⁵¹ Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here?* An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 4, 7 and 8.

¹⁵² Hon Kevin Andrews MP, Minister for Employment and Workplace Relations *Where to From Here?* An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9 at 7.

load.¹⁵³ Nowhere does the Minister study the recent changes to the operation of the Commission through the no disadvantage test and its enterprise focus (as this thesis does in the following chapters). Nowhere does the Minister speak of his love of being, and what it means to be, an Australian – with all of its strange and beautiful flora and fauna and with its idiosyncratic, rebellious charm.

That void was filled by one of the most beautiful speeches the present author has read for some time, also given at the AIRC Centenary Conference and by the Hon Justice Kirby.¹⁵⁴ His Honour acknowledged that “many of the issues that were debated at (the time of the establishment of the Commission) remain important today. It is as if the process of creation and renewal has, like a human life, been one of *constant “rediscovery of things that are fundamental.”* Referring to the fact that the greatness of a system is not measured by how it allows strong people to protect themselves, but rather how it intervenes to protect those who are too weak to mount such a defence, the judge spoke of Higgins and his determination to ensure that working people had a fair and reasonable wage.¹⁵⁵

“Even for an Australian of Ulster Protestant lineage, this was an idea that seemed right to Higgins. Its centrality in industrial relations and economic organisation has changed over the century. But the germ of the idea of a essential ‘safety net’ to protect the dignity of every employee – and thereby the dignity of all those who employ them –

¹⁵³ Refer discussion of Deakin Settlement earlier in this thesis.

¹⁵⁴ Justice Michael Kirby *Industrial Conciliation and Arbitration in Australia – A Centenary Reflection* An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-35.

¹⁵⁵ Justice Michael Kirby *Industrial Conciliation and Arbitration in Australia – A Centenary Reflection* An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-35 at 34, 23 et seq.

remains in the ongoing function that Australians expect of their national tribunal for industrial conciliation and arbitration. Over the course of a century, that body 'has contributed to the equalisation of costs of labour throughout Australia and hence to the growth of a national economy.' It has reinforced the strong constitutional attention to the creation of a continental common market, nearly a century ahead of that achievement in Europe and North America. It has helped weld Australia together, contributed to the creation of a national economic structure and protected our largely egalitarian society which, until now, has been a special feature of life in Australia. We can change these characteristics as we please. However, if we do so, the change will not deny the impact of the Commission and its predecessors upon what it has meant to be an Australian over the past hundred years.

...

"...Rude as it may be to mention it at such a time, there are those who see no future whatever in the Australian Industrial Relations Commission. For them, it should be closed down, lock, stock and barrel. Or, if retained, converted into a mediatory body 'with no legal powers of arbitration or intervention.' For those of this opinion, a wholesale revision of the legislation is required; indeed it is urgent.

Persons of such views tend to live in a remote world of fantasy, inflaming themselves by their rhetoric into more and more unreal passions, usually engaging in serious dialogue only with people of like persuasion. For the rest of us, who live in the real world, and know our country and its institutions better, time will not be wasted over such fairytales. Australia is not a land of extremes. Irritatingly enough to those of extreme persuasions, Australia's basic institutions and laws tend to adapt very slowly and over time: adjusting to changing economic and social forces only as such adjustment is truly needed. So it has been with the national conciliation and arbitration tribunal. So it will be in the future. Those who want more dramatic change, as distinct from constant adjustment, need to look for another country."

The judge concluded his speech by discussing a workplace problem once confronted by his niece, Julie. As a casual worker, she had been frequently underpaid, amongst other problems. Thanks to the intervention of the Commission and the ultimate help of a union, Julie won her case for recompense from the employer. The judge mused as to what would happen to the disenfranchised casual and weaker workers of this world without a Commission. All these observations he gave as a Justice of the High Court of Australia –

which he described as “*the other independent national decision-maker expressly envisaged by the Constitution.*”¹⁵⁶

It is that latter point which may be the most important made by the judge and the one on which it is appropriate to end this chapter. It is a point that goes to the heart of this thesis and which was considered by Professor McCallum some years earlier when the Professor lauded the Constitutionally based Commission in preference to minimum conditions:

“...The use of a core set of statutory standards against which agreements can be vetted will not only ensure that agreement-making is more flexible, but it will greatly curtail the role of the Commission as the primary determiner of national employment standards.

...

I believe that conservative governments have been successful in weakening our network of arbitral tribunals because they are perceived of as little more than creatures of statute. On the contrary, without independent labour relations machinery there can be no viable system of collective labour law in this country. Collectively secured terms and conditions of employment must be guaranteed as an indispensable right of the democratic citizenry. The downgrading of our industrial tribunals is, in my opinion, an attack on citizenship itself.

The failure of adherents of collective labour law to perceive the linkage between independent labour relations machinery and democratic citizenship occurs because insufficient attention has been paid to the worker as citizen and to the place of independent labour relations tribunals in the Australian political structure.

...

In my judgment, the insertion of the labour power into the *Australian Constitution* was a recognition by the founders of our federal nation that its citizen workers should possess the right to have their employment conditions vetted by machinery which is independent of the executive. In other words, the Commission is not merely a creature of the enabling statute which was enacted by Parliament. On the

¹⁵⁶ Justice Michael Kirby *Industrial Conciliation and Arbitration in Australia – A Centenary Reflection* An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-35 at 1, 31 et seq.

contrary, the establishment of the Commission represents part of the constitutional framework of our nation.

While he did not use the word 'citizenship,' Henry Higgins understood perfectly the political dimensions of our collective labour law where conditions of labour are governed by an independent body. As he showed in his many judgments (and especially his 1907 *Harvester* decision), the purpose of conciliation and arbitration is to enhance the rights of persons at work. In other words, this atypical court is part of the political process. After all, as Higgins viewed federal conciliation and arbitration, it was his 'new province for law and order' because it enabled citizen workers to obtain collectively determined wages and other social benefits by the processes of the law and without the need to engage in industrial dispute.¹⁵⁷

The Australian Industrial Relations Commission provides working class Australia with a protection that minimum conditions and collective bargaining alone cannot give. The present writer accepts the earlier critiques of the Commission by the BCA and Walker. There were, indeed, times when the operation of the Commission was wanting, when it was too rigid in a changing world – its industry-wide common rules being the manifestation of this problem. But as Isaac and Deakin and like commentators all knew, the Commission of experts was not always unyielding. In fact, it had a tremendous capacity to deal flexibly with a variety of situations, and within its framework adopted many different approaches to problems such as wage-setting. At various times, it also allowed actual parties to bargain.

Through the adoption of the no disadvantage test and the hybrid system (analysed in detail in chapter four and following) the Commission has answered its critics and shown itself to be a strong institution that is both flexible and fair for all Australians.

¹⁵⁷ Ron McCallum "Collective Labour Law, Citizenship and the Future" (1998) 22 *Melbourne University Law Review* 42-61 at 56-58.

Part B:

*Development and Analysis of the No
Disadvantage Test*

IV. CHAPTER FOUR:

The No Disadvantage Test & the *Industrial Relations Reform Act 1993*:¹

“No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.”²

Since the days of New Testament writing, the difficulty of serving two masters – of aspiring to conflicting goals – has been admonished. In labour law, that difficulty is patent, also. The scholarly works of the authors considered in chapters two and three of this thesis all embody the preoccupation central to industrial law – balancing equity with efficiency, or determining the relationship between flexibility and fairness and how best to achieve it.³ In introducing conciliation and arbitration, Deakin proclaimed: “Permanent prosperity can only be based upon institutions which are cemented by social justice.”⁴ To his eyes, conciliation and arbitration *was* the reconciliation of equity and

¹ The present writer has published work based on some of the material in this chapter in: Louise Willans Floyd “No Disadvantage Test (Introduction to Part VIE and Commentary on s.170XA *Workplace Relations Act 1996* (Cth))” in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2002) 3275-3281.

² Matthew 6:24 *The Holy Bible* (King James Version) (Thomas Nelson Publishers, Nashville, 1976). In a similar vein, see Matthew 19:24: “And again I say unto you, it is easier for a camel to go through the eye of a needle, than for a rich man to enter into the Kingdom of God.”

³ For further discussion of this conflict, see, for example: Ron McCallum and Paul Ronfeldt “Our Changing Labour Law” in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 1-30 at 2. The authors go on to discuss the manner in which the term ‘flexibility’ may be used to describe various degrees of managerial prerogative (at 5 et seq).

⁴ Sir Alfred Deakin “Second Reading of the Conciliation and Arbitration Bill 1903 (Cth)” in *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, Canberra, 1903) at 2868.

efficiency. In fact, he regarded the two ideals as mutually supportive goals.⁵ But as noted in the previous chapter, for later writers, like Niland for example, arbitration had lost its way; it had to be modified – or replaced by a new system, such as collective bargaining supported by minimum conditions.⁶ So it seems, as Ronfeldt and McCallum reflect, change is a feature of Australian labour law – “(it is) continually made and remade.”⁷

The academic debate about arbitration (discussed in chapters two and three) found its expression in a series of well documented modifications to the system, itself. These changes began with what Ronfeldt and McCallum refer to as “managed decentralism.”⁸ In other words, through such decisions as the 1987 and 1988 *National Wage Cases*,⁹ the Commission set about reforming awards, to ensure that pay was linked to productivity and that once narrow job descriptions were broadened, so as to allow workers to develop further skills. *Awards were still the focus of conditions of employment, but there was some notion of bargaining* in terms of the “implementation of changes at a workplace

⁵ See also on that point: Ron McCallum and Paul Ronfeldt “Our Changing Labour Law” in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 1-30 at 6 et seq.

⁶ John Niland *Transforming Industrial Relations in New South Wales (The Niland Green Paper)* (NSW Government Printer, 1989).

⁷ Ron McCallum and Paul Ronfeldt “Our Changing Labour Law” in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 1-30 at 1.

⁸ Ron McCallum and Paul Ronfeldt “Our Changing Labour Law” in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 1-30 at 10 et seq.

⁹ *National Wage Case March 1987* (1987) 17 *Industrial Reports* 65; and *National Wage Case August 1988* (1988) 25 *Industrial Reports* 170 – the Restructuring and Efficiency Principle and the Structural Efficiency Principle (respectively).

level.”¹⁰ Soon after, the legislature embedded a capacity to *bargain for conditions of employment at the workplace level* in the *Industrial Relations Act 1988*¹¹ and, later, the amendments to that principal legislation brought about by the *Industrial Relations Legislation Amendment Act (No 2) 1992* (Cth).¹² In both cases, the *Commission* retained a discretion to accept or reject agreements. Of particular interest, the 1992 legislation contained a ‘no disadvantage test,’ whereby agreements could not be approved by the *Commission* unless their terms of employment did not disadvantage the employees vis-à-vis the award and there was no term against the *general public interest*.¹³

The real break with tradition was to come in 1993 with the amendments to the *Industrial Relations Act 1988* brought about by the *Industrial Relations Reform Act 1993*. That legislation contained many of the features of the 1992 bargaining system, such as

¹⁰ Ron McCallum and Paul Ronfeldt “Our Changing Labour Law” in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 1-30 at 10 et seq. See, also, generally on these early changes and developments: Breen Creighton and Andrew Stewart *Labour Law: An Introduction* (3rd ed, Federation Press, Sydney, 2000) (Chapter Two: The Evolution of Australian Labour Law, especially the section “Wage Fixing” at 41 et seq.); and *Enterprise Bargaining Commentary* in CCH Australia *Australian Labour Law Reporter* (Volume Four) ¶56-000 et seq, in particular the section headed “Enterprise Bargaining as a Wage Fixing Principle.”

¹¹ Sections 115-117 *Industrial Relations Act 1988* (Cth).

¹² Division 3A *Industrial Relations Legislation Amendment Act (No 2) 1992* (Cth).

¹³ The 1992 legislation introduced the ‘no disadvantage test’ in section 134E(1) – discussed further *infra*. See generally: Ron McCallum “Collective Bargaining Australian Style: the Making of Section 115 Agreements under the Industrial Relations Act 1988 (Cth)” (1990) 3 *Australian Journal of Labour Law* 211-226; Ron McCallum “Enhancing Federal Enterprise Bargaining: the Industrial Relations (Legislation Amendment) Act 1992 (Cth)” (1993) 6 *Australian Journal of Labour Law* 63-68; David Plowman “An Uneasy Conjunction: Opting Out and the Arbitration System” (1992) *Journal of Industrial Relations* 284-306; Richard Naughton “The New Bargaining Regime Under the Industrial Relations Reform Act” (1994) 7 *Australian Journal of Labour Law* 147-169 at 148; and Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235 at 210.

the 'no disadvantage test'.¹⁴ However, the *Reform Act* was striking in that it allowed for a stream of *non-union bargaining* called Enterprise Flexibility Agreements (EFAs). While retaining dispute prevention and settlement as the principal object of the act, the system was now, formally, to encourage agreement making; and awards were to act as safety nets – they were no longer the end in themselves.¹⁵ Finally, international concepts were added to Australian labour law. The collective bargaining notions of good faith bargaining and the use of strikes as 'bargaining chips' between unions and employers were introduced. There was also recourse to international conventions to ground provisions on topics such as unfair dismissal.¹⁶

As Naughton commented on the introduction of the legislation, through the *Industrial Relations Reform Act 1993*, enterprise bargaining had been "grafted onto" the arbitration system, which was to provide simply a safety net role.¹⁷ Or as Smith would

¹⁴ Sections 170MC and 170NC – elaborated later in this chapter. See, for example, Richard Naughton "The New Bargaining Regime Under the Industrial Relations Reform Act" (1994) 7 *Australian Journal of Labour Law* 147-169, especially at 147 et seq.

¹⁵ Refer sections 3 and 88A, respectively. See also: Richard Naughton "The New Bargaining Regime Under the Industrial Relations Reform Act" (1994) 7 *Australian Journal of Labour Law* 147-169, especially at 147 et seq; and Amanda Coulthard "Non-Union Bargaining: Enterprise Flexibility Agreements" (1996) 38 *Journal of Industrial Relations* 339-358.

¹⁶ Amanda Coulthard "Non-Union Bargaining: Enterprise Flexibility Agreements" (1996) 38 *Journal of Industrial Relations* 339-358; and Ron McCallum and Paul Ronfeldt "Our Changing Labour Law" in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (Federation Press, Australia, 1995) 1-30 at 12 et seq. It is interesting to note that, generally, internationalisation is becoming increasingly important to the Australian industrial relations landscape, see for example: Ron McCallum "The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993" (1994) 16 *Sydney Law Review* 122; and "Conflicts of Laws and Labour Law in the New Economy" (2003) 16 *Australian Journal of Labour Law* 50-68. See also: Richard Naughton "The New Bargaining Regime Under the Industrial Relations Reform Act" (1994) 7 *Australian Journal of Labour Law* 147-169, especially at 165 et seq, where he discussed the salient features of the US collective bargaining system.

¹⁷ Richard Naughton "The New Bargaining Regime Under the Industrial Relations Reform Act" (1994) 7 *Australian Journal of Labour Law* 147-169, especially at 147.

go on to describe it, the system was a “hybrid...not truly a bargaining system and not truly an award system.”¹⁸ Although Smith uttered those comments with melancholy, he seemed to take solace in his view that “effective change is usually evolutionary and that it is necessary to go to a hybrid system before progressing to a true bargaining system.”¹⁹

The purpose of this chapter is to examine the no disadvantage test under the *Industrial Relations Reform Act 1993*, as applied to both certified (union) agreements and (non-union) enterprise flexibility agreements. Such test was meant to be the channel through which flexibility and worker protection could coalesce. Further, it combined aspects of both compulsory arbitration and the collective bargaining models. The belief such balance is effectively obtainable is, obviously, central to this thesis. Although the no disadvantage test was first propounded in the 1992 legislation, Omar observed that it was “not until the second reading speech on the Industrial Relations Reform Bill 1993...that more detailed observations in relation to the objects and operation of the (test) were made.”²⁰ Thus, the detailed analysis of the test begins with the Reform Act provisions. The attendant provisions regarding good faith bargaining are considered, as appropriate, in chapters seven and eight of the thesis.²¹

¹⁸ Graham Smith “A Practitioner’s View: A Brief Commentary on Working with the New System” (Chapter Nine) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press; Australia, 1995) 202-207, especially 203.

¹⁹ Graham Smith “A Practitioner’s View: A Brief Commentary on Working with the New System” (Chapter Nine) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press; Australia, 1995) 202-207, especially 203.

²⁰ Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235 at 210.

²¹ As noted by the present author in chapter one when considering the original “Rock Solid Guarantee” speech, such attendant provisions, relating to union rights and the role of the Commission, are important to

On enactment of the *Reform Act*, some commentators, like Bennett, were highly critical of the new laws, particularly the EFA provisions, as “bargaining away the rights of the weak.”²² Others, such as Coulthard, observed that even EFAs allowed unions so much scope to intervene in Commission approval hearings that they scared would-be users away.²³ Ultimately, the real legacy of the provisions may be, as Smith suggested, that they were the forerunner of today’s bargaining system under the *Workplace Relations Act 1996*. A critique of that system and how it compares to its forebears is given in the subsequent chapters (chapter five and following), along with this author’s argument for law reform.

Legislative Purpose and Background of the No Disadvantage Test (Industrial Relations Reform Act 1993):

“This Bill starts with a confession that it is based on a humanitarian interpretation of the principles and obligations which form the very basis of civilised society. It leaves to its opponents the creed whose God is greed, whose devil is need, and whose paradise lies in the cheapest market.”²⁴

In the second reading of the Industrial Relations Reform Bill 1993, then Industrial Relations Minister, Hon Laurie Brereton, relied on these words, that Sir Alfred Deakin

a consideration of the no disadvantage test and also the effectiveness of worker protection. They are the mechanisms through which the no disadvantage test is applied.

²² Refer to article of the same name: Laura Bennett “Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction.” (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* pages (The Federation Press, Australia, 1995) 129-154.

²³ Amanda Coulthard “Non-Union Bargaining: Enterprise Flexibility Agreements” (1996) 38 *Journal of Industrial Relations* 330-358 at 341, 355 et seq.

²⁴ Sir Alfred Deakin cited by Hon. Laurie Brereton MP, Minister for Industrial Relations, “Second Reading of the Industrial Relations Reform Bill 1993” *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2777.

had spoken almost one hundred years earlier in introducing the original Conciliation and Arbitration Bill. The passage was useful to distinguish the government's new proposed legislation from Opposition policy, which at that time (1993), espoused minimum standards and the greater use of contract employment.²⁵ The passage also emphasised a commitment to the traditional mechanisms of protecting employees' rights and interests, whilst promoting business flexibility. In a sense the words were ironic, Deakin having been a Liberal politician was now relied upon by a Labor Government. But that paradox was poignant. It demonstrated the significance arbitration had long held in this country and seemed to replicate the 'shades of grey' inherent in a system that seeks both fairness and flexibility through a hybrid model.

Legislative Bargaining Scheme – An Overview:

The starting point for the new regime was the encouragement of agreement making. The principal object of the act, whilst retaining its commitment to the role of the Commonwealth in preventing and settling disputes, expressly encouraged agreement making and saw a new role for the Commission in facilitating agreements.²⁶ Even the objects of the award making provisions now referred to those very instruments as "a safety net of minimum wages and conditions of employment underpinning direct

²⁵ Hon. Laurie Brereton MP, Minister for Industrial Relations, "Second Reading of the Industrial Relations Reform Bill 1993" *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2777.

²⁶ See, for example, section 3(a) *Industrial Relations Act* 1988 (Cth) as amended by the *Industrial Relations Reform Act*. Likewise, the sections of the statute governing bargaining were contained in "Part VIB – Promoting Bargaining and Facilitating Agreements."

bargaining.”²⁷ In tandem with these new objectives, the Commission was to embark on a process of award review to ensure they were, for example, expressed in plain English.²⁸ Convening and executing all these developments was a newly formed Bargaining Division of the Australian Industrial Relations Commission.²⁹

In terms of the actual machinations of bargaining, two broad categories of bargain could be struck: Certified Agreements (to be concluded between employers and trade unions); and Enterprise Flexibility Agreements (EFAs – to be concluded between employers and groups of employees).³⁰ As noted above, it was the latter development – *the advent of the non –union bargain* – that was the watershed. Importantly, however, *both types of agreements required certification by the Commission before they could become operational and both were adjudged against an award.*³¹ To this end, the primary test to be satisfied for such certification to occur was the no disadvantage test. The test was cast in these terms:³²

“...the Commission must (approve implementation of an agreement) and must not do so unless it is satisfied that...the agreement does not, in relation to their terms and conditions of employment, disadvantage the employees who are covered by the agreement...”

²⁷ Section 88A(b) *Industrial Relations Act 1988* (Cth).

²⁸ Section 150A(2)(b) *Industrial Relations Act 1988* (Cth).

²⁹ Section 170QA et seq *Industrial Relations Act 1988* (Cth).

³⁰ Part VIB, Division 2 (Certified Agreements) and Division 3 (Enterprise Flexibility Agreements) *Industrial Relations Act 1988* (Cth).

³¹ See, for example, section 170MC(1)(a) (certified agreements) and section 170NC(1)(b) (enterprise flexibility agreements) *Industrial Relations Act 1988* (Cth).

³² In the case of certified agreements, the test was stated at s.170MC(1) of the statute; and in the case of EFAs, the test was stated at s.170NC(1) *Industrial Relations Act 1988* (Cth).

It was elaborated, thus:³³

“...an agreement is taken to disadvantage employees in relation to their terms and conditions of employment only if:

- (a) (approval of implementation of the agreement) would result in the reduction of any entitlements or protections of those employees under:
 - (i) an award; or
 - (ii) any other law of the Commonwealth or of a State or Territory that the Commission thinks relevant; and
- (b) in the context of their terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest.

Further key safeguards on the bargaining process required *consultation* between employer and employees; and that the terms of the proposed agreement be made known to employees as a part of the bargaining process.³⁴ There was a need for consent to an agreement to be *genuine*.³⁵ Obviously, with certified agreements, relevant unions were entitled to be heard in proceedings that determined whether or not an agreement was to be approved by the Commission; representative unions were, after all, a party to the agreement once it was approved.³⁶ *Importantly, even with EFAs, “eligible unions” could intervene in the actual proceedings for certification of the agreement, despite the fact they would ultimately not be a party to them.*³⁷ So as not to unnecessarily hamstring the

³³ The elaboration is found in sections 170MC(2) and 170NC(2) for certified agreements and EFAs, respectively *Industrial Relations Act 1988* (Cth).

³⁴ Section 170MC(1)(d) et seq (certified agreements) and 170NC(1)(f) et seq (EFAs) *Industrial Relations Act 1988* (Cth).

³⁵ Section 170NC (1)(i) *Industrial Relations Act 1988* (Cth).

³⁶ See, for example, section 170MB *Industrial Relations Act 1988* (Cth). The notion of “eligible union” was defined in s.170LB to mean a union that has members employed by the relevant employer or one that is a party to the relevant award that governs the enterprise.

³⁷ Section 170NB *Industrial Relations Act 1988* (Cth). See also: Amanda Coulthard “Non-Union Bargaining: Enterprise Flexibility Agreements” (1996) 38 *Journal of Industrial Relations* 339-358 at especially 342-248.

process, there was a capacity for the Commission to accept undertakings from parties to alter agreements in accordance with Commission directions at certification hearings.³⁸

As noted in the earlier part of this chapter, there were other statutory innovations designed to provide protection to bargaining employees and unions - mostly flowing from the more international approach of the legislation.³⁹ The Commission had power to make orders for parties to bargain in good faith,⁴⁰ and the parties, themselves, had a freedom from civil penalty if they were taking industrial action in support of genuine bargaining claims – in keeping with notions of collective bargaining, a strike was a bargaining chip.⁴¹ For the first time, there was also a prohibition on unfair dismissal.⁴²

Legislative Purpose – the Second Reading in Depth:

In the Second Reading of the Industrial Relations Reform Bill 1993, Minister Brereton emphasised the need for business reform in a competitive world. In that world, Asia was seen as a dynamic region in which Australia was to compete and not feel

³⁸ See section 170MF and 170NF *Industrial Relations Act 1988* (Cth).

³⁹ These overseas influences were discussed earlier in this chapter and may be evidenced by the ILO Treaties that became a schedule to the *Industrial Relations Act 1988* (Cth), for example: *Convention Concerning Termination of Employment at the Initiative of the Employer* (which was Schedule Ten).

⁴⁰ See, for instance, section 170QK former *Industrial Relations Act 1988* (Cth).

⁴¹ Refer Part VIB Division Four, Immunity From Civil Liability (that is sections 170PA et seq *Industrial Relations Act 1988* (Cth).)

⁴² For example, section 170DF et seq *Industrial Relations Act 1988* (Cth). These provisions derive from the ILO Treaty *Convention Concerning Termination of Employment at the Initiative of the Employer* (which was Schedule Ten of the *Industrial Relations Act 1988* (Cth)).

threatened.⁴³ Tariffs were not to be retained. Rather, a robust and flexible private sector would prove the engine of growth; and enterprise bargaining was the way to achieve this.⁴⁴

However, as in the time of Sir Alfred Deakin, this goal of flexibility was seen as *consistent with fairness*. Weaker parties were to be protected not simply on humanitarian grounds but for sound business reasons. If employees were scared of the new system, such would translate into poor performance and a reluctance to embrace bargaining.⁴⁵

The no disadvantage test was, therefore, the major employee protection and the centre piece of the bargaining regime. The Minister was keen to note its *reliance on the traditional award system as the benchmark against which all agreements were to be judged by the traditional arbiter, the Commission*. The system was painstakingly distinguished from one based on minimum standards (espoused by the Opposition of the day), in which working conditions were viewed as “expropriated”.⁴⁶

⁴³ Hon. Laurie Brereton MP, Minister for Industrial Relations, “Second Reading of the Industrial Relations Reform Bill 1993” *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2778.

⁴⁴ Hon. Laurie Brereton MP, Minister for Industrial Relations, “Second Reading of the Industrial Relations Reform Bill 1993” *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2779.

⁴⁵ Hon. Laurie Brereton MP, Minister for Industrial Relations, “Second Reading of the Industrial Relations Reform Bill 1993” *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2784.

⁴⁶ Hon. Laurie Brereton MP, Minister for Industrial Relations, “Second Reading of the Industrial Relations Reform Bill 1993” *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2778-2779.

"It is the award that guarantees unionists and non-unionists alike legal protection for the conditions they currently enjoy. To remove the award is to remove employee bargaining power. And, where the award is replaced by minimum standards, as the opposition proposes, then everything not covered by those standards is no longer the employee's to trade. That is not bargaining. Employers do not have to negotiate with their employees on working conditions; the Government removes everything but the basics, and does so at no cost to the employer. Under those circumstances employees do not start the bargaining process with their existing conditions, they start with the bare minimum."

Yet, the no disadvantage test was not to be interpreted so that awards were a 'millstone' around parties' 'necks.' There could be some reduction of award conditions so long as there were corresponding benefits. The test was to facilitate innovation through mutual gain, and in that process, the further employee protection was highlighted, namely, that the basic standards that had formed part of the 'pillars' of Australian life would not be denigrated. To use the Minister's oft-cited explanation:⁴⁷

"In the bargaining process employees want and deserve the security of knowing they cannot be worse off – worse off in totality. The security of knowing that the conditions they currently enjoy are not to be traded off without something being offered in return. It may not always be a pay rise, it may be extra training, more flexible rosters or just greater job security; it will be something nevertheless..."

"...The no disadvantage test has been an important innovation. Applying as it does to the overall package of employee entitlements, it allows for a wide range of variations to award conditions. It also allows for agreed reductions if these are judged not to be against the public interest, for example, as part of a strategy for dealing with a short term business crisis and revival. However, as the government has consistently stressed, the provision is intended to protect well established and accepted standards which apply across the community, standards such as maternity leave, hours of work, parental leave, minimum rates of pay, termination change and redundancy provisions and superannuation."

⁴⁷ Hon. Laurie Brereton MP, Minister for Industrial Relations, "Second Reading of the Industrial Relations Reform Bill 1993" *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2778 and 2781 as cited in especially *Enterprise Flexibility Test Case, May 1995* (1995) 59 *Industrial Reports* 430-477 (Australian Industrial Relations Commission per Ross VP; Maher DP and Cox C); and, for example, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212 at 232 et seq.

This passage of the Second Reading was instructive in interpreting the legislation and setting the tone for the new bargaining regime. It formed an important part of many judgments dealing with the application of the no disadvantage test. Foremost amongst these was the *EFA Test Case*,⁴⁸ which was the leading statement of principle on the operation of the test and, as Justice Munro would one day observe, remains so even today.⁴⁹ The decision was brought down about eighteen months into the life of the *Reform Act* provisions, in May 1995, and eighteen months prior to their repeal.

EFA Test Case.⁵⁰

Basically, the Commission saw the test operating in two phases. First, the agreement was to be compared with the award on a line-by-line basis. If there was a reduction in award entitlements and protections (such was not proscribed), then the second, global phase of analysis would start. In this latter context, the key consideration was whether the reduction was contrary to the public interest, having regard to the overall package of terms and conditions of employment to apply to the employees covered by the agreement. The Commission concluded that:

⁴⁸ *Enterprise Flexibility Test Case, May 1995* (1995) 59 *Industrial Reports* 430-477 (Australian Industrial Relations Commission per Ross VP; Maher DP and Cox C).

⁴⁹ Justice Munro "Section 170LK Agreements, Australian Workplace Agreements and the No Disadvantage Test" – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24. (Copy given to the present writer by the friend and mentor, Hon David Hall, President, Industrial Court of Queensland – on file with author) at 10 paragraph [34] reflecting on the *Enterprise Flexibility Test Case* and the present *Workplace Relations Act* 1996, His Honour stated: "There have been changes in the legislation since those Full Bench decisions but there has not, to my knowledge, been a similar wholesale consideration of the present provisions." As noted above, Merlo also notes the importance of the Second Reading and the *EFA Test Case* to the interpretation of the bargaining regime.

⁵⁰ *Enterprise Flexibility Test Case, May 1995* (1995) 59 *Industrial Reports* 430-477 (Australian Industrial Relations Commission per Ross VP; Maher DP and Cox C).

“Given the need to balance a range of factors the determination of whether or not the no disadvantage test has been met in a particular case will *largely be a matter for the impression and judgment of the Commission member at first instance* (emphasis added).”⁵¹

The no disadvantage test was, therefore, an ‘imprecise science’ – there was a degree of discretion or judgment involved on the part of the industrial bench determining whether or not it was met. It was through that ‘imprecision’ that innovation was to flow.

However, as noted earlier, to counter any possible vulnerability such discretion may have presented for employees, numerous safeguards were built into the test, itself.

In summary, there were:

- The first, line-by-line phase of analysis anchored the agreement to the pre-existing award conditions to avoid so-called “expropriation.”
- The second, global, public interest phase was drafted as a central part of the test (ie if limb one was failed, it was a mandatory consideration).
- Further, the second limb was expressed in such a way that one only had to demonstrate that the agreement was against the public interest, not that it was in the public interest. There is a question as to whether the latter test is harder to satisfy.
- Community standards (ie social benchmarks extraneous to the employer-employee relationship) were an important part of the public interest consideration.

⁵¹ *Enterprise Flexibility Test Case, May 1995* (1995) 59 *Industrial Reports* 430-477 (Australian Industrial Relations Commission per Ross VP; Maher DP and Cox C) at 457.

- The Commission also gave guidance on specific issues that had been raised in the test case. For example, where an agreement provided for increased wages in order to compensate for the reduction in penalty rates, regard should be had to the existence of a reconciliation mechanism as a means of ensuring the employees did not receive less under the agreement than under the relevant award. Also, undertakings were primarily to be used to discuss the operation of the terms of the agreement (such as interpreting a term in a certain way). There was a limit on the use of undertakings regarding essential provisions of an agreement, particularly those concerning pay.

Operation and Application of the No Disadvantage Test: Major Cases decided under the *Industrial Relations Reform Act 1993*

The *EFA Test Case*⁵² distilled principles from decided cases and chartered a course for future bargaining. But academic comment remained divided about the no disadvantage test. Many business persons found the test an anachronism – a rather restrictive, cumbersome device out of place in a flexible market.⁵³ But others felt it did not provide sufficient protection, especially to non-unionised workers.⁵⁴

⁵² *Enterprise Flexibility Test Case, May 1995* (1995) 59 *Industrial Reports* 430-477 (Australian Industrial Relations Commission per Ross VP; Maher DP and Cox C).

⁵³ See, for instance, *Australian Financial Review* (24 March 1995) at 36 as cited in Laura Bennett “Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction” (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995)129-153 at 145.

⁵⁴ Kylie Nomchong and Jim Nolan “Enterprise Flexibility Agreements and Threats to Unions Under the New Federal Act” (Chapter Seven) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 154-184 at 167 et seq; and Laura

In the view of the present writer, the first of two key considerations about the test was its discretionary nature. Such was acknowledged by the Full Bench of the Commission in the *EFA Test Case*⁵⁵ when they spoke of “matters (of) impression and judgment.” Commentators, such as MacDermott, noted that the underlying goal of “flexibility” was elusive – it might mean simply removing non-competitive barriers to business operation or it could extend to reorganising business so as to suit the *enterprise*.⁵⁶ The more optimistic view was that the Commission had used the openness of the test to be bold and innovative, and that it provided enough scope to be both equitable and efficient. Though hardly effusive, Dr Graham Smith concluded that “the no disadvantage test is not such a great problem.”⁵⁷ While arguing for some legislative change, Dr Smith concluded:

Bennett “Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction” (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 129-153 at 145.

⁵⁵ *Enterprise Flexibility Test Case, May 1995* (1995) 59 *Industrial Reports* 430-477 (Australian Industrial Relations Commission per Ross VP; Maher DP and Cox C) at 457.

⁵⁶ Therese MacDermott “The Changing Role of the Safety Net: The Australian Industrial Relations Commission’s s150A Review” (Chapter Five) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 107-129 at 116 et seq. The editors of that work also discuss the elusiveness of “flexibility” and the fact that the seemingly harmless idea of being flexibly may mask a return to managerial prerogative – refer Paul Ronfeldt and Ron McCallum “Our Changing Labour Law” (Chapter One) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 1-31 at particularly 7 et seq.

⁵⁷ Graham Smith “A Practitioner’s View: A Brief Commentary on Working with the New System” (Chapter Nine) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 202-208 at 205. Essentially, Smith urged the Commission take a more radical approach to the review of awards so as to allow for greater freedom in applying the no disadvantage test and also suggested that individual employees were well protected especially by the parts of the legislation reliant on ILO Treaties – at 202. See generally on the operation of the *Reform Act* provisions: Iain Ross “Bargaining in the Federal System” (Chapter Two) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 31-52.

“...That is not to say that the Australian Industrial Relations Commission...has not done its best to try to make the reforms work. It has, and it has done so by being pragmatic and flexible. This is no better illustrated than by Vice President Ross’ decision in *Deckway Pty Ltd v/a Lillianfels Blue Mountains*⁵⁸ regarding the application of the no disadvantage test to Enterprise Flexibility Agreements.”⁵⁹

The following pages provide analysis of what are regarded as some of the most innovative and important cases involving the application of the no disadvantage test by the Commission.⁶⁰ From such a study, it may be seen that some changes gained under the test related to the trading of penalty rates for higher base rates of pay; and the cashing in of leave entitlements. Such were balanced out by the Commission’s acknowledgement that there were also community standards, that is, basic entitlements that could *never* be traded away (such as sick leave).

A study of these major authorities sheds light on the second key point: most notable decisions on the no disadvantage test involved the certification of *non-union enterprise flexibility agreements*, rather than their union-negotiated counterparts. That fact begs the questions at the heart of this thesis and raised, at the time of the *Industrial*

⁵⁸ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18.

⁵⁹ Graham Smith “A Practitioner’s View: A Brief Commentary on Working with the New System” (Chapter Nine) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 202-208 at 205.

⁶⁰ The cases dealt with are oft-discussed in leading commentaries, for example: *Enterprise Bargaining Commentary* in CCH Australia *Australian Labour Law Reporter* (Volume Four) ¶56-140 et seq; Louise Willans Floyd “No Disadvantage Test (Introduction to Part VIE and Commentary on s.170XA)” in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2002) 3275-3281; and Kylie Nomchong and Jim Nolan “Enterprise Flexibility Agreements and Threats to Unions Under the New Federal Act” (Chapter Seven) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 154 - 184 at 167-168.

Relations Reform Act by Bennett,⁶¹ as well as Nomchong and Nolan,⁶² namely: *whether the no disadvantage test works as effectively without union involvement, and whether the supporting structures (of the Commission and unions) are equally important in protecting workers' rights.*

Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement 1994.⁶³

This EFA was breathtaking in the scope of award terms it altered, which pertained to such matters as removal of penalty provisions; the introduction of greater flexibility with respect to working hours; and changes to leave entitlements. In applying the first limb of the no disadvantage test, Vice President Ross noted that the agreement would result in a number of reductions in employee entitlements under the award. For example, under the agreement:⁶⁴

- casual loadings were reduced from 24.5% to 23% and award restrictions on the total number of hours that could be worked by casuals was removed;
- part-time employees could work between 12 and 38 hours per week compared to a maximum of 30 hours per week in the awards. Regarding training and stock

⁶¹ Laura Bennett "Bargaining Away the Rights of the Weak: Non-Union Agreements in the Federal Jurisdiction" (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 129-154 at, for example, 132.

⁶² Kylie Nomchong and Jim Nolan "Enterprise Flexibility Agreements and Threats to Unions Under the New Federal Act" (Chapter Seven) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 154 – 184 at, for example, 174 et seq.

⁶³ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22.

⁶⁴ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 at 8 et seq.

replenishment, the minimum period of engagement was reduced from three hours to two;

- typically, ordinary hours of work were increased to 7am-midnight, Monday to Friday; 7am-9pm, Saturday; and 8am-5pm, Sunday. This was more than 6 hours per day more ordinary hours than under most of the relevant awards. Further, the number of ordinary hours that can be worked per day was also increased;
- the agreement would not provide for rostered days off;
- the rate of overtime was time and a half compared to a typical award rate of time and a half for the first two hours and double time thereafter. Loadings for night fill were reduced as were the circumstances in which one could claim meal allowance;
- annual leave loading was removed;
- late night and weekend penalties were eliminated;
- allowances, such as laundry allowance, was eliminated;
- the agreement made no provision for an entitlement to transport home if work finished late and public transport was not available; and
- the agreement allowed the employer to require employees to undergo a medical examination by a qualified medical practitioner selected by the employer and at the employer's expense. No such provision was contained in any of the relevant awards.

The issue, therefore, became whether or not the reductions referred to were contrary to the public interest, looking at the overall package of conditions under the

agreement. *Subject to certain qualifications, discussed below, the Vice President determined that they were not, particularly given the higher pay rates available under the agreement when compared to the award.*⁶⁵ In coming to this conclusion, the pliable nature of the no disadvantage test allowed the Vice President to weigh up factors unique to this agreement. For instance, Vice President Ross was moved by the submissions of the union that he must take into account the composition of the workforce covered by the agreement, the overwhelming majority of which were casuals. A benefit only extending to fulltime employees, therefore, would not carry as much weight as one effecting casuals.⁶⁶ Another consideration relied on by the Vice President was the existence of reconciliation mechanism. Employees could request a comparison of their remuneration under the agreement with the remuneration they would have received under the award. Any shortfall would be paid by the company.⁶⁷ Also important was a series of case studies. The employer provided evidence that in many cases, employees would receive more under the agreement than they would have under the award. This evidence was based on current patterns of work and was accepted in preference to the union case studies, which indicated a drop in conditions based on theoretical possibilities. However, employees were still protected. If the pattern of work did change such that the continued

⁶⁵ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22.

⁶⁶ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 at 9-10.

⁶⁷ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 at 10.

operation of the agreement would be unfair, then the agreement could be reviewed under s.170NN.⁶⁸

As to the qualifications or amendments to the agreement required by the Vice President, some of these were minor, for example, that medical checks would only be requested when an examination was a requirement for the performance of a job.⁶⁹ Others were more significant. For example, the removal of the requirement for the company to transport workers home after overtime if their usual public transport was not available, was held to be contrary to the public interest. Many of the employees were young; combining that with the spread of ordinary hours, the Vice President found that was contrary to the public interest, accordingly a more appropriate term should be drafted by the employer.⁷⁰

Related to the application of the no disadvantage test was a union argument that the bargaining process had been flawed.⁷¹ Vice President Ross rejected that argument, instead finding evidence that employees had been able to ask questions about meeting and the employer had made some changes to the agreement that reflected employee concerns. However, the Vice President also held that the employer failed to properly

⁶⁸ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 at 10-11.

⁶⁹ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 at 12.

⁷⁰ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 at 13.

⁷¹ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 at 15 et seq.

explain to the employees the impact of the agreement vis-à-vis the existing award; it also failed to identify the role of the Commission in applying the no disadvantage test; and it emphasised matters that the *company* viewed as advantageous.⁷² For that reason, the Vice President did not accept that the consultation requirements of the statute had been complied with and therefore questioned whether the consent to the agreement was genuine.⁷³

*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors*⁷⁴

This appeal against the certification of an EFA is famous for its pronouncements on the ‘cashing in’ of sick leave under the *Industrial Relations Act* 1988 and the position of ‘community standards’ in the operation of the no disadvantage test. But, the story of how it even came to be heard by the Full Bench of the Commission is interesting, in itself.

The only express right of appeal to the Full Bench in certification matters lay against refusals to approve agreements at first instance; there was no express right of

⁷² *Toys ‘R’ Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 at 15 et seq.

⁷³ Such were required under section 170NC(1) for example paragraphs (h) and (g).

⁷⁴ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235 (Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C).

appeal against approval.⁷⁵ Consequently, the union bringing the application sought leave to appeal as “an organisation...aggrieved by (a) decision...”⁷⁶ on the ground that there had been a refusal or failure by the Commissioner at first instance to exercise jurisdiction.⁷⁷ The error alleged was that the Commissioner at first instance erred in applying the no-disadvantage test; and that error was an error in law concerning the nature and extent of the jurisdiction, itself.⁷⁸

The Full Bench accepted that argument. Essentially, the Commissioner’s decision, at first instance, was simply that certification of the agreement in question would not result in a reduction of any entitlement of the employees concerned. Consequently, he was obliged to certify the agreement under what *The EFA Test Case* had described as limb one of the no disadvantage test, without considering limb two. No further reasons for the Commissioner’s decision were given. On appeal, such finding was held to be “not available on the basis of the agreed facts.”⁷⁹ Instead, consideration of the terms of the EFA was said to reveal a number of reductions in award entitlements. For example:⁸⁰

⁷⁵Section 45(1)(eaa) *Industrial Relations Act 1988* (Cth).

⁷⁶ Section 45(3)(d) *Industrial Relations Act 1988* (Cth)..

⁷⁷ Section 45(1)(g). See also section 45(2) *Industrial Relations Act 1988* (Cth).

⁷⁸ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235 (Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C) at 233-234.

⁷⁹ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235 (Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C) at 233.

⁸⁰ These examples are drawn from a table provided in: *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235

- Under the award, employees were entitled to 38 hours of paid sick leave in the first year and 61 hours of paid sick leave during each subsequent year (accumulating for seven years). Under the agreement, there was no paid sick leave and no specific entitlement to unpaid leave;
- Paid bereavement leave was abolished – leave for such periods, under the agreement, had to be taken as either annual leave or unpaid leave;
- The right of unionists to enter the premises during unpaid meal breaks to talk to workers about legitimate union business was abolished;
- Probationary periods (during which employees could be dismissed with only one hour's notice) were extended from one week to three months;
- Ordinary hours were extended by two hours per day. Annual leave loading (which had been 17.5%) was also abolished;
- The agreement provided for no redundancy pay; whereas the award had stipulated between 4-8 weeks redundancy entitlements for those employed for over a year; and
- Casual loading (of 20% under the award) was abolished and the right to employ casuals (which had been limited under the award) was completely at the discretion of the employer under the agreement.

According to the Full Bench on appeal, these were all reductions of award entitlements, so the decision of the Commissioner to dispose of the matter entirely under

(Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C) at 218-220. Further, the judgment refers, at 233-234, to admissions made at first instance by an agent for the employer applicant, that some reductions in award entitlements would occur.

limb one was not simply a mistake, but represented a misunderstanding of the jurisdiction, itself. Speaking of the Commissioner's analysis of the agreement under limb one ("the critical issue"), the Full Bench emphasised the importance of the no disadvantage test and how it was to operate:⁸¹

"The view reached by the Commissioner in relation to this critical issue amounted to more than a wrong finding of fact, it constituted an error of law. Moreover it seems to us that the relevant error was not merely an error of law in the exercise of the Commissioner's jurisdiction; the error concerned the nature and extent of the jurisdiction itself.

"Clearly not every legal error in the application of the statutory tests associated with decisions to approve the implementation of an EFA will be a jurisdictional error. However given the central importance of the *no disadvantage test* in the statutory scheme, the error in this case is of such a profound and obvious character that it amounts to a constructive failure to exercise jurisdiction."

The Commissioner should have seen the failure of the agreement under limb one and gone on to globally consider the EFA under limb two of the test. The Full Bench quashed the order of the Commissioner at first instance to certify the EFA and remitted the matter to the Commissioner for consideration in light of its judgement.

Given the significance of sick leave, the Full Bench, in the course of its judgement, made a number of observations about the place of 'community standards' in the process of considering limb two, the public interest portion, of the no disadvantage test.⁸²

⁸¹ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235 (Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C) at 233 et seq, particularly 234.

⁸² *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235 (Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C) at 232-233. The Second Reading is referred to earlier in the chapter.

“It is clear from the terms of s.170NC(2) and the extract from the Minister’s Second Reading Speech...that an agreement may satisfy the *no disadvantage test* notwithstanding that its implementation would result in a reduction in award entitlements and protections. It does not operate to proscribe a reduction in award entitlements and protections. The key consideration is whether such a reduction is contrary to the public interest having regard to the overall package of terms and conditions of employment to apply to the employees covered by the Agreement.

“However the *no disadvantage test* was intended to protect well established and accepted community standards. Such standards, including test case decisions, should be accorded substantial weight by the Commission in the exercise of its discretion in relation to the *no disadvantage test* ...

“In our view an entitlement to paid sick leave is a community standard...

“Industrial tribunals have traditionally taken the view that sick leave exists to meet the fact that sickness may strike anyone; it is not a right that an employee gains by virtue of the performance of his duties...

“While a reduction in an entitlement or protection that has the status of a community standard is not prohibited by the Act it must be accorded substantial weight by the Commission in the exercise of its discretion in relation to the *no disadvantage test*.”

Other interesting observations of the Full Bench went to the conduct of the trial at first instance, particularly the adequacy of the union’s submissions. In granting leave to appeal against the decision at first instance, the Full Bench stated:⁸³

“In this matter we have decided, on balance, to grant leave to appeal. The matters raised in the appeal are both novel and of general importance. In our opinion the appeal raises real and substantial issues as to jurisdiction which warrant consideration by a Full Bench of the Commission on appeal.

“We have reached this conclusion with some reluctance given the wholly inadequate nature of the case presented by the Union at first instance. In other circumstances the appellant’s failure to fully debate the matter at first instance would have led us to refuse to grant the application for leave to appeal...

⁸³ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235 (Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C) at 216-217.

“It is unfortunate that the Commissioner was not given the benefit of the analysis of the Agreement submitted by the Union in these appeal proceedings. The Commissioner was not assisted in his task by the Union’s submissions at first instance...”

This case, then, is a testament to the importance of community standards; how crucial it is to prepare arguments to be put before the Commission; and the significance that tribunal placed on these issues in even hearing the case at all.

*Arrowcrest Group Pty Ltd*⁸⁴

Another well known case that involved a failed EFA and community standards was the decision of *Arrowcrest*. That Commonwealth case gained attention for its protection of annual leave as a community standard. It is also interesting in that it distinguished the decision of the Full Bench of the Queensland Industrial Relations Commission in *Bond University General Staff Services Pty Ltd and the Bond University General Staff Association*,⁸⁵ which had allowed a degree of ‘cashing in’ of that entitlement in the context of a non-union agreement negotiated under mirror legislation.

Clause 2(b) of the *Arrowcrest* agreement provided capacity for any employee “on a voluntary basis, and subject to the consent of the employer, to ‘cash out’ one half of their annual leave entitlement.” In contrast, the relevant *Metal Industry Award 1984* provided that, except in the event of termination and annual close down, “payment shall

⁸⁴ *Arrowcrest Group Pty Ltd* (Australian Industrial Relations Commission per Watson DP, Print L4310, 12 July 1994) 1-13.

⁸⁵ *Metal Industry Award 1984* (Australian Industrial Relations Commission, No. B87 of 1993).

not be made or accepted in lieu of annual leave” (ie the entitlement was to be taken and not ‘cashed in’).⁸⁶

In finding that clause 2(b) was a disadvantage and in breach of the second, public interest limb of the no disadvantage test, the Commission noted that such clauses, requiring the taking of the leave as an entitlement, in itself, were common. The fact that any ‘cashing in’ would be voluntary was said not to be relevant.⁸⁷ The objects of the act, although designed to facilitate agreements, still required an applicant to meet the no disadvantage test. That test had the legislative intent of protecting community standards – this was noted in the oft-cited passage of the Minister’s Second Reading (discussed above). Although not specifically mentioned in that speech, annual leave was a ‘community standard’. That was affirmed in the *1991 Review of Wage Fixing Principles Decision*.⁸⁸

The Federal Commission noted that a ‘cashing in’ had been approved in the context of the making of a new award in the *Bond University Case*;⁸⁹ however, held that such could be distinguished. The relevant provision in that case was:⁹⁰

⁸⁶ *Arrowcrest Group Pty Ltd* (Australian Industrial Relations Commission per Watson DP, Print L4310, 12 July 1994) 1-13 at 7 et seq.

⁸⁷ *Arrowcrest Group Pty Ltd* (Australian Industrial Relations Commission per Watson DP, Print L4310, 12 July 1994) 1-13 at 8 et seq.

⁸⁸ *1991 Review of Wage Fixing Principles Decision* (Australian Industrial Relations Commission, Print K9700).

⁸⁹ *Bond University General Staff Services Pty Ltd and the Bond University General Staff Association* (Australian Industrial Relations Commission, No. B87 of 1993).

⁹⁰ As cited in: *Arrowcrest Group Pty Ltd* (Australian Industrial Relations Commission per Watson DP, Print L4310, 12 July 1994) 1-13 at 10 et seq.

“At the request of the employee, a proportion of accrued annual leave in excess of four weeks may be taken in money in lieu of leave. Only 30% of the accrued entitlement may be paid out in this manner, the remainder to be taken as leave.”

That provision had been approved in light of the specific circumstances of the matter and could be distinguished. Such provision had operated since the *inception* of the university. Further, it applied to *accrued entitlements* and not the cashing out of the current year entitlements. The Federal Commission also noted the words of the Queensland Bench that sanctioned the Bond agreement:⁹¹

“...the Commission has some reservations with the wording as it could result in an employee continually cashing in annual leave beyond the accrual of 40 days and not taking annual leave. It is not the intention of the Commission that this should occur and indeed the Commission strongly counsels against this occurring as it would negate the purpose for granting of annual leave and be to the detriment of the employees concerned.”

According to the Bench in the *Arrowcrest* decision, clause 2(b) raised public policy issues and, if approved, would negate the purpose of annual leave. Hence, it was a disadvantage to the employees in the context of the total package and was contrary to the public interest.⁹² The agreement could only be approved if clause 2(b) was removed.

⁹¹ Cited in: *Arrowcrest Group Pty Ltd* (Australian Industrial Relations Commission per Watson DP, Print L4310, 12 July 1994) 1-13 at 10.

⁹² *Arrowcrest Group Pty Ltd* (Australian Industrial Relations Commission per Watson DP, Print L4310, 12 July 1994) 1-13 at 10.

*Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994*⁹³

Oft-cited for its position affirming *Arrowcrest* (regarding annual leave as a 'community standard'), *Lillianfels*, in the view of this author, is a good example of how the bargaining process works to attain mutual employer-employee benefit. Concessions were made by parties and problems with the business (in this case, turn over of staff) were addressed. Similar praise for this decision and its reasoning, given by Dr Smith, was highlighted earlier in this chapter.

As seems to be the case with most bargaining, this agreement failed limb one of the no disadvantage test. There were, for example,⁹⁴ reductions in penalty rates; ordinary hours of work increased from 38 to 40 hours per week; and annual leave loading was abolished. However, provided two concessions were made, the reductions in award entitlements were held to be "not contrary to the public interest"⁹⁵ and the agreement passed the no disadvantage test. Essentially, the trade off in favour of the employees was that annualised salaries were paid at a loaded rate. Further, the applicant gave a number of undertakings about the operation of the agreement to minimise any detrimental effects of the agreement. The agreement was to be reviewed after 18 months of operation; the results were to be reported back to the Commission; and there was to be a reconciliation

⁹³ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18.

⁹⁴ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18 at 2-3 et seq.

⁹⁵ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18 at 5.

provision. Finally, an employee could choose any person or organisation for representation.

In the view of this author, one of the more important features of the agreement was the so-called 'longevity bonus.' Although the award entitlement to annual leave loading was abolished, employees would gain monetary benefits if they remained in their employment for nine months or more. This was significant because staff turnover had been a problem at Lillianfels (a hotel and conference facility in the Blue Mountains) – something in the nature of 80%. The longevity bonus instead of annual leave loading, it is submitted, was an example of an innovative solution to a specific problem that held mutual benefit for employers and workers.⁹⁶

The two specific issues, alluded to above, which caused problems for the agreement in terms of passing the no disadvantage test were the capacity of employees to 'cash in' two weeks of their annual leave; and the capacity to effectively 'contract out' of the agreement by the payment of an additional 5% wage increase.⁹⁷

In regards to annual leave, Ross VP relied on the *Review of Wage Fixing Principles*⁹⁸ and *Arrowcrest Group Pty Ltd EFA*⁹⁹ to find that the no disadvantage test

⁹⁶ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18 at 2

⁹⁷ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18 at 9-10.

⁹⁸ *1991 Review of Wage Fixing Principles Decision* (Australian Industrial Relations Commission, Print K9700) at 35-36.

was intended to protect well established community standards, and the provision of four weeks annual leave taken as leisure time constituted such a standard. The agreement had originally provided for workers to take two weeks annual leave, then 'cash in' the remaining fortnight's leave. However, in light of the previous authority, a reduction of this kind was contrary to the public interest. Interestingly, the business/employer had earlier stated that it was "prepared to maintain the four week annual leave period without the benefit of the two week trade off for wages."¹⁰⁰ Hence, the original provision was changed and did not linger as a barrier to the agreement.

Perhaps the more significant problem to be overcome in the approval process was the capacity, provided in the original agreement, to contract out of the agreement in return for a 5% pay rise. Such individual agreements were not subject to Commission scrutiny through the no disadvantage test. Such a clause was held to be a reduction in award entitlements and possibly even an "exceptional circumstance" under s.170ND(3). The clause was changed to make it clear that the individual contracts could only improve wages and conditions of employment.¹⁰¹

Conclusion:

⁹⁹ *Arrowcrest Group Pty Ltd* (Australian Industrial Relations Commission per Watson DP, Print L4310, 12 July 1994) 1-13.

¹⁰⁰ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18 at 10.

¹⁰¹ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18 at 10.

A reflection on the no disadvantage test under the *Industrial Relations Act 1988* shows a device capable of producing innovative developments, whilst also fostering employee protection. The case just considered, *Lillianfels*¹⁰², through its initiative of a longevity bonus, demonstrated how enterprise bargaining could address problems of a *particular workplace*, namely 80% staff turnover, whilst also presenting opportunities for workers. Likewise, the refusal of the Commission, in *Toys 'R' Us*,¹⁰³ to allow the removal of an award term (requiring an employer to transport their young workers home if public transport was not available) demonstrates how the public interest did protect workers from dilution of important award entitlements. The capacity of the Commission to continue to monitor agreements (as they did in *Lillianfels*)¹⁰⁴ was a further safeguard.

However, while those examples reflect positively on the operation of the no disadvantage test, itself, the important fact that cannot be escaped is that *many of the famous cases decided under the former no disadvantage test involved EFAs, that is the non-union stream of agreement. And the only way problems with those agreements were rectified was through the right of unions to intervene under the former legislation, and the subsequent determinations of the expert Commissioners of the AIRC.*

¹⁰² *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18 at 10.

¹⁰³ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 at 13.

¹⁰⁴ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18.

As alluded to earlier in this chapter, authors such as Nomchong and Nolan,¹⁰⁵ as well as Bennett,¹⁰⁶ were scathing of the non-union bargaining stream as one which bargained away the rights of the weak. *In the view of the present writer, the best argument put by commentators relates to the lack of resources and power of non-unionised employees in negotiating for an agreement (which ties back to the discussion of power imbalance in chapter two of this thesis).* The cases considered in this chapter demonstrate the complexities of some of the issues that arise in the bargaining process. The extent of the ‘cashing in’ of penalty rates and loadings in *Toys ‘R’ Us*¹⁰⁷, for instance, required complex calculations and a reconciliation mechanism. Ensuring those tasks were undertaken in a valid fashion required mathematical understanding and business insights, which may be more easily found in collective unions and an expert Commission, rather than a group of (possibly unskilled) individual workers. While the legislation contained requirements for the agreement to be genuinely approved by a valid majority of non-unionised workers,¹⁰⁸ the judgment of Vice President Ross in *Toys ‘R’ Us*¹⁰⁹ demonstrated the potentially porous nature of that legislative safeguard – a

¹⁰⁵ Kylie Nomchong and Jim Nolan “Enterprise Flexibility Agreements and Threats to Unions Under the New Federal Act” (Chapter Seven) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 154 – 184 at, for example, 164 et seq.

¹⁰⁶ Laura Bennett “Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction” (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 129-153 at 145.

¹⁰⁷ *Toys ‘R’ Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22.

¹⁰⁸ Refer s.170NC(1)(I) *Industrial Relations Act 1988* (Cth).

¹⁰⁹ *Toys ‘R’ Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22.

protection at which Bennett and Nomchong and Nolan almost scoffed.¹¹⁰ Initiating EFAs lay largely in the hands of the employers, and it was possible for those employers to introduce *their* view of what was good about the agreement and possibly ‘gloss’ over the differences between the award and proposed EFA.¹¹¹ The lack of expertise of many employees and *the fact that their employer may be able to terminate their employment* (or, if they were casual workers, limit the amount of hours that they worked) might quell the desire of some employees to examine the minutiae to search for possible disadvantage.

The broader criticisms of Nomchong and Nolan, and Bennett included consideration of:¹¹²

- whether the no disadvantage test was too dependent on the rigor of individual Commissioners and the material they were given in evidence by employers to function properly;

¹¹⁰ Laura Bennett “Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction” (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 129-153 at 138; and Kylie Nomchong and Jim Nolan “Enterprise Flexibility Agreements and Threats to Unions Under the New Federal Act” (Chapter Seven) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 154 – 184 at, for example, 160, 164 et seq.

¹¹¹ Refer: *Toys ‘R’ Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22 – considered earlier in this chapter.

¹¹² See generally: Kylie Nomchong and Jim Nolan “Enterprise Flexibility Agreements and Threats to Unions Under the New Federal Act” (Chapter Seven) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 154 – 184; and Laura Bennett “Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction” (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 129-153.

- whether the move to bargaining, generally, benefited larger unions at the expense of the small;
- the threat of de-unionisation; and
- whether there were simply not enough opportunities for unions to become involved in the EFA process.

That latter criticism stands as a marked contrast to some other commentators of the day. *As alluded to earlier, in EFA applications, unions had rights to intervene.* Those rights were encompassed in sections 170NA and 170ND of the legislation. Under those provisions, relevant unions were to be contacted and given a right to be heard in the certification of EFAs, where the workplace concerned was covered by an award to which they were a party. According to authors such as Coulthard, this right of unions to be heard quelled any desire employers might have had to pursue an agreement. According to her research, between March of 1994 and May of 1996, only 181 EFAs had been approved. Her droll observation was that “this is no flood.”¹¹³ Contrastingly, Vice President Iain Ross was more ‘upbeat’ on this latter issue and observed in one of his conference papers that the level of EFA making increased as the system progressed.¹¹⁴ In terms of the involvement of unions and the Commission in the making of EFAs, the present writer makes one final point. In *Tweed Valley*, it was the poor quality of union representation at first instance that contributed to the problems with that decision and it

¹¹³ Amanda Coulthard “Non-Union Bargaining: Enterprise Flexibility Agreements” (1996) 38 *Journal of Industrial Relations* 330-358 at 341 – see also 355 et seq.

¹¹⁴ Iain Ross “Bargaining in the Federal System” (Chapter Two) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 31-52.

was the dexterity of the Full Bench of the Commission in finding jurisdiction that rectified the problem.¹¹⁵

The changes introduced by the Industrial Relations Reform Act 1993 are long gone. Its significance to this thesis, is its legacy – and that legacy goes to highlighting the importance of the supporting structures of unions and the Commission to the operation of the no disadvantage test, itself.

Although the *Reform Act* was said to spawn a “new system for a new era”,¹¹⁶ in truth, the hallmarks of the arbitration system – awards, the Commission and the unions – were not quite evanescent. The major preoccupation of the government of the day was to distinguish its decentralisation from a system of minimum conditions. So, as suggested by Pittard, the path towards deregulation was, “slow and...subtle.”¹¹⁷

The current system under the Workplace Relations Act 1996 represents a much larger step down the path of deregulation. Under the new provisions, there are both agreements in which unions have no rights to intervene (non-union, collective s.170LK agreements) and those for which the Commission is not the major administrator

¹¹⁵ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235 (Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C) at 216-217.

¹¹⁶ Hon. Laurie Brereton MP, Minister for Industrial Relations, “Second Reading of the Industrial Relations Reform Bill 1993” *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2777. There was reflection on the development of decentralisation from the Accord to amending legislation. This development has also been tracked by, for example, Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235 at 207-211.

(individual AWAs). These agreements and the application of the no disadvantage test to them are analysed in the following chapters. *The question they beg, in concluding this chapter, is whether the removal of the traditional features means the problems alluded to by Bennett, Nomchong and Nolan have become more than just a threat...*

¹¹⁷ Marilyn Pittard "Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements" (1997) 10 *Australian Journal of Labour Law* 62.

V. CHAPTER FIVE:

The No Disadvantage Test & the *Workplace Relations Act 1996: An Understanding of the Law.*¹

This dissertation began with the words: “I give this rock solid guarantee. Our policy will not cause a cut in the take-home pay of Australian workers.”² A reassuring sentiment, perhaps, but the speech in which it was uttered went on to describe then Opposition plans for *structural reform* of Australian industrial law, in which *direct bargaining* was to become the centrepiece and the once abiding third party protections of arbitration and unions were minimised.

On the change of Government, in 1996, the *Workplace Relations and Other Legislation Amendment Bill 1996* was introduced to Parliament. The chrysalis of reform that was the ‘rock solid guarantee’ speech, was coming to fruition.

¹ The present writer has published work based on some of the material in this chapter in: Louise Willans Floyd “No Disadvantage Test (Introduction to Part VIE and Commentary on s.170XA *Workplace Relations Act 1996* (Cth))” in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2002) 3275-3281; and Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter Thirty Two) in Clive Turner *Australian Commercial Law – (formerly Yorston and Fortescue Australian Commercial Law)* (24th ed, Thomson Legal Publishing, Sydney, 2003) 973-1011.

² Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 5. (Copy supplied by Prime Minister’s Office and on file with author).

From a bargaining perspective, the original version of workplace reform had three major features.³ *Awards* were to be simplified to 18 allowable matters – pertaining to matters such as pay rates, leave entitlements and notice of termination – and paid rates awards were to be abolished.⁴ This would encourage parties to negotiate *certified agreements*. As with the predecessor legislation, such agreements could be concluded either between employers and unions or employers and groups of employees; there were also requirements as to consultation, and both agreements had to be certified by the Commission to become operative.⁵

*However, the crucial difference between the past and proposed regime was the nature of the ‘safety net.’ The no disadvantage test was to be abolished by the proposed laws. In its place was a ‘two pronged safety net.’ All the non-monetary minimum conditions were listed in the Bill as:*⁶

- no less than four weeks of recreation leave each year;⁷

³ These changes were discussed more fully by the present writer in: Louise Willans Floyd “To Thine Own Self Be True: Enterprise Bargaining and the Rise of Individualism in Australian Industrial Law and Trade” (1997) 3 *International Trade and Business Law Annual* 263-276 at 267-271. That article drew largely from a tandem presentation of two speeches given by Louise Willans Floyd and Thomas Bradley, then Senior Associate with Minter Ellison Brisbane: “The Federal Government’s Proposed Industrial Relations Law: An Overview” at the conference “Asia-Pacific Trade & Commerce: Developments in Policy and Law” (TC Beirne School of Law Annual Symposium/Fourth International Trade and Business Law Forum 1996 at Customs House, Brisbane, 11 October 1996).

⁴ Proposed sections 89A(2) and (3) as well as proposed section 88A *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

⁵ See, for example, proposed provisions: sections 170LK, 170LW, 170MD and 170ML *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

⁶ Schedule 13 and section 1270XA *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

⁷ Proposed section 170XI *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

- no less than 12 days of personal/carer's leave with pay each year if the employee is sick, is caring for a family or household member or is absent because of the death of such a member;⁸
- no less than 52 weeks of parental leave or adoption leave without pay after 12 months of continuous service;⁹
- long service leave on terms and conditions that are no less favourable than those that would otherwise apply;¹⁰
- equal pay for work of equal value without discrimination on the ground of sex;¹¹ and
- payment for jury service no less than the difference between the amount payable under the agreement for the period of the absence and any amount payable by the court.¹²

As to the crucial condition of take-home pay, however, the Bill did refer the Commission back to the awards. The government maintained its 'rock solid guarantee' that no worker would be worse off in terms of take-home pay, through an agreement negotiated under the bill, than they would be under an award.¹³ Consequently, the Bill

⁸ Proposed section 170XJ *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

⁹ Proposed section 170XK *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

¹⁰ Proposed section 170XL *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

¹¹ Proposed section 170XM *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

¹² Proposed section 170XN *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

¹³ Compare: Syd Marris, "Coalition Reaffirms Rock Solid IR Pledge," *The Australian* (21 May 1996).

provided that the Commission, in ensuring minimum conditions had been met, must be satisfied that:

“the wages payable under the agreement to the employee...(are) no less than the wages that would be payable to the employee under the relevant award...”¹⁴

The assessment relevant to the ‘rock solid guarantee’ was made over a ‘reasonable period,’ so presumably pay levels could drop one week if they were supplemented at a later date. In this regard, it was likely that a business could lower pay levels for a short while in order to ‘trade out of difficulties.’

The faithfulness with which the ‘rock solid guarantee speech’ was adhered to was demonstrated in the final and most crucial part of the bargaining provisions, as well as the myriad other parts of the legislation dealing with trade union security. *Australian Workplace Agreements (AWAs)* were to be introduced. These were the first ever agreements under the Australian labour legislation which were to be signed by the individual worker, and in which bargaining was to take place directly between employer and employee, without requiring sanction by the Australian Industrial Relations Commission.¹⁵ Rather, AWAs were to be lodged with an entirely new body called the *Employment Advocate*, which would then check the agreements against the minimum conditions.¹⁶

¹⁴ Proposed section 170XF *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

¹⁵ Proposed sections 170VW and 170VN *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth).

¹⁶ Proposed section 170XA *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth). Refer also Schedule Three.

The further changes the bill proposed included the removal of trade union security devices. This particularly meant: limiting union intervention in bargaining; the removal of trade union preference; the introduction of enterprise unions (ie smaller, business-based unions, rather than the industry-based unions that existed at the time); and the reintroduction of the secondary boycott provisions into the *Trade Practices Act 1974*.¹⁷

When the *Workplace Relations and Other Legislation Amendment Bill 1996* was read for a second time to the Australian parliament, then Minister for Industrial Relations, the Hon Peter Reith MP, described his brainchild in what a cynic might suggest is the ‘hyperbolic tone mandatory when announcing change to Australia’s industrial laws.’¹⁸

Describing “Australia at the turning point”, the Minister said:

“The Bill I introduce today represents a break with a system of industrial relations that has been based on a view that conflict between employer and employee is fundamental to the relationship and that an adversarial process of resolving disputes is appropriate and inevitable.

“The Bill rejects the highly paternalistic presumption that has underpinned the industrial relations system in this country for too long – that employees are not only incapable of protecting their own interests, but even of understanding them, without the compulsory involvement of unions and industrial tribunals.

“The system of industrial relations which this Bill seeks to reform has almost become an end in itself, doing more to protect the interests of those involved in the system, rather than the people the system is supposed to serve.

¹⁷ Sections 45D and 45E *Trade Practices Act 1974* (Cth).

¹⁸ Compare: Richard Naughton “The New Bargaining Regime under the Industrial Relations Reform Act” (1994) 7 *Australian Journal of Labour Law* 147-169 at 147 where the author refers to the fanfare with which the Industrial Relations Reform Bill 1993 was introduced and notes the aspects of the previous labour system that were still present at the time. It is important to note that Naughton did not use that expression when referring to the *Workplace Relations Act 1996* (Cth). The present writer uses Naughton’s commentary in this context simply to demonstrate that many incremental changes have been made to Australian labour law and touted as revolutionary.

“This Bill, by contrast, seeks to restore the focus of the system on those who really matter, employees and employers at the workplace and enterprise level.”¹⁹

And yet, Minister Reith was at pains to note that the previous Labor government had commenced the decentralisation of Australian labour law and would have pursued further measures had it retained power.²⁰ The “intellectual debate” - “the battle of ideas” - had been won, he concluded. As suggested in the original ‘rock solid guarantee’ speech, individualism was lauded as the right path for an Australia challenged by globalisation, competition and the domestic economic pressures of high unemployment.²¹

After its introduction to the parliament, the Workplace Relations and Other Legislation Amendment Bill was referred to the Senate Economic References Committee.²² Putting aside laconic wit and any wagger as to the policy direction the

¹⁹ Hon. Peter Reith MP, Minister for Workplace Relations *Second Reading of the Workplace Relations and Other Legislation Amendment Bill 1996* (Parliament House, Canberra, 1996) 1-13 at 1 (<http://www.nla.gov.au/dir/reforms/speech.htm> – accessed on 23 May 1996).

²⁰ Hon. Peter Reith MP, Minister for Workplace Relations *Second Reading of the Workplace Relations and Other Legislation Amendment Bill 1996* (Parliament House, Canberra, 1996) 1-13 at 2 (<http://www.nla.gov.au/dir/reforms/speech.htm> – accessed on 23 May 1996). The Minister refers to a 1993 speech given by the former Prime Minister, Hon Paul Keating, to the Institute of Company Directors, in which the Prime Minister said, for example:

- Australia needed a model of industrial relations “which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals;”
- “...compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net.”
- “Over time, the safety net would inevitably become simpler. We would have fewer awards with fewer clauses.”

The ‘goal’ of the former Labor Government of pursuing decentralisation has been discussed earlier in this thesis in Chapters Three and Four, and is revisited in Chapter Seven.

²¹ Hon. Peter Reith MP, Minister for Workplace Relations *Second Reading of the Workplace Relations and Other Legislation Amendment Bill 1996* (Parliament House, Canberra, 1996) 1-13 at particularly 3 et seq. (<http://www.nla.gov.au/dir/reforms/speech.htm> – accessed on 23 May 1996). See also discussion of original ‘rock solid guarantee’ speech in chapter one of this thesis.

²² This took place on 23 May 1996. Refer: “Terms of Reference” *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* (Senate, Parliament of Australia, Canberra,

Labor government would have followed had it been returned, the workplace relations bill embodied the real and fundamental change encapsulated above. It was, then, heavily criticised by the Senate committee in a report written largely on party lines.

The majority of the Senate Committee was strongly opposed to the introduction of minimum conditions (and consequent removal of the no disadvantage test).²³ Legislated minimum conditions were seen as being politicised and, ironically, *not tailored to individual employment relationships or different industries*. They were also viewed as disregarding the inherent and valuable role of the Australian Industrial Relations Commission under section 51(xxxv) of the Australian Constitution.²⁴ Further proposed changes – from the introduction of the *two* non-union bargaining streams through to the organisation of the Employment Advocate as something that would only accept AWAs (in contrast to the Commission’s role of scrutinising agreements) - were also criticised. Essentially, the Bill was adjudged as promoting individualism at the expense of protecting the most vulnerable workers.²⁵

Australia, 1996) (http://www.aph.gov.au/Senate/committee/economics_ctte/workplace/report/a.htm accessed 27 October 2003).

²³ See, for example, (Chapter Four) “Changes to the System and Its Institutions” (Parts A, B and C, especially Part B pages 1-17) *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* (Senate, Parliament of Australia, Canberra, 1996) (http://www.aph.gov.au/Senate/committee/economics_ctte/workplace/report/c05.htm last accessed 27 October 2003.)

²⁴ See, for example, (Chapter Four) “Changes to the System and Its Institutions” (Parts A, B and C, especially Part B pages 1-17) *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* (Senate, Parliament of Australia, Canberra, 1996) (http://www.aph.gov.au/Senate/committee/economics_ctte/workplace/report/c05.htm last accessed 27 October 2003.) See, especially page 5, where the Committee discusses the American use of legislated minimum conditions and the difficulty of changing what was a substandard minimum wage in that country.

²⁵ On criticisms of the original bill, see also: Louise Willans Floyd, “To Thine Own Self Be True: Enterprise Bargaining and the Rise of Individualism in Australian Industrial Law and Trade” (1997) 3 *International Trade and Business Law Annual* 263-276 at 271-273.

What is of particular interest is the constant reference of the majority of the committee to the original ‘rock solid guarantee’ speech on so many bargaining issues: from the proposal to place paramount importance on state agreements; through to award simplification; the abolition of paid rates awards; and the introduction of minimum conditions. With each reference, the majority of the committee concluded that changes foreshadowed in the bill would lead to workers being worse off under the new legislation – and that was unacceptable.²⁶ The breadth with which the committee interpreted that rock solid promise, underscored the narrowness of the original guarantee. It was a promise only as to take-home pay - the remainder of the speech was a harbinger for change. *But as argued throughout this thesis, assuredness as to one’s welfare hinges on a number of factors that go to bargaining strength – not simply the provision of a monetary breakwater.*

Ultimately, the government did secure the passage of some of its workplace reforms due to an agreement it struck with then holders of the balance of power in the Australian Senate, the Australian Democrats. In a document known as “The October Agreement,” the government set out its compromise legislation.²⁷ Such retained a number of the government’s original suggestions for reform, such as the reintroduction of secondary boycotts law; the abolition of paid rates awards; and the removal of trade

²⁶ “Executive Summary” *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* (Senate, Parliament of Australia, Canberra, 1996) http://www.aprh.gov.au/Senate/committee/economics_ctte/workplace/report/b03.htm last accessed 27 October 2003) 1-18 at, for example, 2, 3, 5.

²⁷ *Agreement Between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill - The October Agreement* (AGPS, Canberra, 1996).

union preference. But there were three major changes to the original bargaining proposals:²⁸

- two more allowable matters were to be included in awards;
- the no disadvantage test was to be reintroduced (albeit in a modified form); and
- AWAs were to be vetted by the Employment Advocate in accordance with that latter no disadvantage test and referred to the Industrial Commission if the Advocate had doubts as to the AWA's compliance with that test.

The remainder of this chapter explains the bargaining regime under the *Workplace Relations Act 1996*, then gives a detailed analysis of the operation of the current no disadvantage test and how it compares to the test under the former provisions of the *Industrial Relations Act 1988*. Chapter Six goes on to critically analyse the current bargaining provisions. The remaining chapters of this work analyse the relevant supporting structural aspects of the *Workplace Relations Act 1996* on the topics of trade union security and intervention in bargaining; AWAs; and individual contracts.²⁹

²⁸ Refer also: Louise Willans Floyd "To Thine Own Self Be True: Enterprise Bargaining and the Rise of Individualism in Australian Industrial Law and Trade" (1997) 3 *International Trade and Business Law Annual* 263-276 at 273 et seq.

²⁹ For a comparison of all major aspects of the former *Industrial Relations Act 1988* (Cth) and the present *Workplace Relations Act 1996* (Cth) see: Louise Willans Floyd "Workplace Relations: Employment and Industrial Law" (Chapter Thirty Two) in Yorston Fortescue and Turner (as it was then known) *Australian Commercial Law* (21st ed, Law Book Company, 1997) 978-1016.

Enterprise Bargaining Under the Workplace Relations Act 1996: An Outline of the Regime:³⁰

The *Workplace Relations Act 1996* is, at once, another step down the pathway of decentralisation and another form of hybrid, in which parties are to bargain but the Commission still serves as a third party safeguard.³¹ As alluded to earlier in the chapter, the statute's main bargaining reform initiatives begin with *simplifying the topics that can be dealt with by awards* and thereby encouraging parties to bargain. *The types of bargains to which people may become a party have also been increased, especially the types of bargains that do not include unions as parties-principal.* This is particularly demonstrated by the introduction of *Australian Workplace Agreements (AWAs)*, which are essentially one-on-one agreements between employers and employees, governed by a body called the *Employment Advocate* and involving harsh penalties for breach. Underpinning these changes are a series of *objects* provisions scattered through the various parts of the legislation, which supplement the principal object of the act and espouse the virtues of decentralisation. Yet a key feature of the system remains a recast no disadvantage test, with its inherent reliance on the Industrial Commission, awards, and possibly trade unions. These main aspects of the *Workplace Relations Act 1996* are outlined below.

³⁰ The candidate has published a more detailed discussion of the main features of the *Workplace Relations Act 1996* in Louise Willans Floyd "Workplace Relations: Employment and Industrial Law" (Chapter Thirty Two) in Turner *Australian Commercial Law* (24th ed, Thomson Legal Publishing, Australia) 973-1011.

³¹ See, for example: Graham Smith "Reforms are just the beginning" *The Australian* (28 October 1996) at 4.

Awards

Awards are covered by Pt VI of the *Workplace Relations Act 1996*. The objects of that Part are stated in s 88A(d):

“The Commission's functions and powers in relation to making and varying awards are (to be) performed and exercised in a way that *encourages the making of agreements between employers at the workplace or enterprise level*” (emphasis added).

Likewise, awards are to be suited to the efficient performance of work according to the needs of *particular workplaces or enterprises*.³² The Commission is required to carry out its functions in a way that furthers the objects of the Act.³³ So, it is clear from the outset that the emphasis of the Act is on agreements. Awards are not to exhaustively cover terms and conditions of employment as they have in the past. Rather, awards are simply designed to protect wages and conditions of employment by “providing a safety net of fair minimum wages and conditions of employment.”³⁴ To this end, the Commission is no longer empowered to make paid rates awards and is limited to making minimum rates awards.³⁵ Further, the topics with which awards can deal are limited to:³⁶

- (a) classifications of employees;
- (b) ordinary hours of work and the times within which they are performed;

³² Section 88A(c) *Workplace Relations Act 1996* (Cth).

³³ Section 88B *Workplace Relations Act 1988* (Cth).

³⁴ Section 88A(a) and (b) *Workplace Relations Act 1996* (Cth).

³⁵ Section 89A(3) *Workplace Relations Act 1996* (Cth).

³⁶ Section 89A(2) *Workplace Relations Act 1996* (Cth).

- (c) rates of pay generally (such as hourly rates and salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system;
- (d) piece rates, tallies and bonuses;
- (e) annual leave and leave loadings;
- (f) long service leave;
- (g) personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave and other like forms of leave;
- (h) parental leave, including maternity and adoption leave;
- (i) public holidays;
- (j) allowances;
- (k) loadings for working overtime or for casual or shift work;
- (l) penalty rates;
- (m) redundancy pay;
- (n) notice of termination;
- (o) stand-down provisions;
- (p) dispute settlement procedures;
- (q) jury service;
- (r) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;
- (s) superannuation; and
- (t) pay and conditions for outworkers (ie, an employee who, for the purposes of the business of the employer, performs work at private residential premises), but only

to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award for employees who perform the same kind of work at an employer's business or commercial premises.

Award simplification means, therefore, that if parties want conditions over and above the minimum, they are, in real terms, compelled to negotiate. However, there are some "protections" for employees. The Commission may include in an award provisions that are incidental to the allowable matters and essential for the effective operation of the award.³⁷ Further, the Commission has a residual power to arbitrate on some exceptional matters where conciliation has been genuinely attempted and failed and a harsh situation would result if arbitration did not take place.³⁸

Transitional provisions provided for a period of 18 months from commencement of the Act during which awards were to be simplified. That "interim period" expired on 1 July 1998. Consequently, each award has ceased to have effect to the extent that it provides for matters other than "allowable award matters." The principles relevant to award simplification and the scope of s 89A of the *Workplace Relations Act 1996* were set out in the decision of the Australian Industrial Relations Commission in *Hospitality Industry — Accommodation, Hotels, Resorts and Gaming Award 1995*.³⁹ That decision

³⁷ Section 89A(6) *Workplace Relations Act 1996* (Cth).

³⁸ Section 89A(7) *Workplace Relations Act 1996* (Cth).

³⁹ *Hospitality Industry — Accommodation, Hotels, Resorts and Gaming Award 1995* (Australian Industrial Relations Commission per Giudice P, Ross and McIntyre VPP, MacBean SDP and McDonald C, Print M 7500, 23 December 1997) 1-173.

confirmed that awards had been pared back by the new legislative approach, but they were not gutted. Essentially, the award had to be simplified so as to include relevant allowable matters and matters which are reasonably connected to their attainment. Those ancillary matters were not to be dealt with in a manner that was protracted so as to defeat the simplification process. Further, not all the allowable matters had to be included. The award was to be simplified so as to ensure that it did not hinder productivity. *It had to be fair and non-discriminatory and, of primary importance, constitute an effective "safety net" of minimum conditions for employees.* The award simplification process was challenged as an unconstitutional limitation on the Commission's arbitral power. That argument was rejected by the High Court (by a majority of 4 to 3) in *Re Pacific Coal Pty Limited; Ex parte Construction, Forestry, Mining and Energy Union*.⁴⁰

Agreements

The *Workplace Relations Act 1996* deals with two main categories of agreement. The no disadvantage test applies to both categories, but, it is argued throughout chapters five through to eight of this thesis, that the manner in which it is applied differs according to the category of agreement concerned. The first such category are *Certified Agreements*. These are collective and are of two types, namely, those between unions and employers⁴¹ and those negotiated directly between employees and employers.⁴² Both of

⁴⁰ *Re Pacific Coal Pty Limited; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 172 *Australian Law Reports* 257.

⁴¹ See: Pt VIA, Div 2 *Workplace Relations Act 1996* (Cth), especially s 170LJ.

these types of agreements require approval by the Australian Industrial Relations Commission (applying the no disadvantage test and other criteria) before they can become operative. The second category of agreements are *Australian Workplace Agreements*. These can be made between the employer and either one employee or a group of employees.⁴³ In either case, they are individually signed by employees. Significantly, they are, in the first instance, examined by a new body, the Employment Advocate, and are only sent to the Commission if, in the opinion of the Employment Advocate, the no disadvantage test has not been satisfied. It almost goes without saying that AWAs are a second non-union bargaining stream, which exist in addition to the non-union certified agreements outlined above.

Certified Agreements

Certified Agreements are governed by Pt VIB of the *Workplace Relations Act* 1996. The objects of Pt VIB, Div 1 emphasise the government's commitment to "facilitating the making and certifying by the Commission of certain agreements, particularly at the level of the single business or part of a single business." To be certified under the *Workplace Relations Act* 1996, an agreement must pass a recast no disadvantage test, which is explained more fully and analysed later in this chapter and

⁴² Section 170LK *Workplace Relations Act* 1996 (Cth).

⁴³ Part VID *Workplace Relations Act* 1996 (Cth).

chapter six.⁴⁴ Further pre-conditions for certification of Agreements are contained in Pt VIB, Div 4 of the *Workplace Relations Act 1996* and include:

1. The agreement must include procedures for preventing and settling disputes.⁴⁵
The agreement may even stipulate that the Commission is to settle a dispute over the application of the agreement.⁴⁶
2. The agreement must be made by a valid majority of persons employed at the time whose employment would be subject to the agreement and who made the agreement genuinely.⁴⁷
3. The agreement must be fully explained to prospective parties and those parties must not be unduly influenced into signing the agreements.⁴⁸
4. There must be an expiry date—usually three years.⁴⁹ There are also provisions for extending, varying or terminating certified agreements.⁵⁰

There are also certain further circumstances where the Commission must refuse to certify an agreement, for example, where an employer has discriminated against unionists in negotiating a deal or where the agreement itself is discriminatory.⁵¹

⁴⁴ See sections 170LT(2) and 170XA as well as Part VIE *Workplace Relations Act 1996* (Cth).

⁴⁵ Section 170LT(8) *Workplace Relations Act 1996* (Cth).

⁴⁶ Section 170LW *Workplace Relations Act 1996* (Cth).

⁴⁷ Section 170LT(5) *Workplace Relations Act 1996* (Cth).

⁴⁸ Section 170LT(7) and (9) *Workplace Relations Act 1996* (Cth).

⁴⁹ Section 170LT(10) *Workplace Relations Act 1996* (Cth).

⁵⁰ Part VIB, Division 7 *Workplace Relations Act 1996* (Cth).

⁵¹ Section 170LU *Workplace Relations Act 1996* (Cth).

Div 5 of Pt VIB determines the effect of a Certified Agreement when there is a conflict between the agreement and other pieces of legislation. Essentially, a Certified Agreement prevails over an award;⁵² has no effect to the extent of an inconsistency with a current Certified Agreement; and prevails over a State law (on most issues), award or agreement.⁵³ Agreements bind both the original parties and transmittes of the business.⁵⁴

Strikes as a "bargaining chip"

The *Workplace Relations Act* 1996 contains provisions conferring the right to take industrial action with immunity from civil liability where that industrial action is used as a "bargaining chip" or a "tool" of negotiation. These provisions are broadly similar to those contained in the predecessor *Industrial Relations Act* 1988, although under the new Act there are harsher penalties for breach. Clearly, both regimes introduced concepts akin to American-style collective bargaining into an Australian system which had originally been a reaction against collective bargaining.⁵⁵

Under the *Workplace Relations Act* 1996, there is no open-ended right to take industrial action—the action must be taken within the "bargaining period". Parties

⁵² Section 170LY *Workplace Relations Act* 1996 (Cth).

⁵³ Sections 170LZ(1), (2) and (3) *Workplace Relations Act* 1996 (Cth).

⁵⁴ Refer: Section 170MB *Workplace Relations Act* 1996 (Cth) and Division 6 of Part VIB, generally.

⁵⁵ The relationship between the US system and the origins of the Australian system was discussed in chapter three of this thesis.

wanting to initiate a bargaining period notify the other proposed party to the agreement and the Commission of this intention.⁵⁶ The notice sets out particulars such as the parties and business to be covered by the agreement and the issues to which it pertains.⁵⁷ Seven days after the day the notice is given, the bargaining period begins.⁵⁸

During the bargaining period, employers/unions can take industrial action which is protected (ie, immune from civil action) so long as the action is to support claims made in respect of the proposed agreement or taken by one party in response to action already taken by the other.⁵⁹ Significantly, the action cannot take the form of a secondary boycott.⁶⁰ An employer who “locks out” employees from the workplace is entitled to refuse to pay remuneration to the employees for the period of the “lock out.”⁶¹ However, the employees' continuity of employment is not affected by the “lock out.”⁶²

⁵⁶ Section 170MI *Workplace Relations Act 1996* (Cth).

⁵⁷ Section 170MJ *Workplace Relations Act 1996* (Cth).

⁵⁸ Section 170MK *Workplace Relations Act 1996* (Cth).

⁵⁹ Section 170ML(2) and (3) *Workplace Relations Act 1996* (Cth). The topic of “genuine bargaining” is traversed in Chapters Seven and Eight of this thesis, in the context of “pattern bargaining.” A brief outline of the law on the topic has also been written by the present author in her forthcoming book chapter: Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter Thirty Two) in Clive Turner *Australian Commercial Law* (formerly Yorston and Fortescue *Australian Commercial Law* – Thomson Legal Publishing, Sydney, 2005).

⁶⁰ Section 170MM *Workplace Relations Act 1996* (Cth).

⁶¹ Section 170ML(5) *Workplace Relations Act 1996* (Cth).

⁶² Section 170ML(6) *Workplace Relations Act 1996* (Cth).

There are certain further pre-conditions to the taking of industrial action. As a general rule, three days' notice of the intended industrial action must be given.⁶³ Further, the parties must have genuinely tried to reach an agreement and, if the Commission had made an order in respect of negotiations, have complied with those orders.⁶⁴ The industrial action must be authorised by the management of the organisation.⁶⁵ The Commission can also order a ballot to ensure that a majority of employees support the taking of industrial action.⁶⁶ Industrial action will not be protected unless they do. Unless an application to the Commission to certify an agreement is made within 21 days after the day when the agreement is made, nothing that was done during the bargaining period by the employee, whose employment is subject to the agreement, is protected.⁶⁷ There is no immunity from prosecution where the industrial action involved defamation or damage to property or personal injury.⁶⁸

Termination of the bargaining period

Consistent with the very specific nature of the immunity from prosecution for industrial action in the context of enterprise bargaining, the Commission has the power to terminate the bargaining period in some circumstances, therefore exposing the union

⁶³ Section 170MO *Workplace Relations Act 1996* (Cth).

⁶⁴ Section 170MP *Workplace Relations Act 1996* (Cth).

⁶⁵ Section 170MR *Workplace Relations Act 1996* (Cth).

⁶⁶ Section 170MQ *Workplace Relations Act 1996* (Cth).

⁶⁷ Section 170MS *Workplace Relations Act 1996* (Cth).

⁶⁸ Section 170MT *Workplace Relations Act 1996* (Cth).

concerned to civil penalty if their industrial campaign continues. Under s 170MW of the *Workplace Relations Act* 1996, the Commission can terminate the bargaining period where "it is satisfied" that:

- the parties did not genuinely try to reach an agreement;
- the parties failed to comply with directions of the Commission;
- the industrial action is threatening to endanger the life, personal safety or health or welfare of the population or part of it;
- the action is causing significant damage to the Australian economy or an important part of it.

If the Commission terminates a bargaining period, any further industrial action taking place may incur civil sanctions. On terminating a bargaining period, the Commission must conciliate and, if that fails, arbitrate the dispute.⁶⁹ The leading decision on termination of the bargaining period is *Coal and Allied v Australian Industrial Relations Commission*.⁷⁰ This High Court of Australia judgment had the effect of narrowing the discretion to terminate the bargaining period. Essentially, it limits the range of factors that can be taken into account and states that the discretion must only be exercised in accordance with objective facts and circumstances, not impression or experience, alone. There are also provisions against "Pattern Bargaining" or the serving by unions of identical demands on multiple employers so as to create a de facto award. Essentially, the view is taken that some work may be sufficiently similar from employer-to-employer

⁶⁹ Section 170MX *Workplace Relations Act* 1996 (Cth).

⁷⁰ *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 *Commonwealth Law Reports* 194.

to justify serving similar demands on many different employers. But, if it becomes apparent thereafter that the union is making no real attempt to bargain with particular employers (if demands are being pursued on an all or nothing basis), then the bargaining ceases to be viewed as genuine and the bargaining period may be terminated.⁷¹

Role of the Commission and the Right of Trade Unions to be Heard

Section 43 states that if the matter before the Commission is an application under Div 2 or 3 of Pt VIB for certification of an agreement, the Commission must not grant leave to intervene in the matter to an organisation of employees, other than one that is proposed to be bound by the agreement.⁷² However, under s 170LK unions can be bargaining agents for employees negotiating certified agreements.⁷³

The right of unions to be heard in the hearing of particularly non-union agreements has been a live issue since the times of the *Industrial Relations Reform Act 1993*.⁷⁴ Clearly in the era of two types of non-union agreements, the issue has only

⁷¹ *Australian Industry Group v Automotive, Food, Metals, Engineers, Printing and Kindred Industries Union* (Australian Industrial Relations Commission, Print T 1982, 16 October 2000) (per Munro J). See also: s.170MW *Workplace Relations Act 1996* (Cth).

⁷² *Transport Workers' Union of Australia v DHL International (Australia) Pty Limited* (1997) 73 *Industrial Reports* 356.

⁷³ Unions were permitted to undertake this role in *Group Four Securitas Pty Ltd v Transport Workers Union of Australia* (1997) 43 AILR 3-718. The present writer has briefly outlined the law on bargaining agents in her forthcoming publication: Louise Willans Floyd "Workplace Relations: Employment and Industrial Law" (Chapter Thirty Two) in Clive Turner *Australian Commercial Law* (formerly Yorston and Fortescue *Australian Commercial Law* – Thomson Legal Publishing, Sydney, 2005).

⁷⁴ Recall, for example: Amanda Coulthard "Non-Union Bargaining: Enterprise Flexibility Agreements" (1996) 38 *Journal of Industrial Relations* 339-358 discussed in chapter four of this thesis.

grown in importance. It is considered more fully in Chapters Seven and Eight of this thesis.

Australian Workplace Agreements

The second type of workplace agreement is the Australian Workplace Agreement (AWA). AWAs are broadly similar to Certified Agreements negotiated between employers and employees. However, there are key differences between these types of agreements. First, AWAs have harsher penalties for breach. Secondly, AWAs are signed by the individual employee who is a party to them. Thirdly, in the first instance AWAs are examined by a new body, the Employment Advocate, and are only sent to the Australian Industrial Relations Commission if the Employment Advocate has doubts as to whether the AWA passes the no disadvantage test.⁷⁵ This no disadvantage test is the same as applied to certified agreements and, as noted above, it is elaborated more fully in the final pages of this chapter and in chapter six and following of this thesis. However, that analysis will demonstrate that the test is applied in a different manner for AWAs than for (particularly union-based) Certified Agreements.

Other protections for employees which are prerequisites for a valid AWA include the following:

⁷⁵Section 170VPB *Workplace Relations Act 1996* (Cth). See also 170VPG and VPE *Workplace Relations Act 1996* (Cth).

1. There must be a dispute resolution procedure in the AWA and this can include recourse to the Commission.⁷⁶
2. The agreement must not be discriminatory.⁷⁷
3. The AWA must not restrict disclosure of the terms of the agreement,⁷⁸ although Commission hearings are private.⁷⁹
4. Employees must receive a written copy of the AWA before signing it; it must be explained to them and there must be genuine consent.⁸⁰

AWAs generally last for a period of three years.⁸¹ They can be varied or terminated.⁸² AWAs also embrace the notion that industrial action is allowable when used as a legitimate tool of bargaining.⁸³ The same kinds of notice requirements apply and the right to take action is not available where, for example, it may endanger human life.⁸⁴ Bargaining agents may be appointed, although intervention by third parties is otherwise limited.⁸⁵

⁷⁶ Section 170VG(3) and (4) *Workplace Relations Act 1996* (Cth).

⁷⁷ Section 170VG(1) *Workplace Relations Act 1996* (Cth).

⁷⁸ Section 170VG(2) and 83BT *Workplace Relations Act 1996* (Cth).

⁷⁹ Sections 170WHB, 170WHC and 170WHD *Workplace Relations Act 1996* (Cth).

⁸⁰ Section 170VPA *Workplace Relations Act 1996* (Cth).

⁸¹ Section 170 VH and 170 VJ *Workplace Relations Act 1996* (Cth).

⁸² Sections 170VL and 170VG as well as 170VM *Workplace Relations Act 1996* (Cth), respectively.

⁸³ Sections 170WC and 170WB *Workplace Relations Act 1996* (Cth).

⁸⁴ Section 170WD *Workplace Relations Act 1996* (Cth).

⁸⁵ Section 170VK and 170WHA *Workplace Relations Act 1996* (Cth), respectively.

It is especially significant to note the penalties for breach of an AWA. A court may impose a penalty on persons contravening an AWA up to an amount not exceeding \$10,000 for a body corporate or \$2,000 in other cases.⁸⁶ There is also a right to additional common law damages.⁸⁷ Penalties for forcing a party to agree to an AWA by duress also exist and agreements reached in this way can be set aside. There is a right to seek an injunction to stop or prevent a breach.⁸⁸ There is also a small claims jurisdiction.

As a general rule, an AWA operates to the exclusion of Federal awards and State awards and laws. It will take precedence over any Federal certified agreement, except, for example, a certified agreement that was operative at the time the AWA was concluded.⁸⁹

The Employment Advocate

As mentioned earlier, AWAs are more a creature of the Employment Advocate than the Industrial Relations Commission. Consequently, it is especially interesting to note that latter body's statutory functions and duties. These are prescribed in s 83BB(1) *Workplace Relations Act 1996*, which is worth quoting in full:

⁸⁶ Section 170VV *Workplace Relations Act 1996* (Cth).

⁸⁷ Section 170VW *Workplace Relations Act 1996* (Cth).

⁸⁸ Section 170VZ *Workplace Relations Act 1996* (Cth).

⁸⁹ Section 170VQ *Workplace Relations Act 1996* (Cth).

- “(a) providing assistance and advice to employees about their rights and obligations under this Act;
- (b) providing assistance and advice to employers (especially employers in small business) about their rights and obligations under this Act;
- (c) providing advice to employers and employees, in connection with AWAs, about the relevant award and statutory entitlements and about the relevant provisions of this Act;
- (d) performing functions under Pt VID, including functions relating to the filing of AWAs and ancillary documents;
- (e) investigating alleged breaches of AWAs, alleged contraventions of Pt VID and any other complaints relating to AWAs;
- (f) investigating contraventions of Pt XA;
- (g) providing free legal representation to a party in proceedings under Pt VID or Pt XA, if the Employment Advocate considers this would promote the enforcement of the provisions of those Parts;
- (h) providing aggregated statistical information to the Minister;
- (i) any other functions given to the Employment Advocate by this Act or any other Act;
- (j) any other functions prescribed by the regulations.”

What ‘leaps out’ about the Office of Employment Advocate is that it is not fulfilling a role similar to that of the Australian Industrial Relations Commission. In particular, it does not certify (validate or invalidate) agreements lodged with it; the Employment Advocate simply accepts agreements when they are filed, subject to the operation of the no disadvantage test. Further, it provides advice to *both* employers and employees about the system – something that was considered the bane of the office, when it was first introduced.⁹⁰

The importance of secrecy to AWAs is also conspicuous. In addition to the secrecy of the agreements, themselves, (referred to above), the staff of the Employment Advocate are to observe a duty of confidence which is punishable by up to six months’

⁹⁰ The criticisms of the office; whether it would cause conflicts of interest; and whether the ‘Chinese Walls’ on which it seemed to rely would work were outlined in: Louise Willans Floyd, “To Thine Own Self Be True: Enterprise Bargaining and the Rise of Individualism in Australian Industrial Law and Trade” (1997) 3 *International Trade and Business Law Annual* 263-276 at especially 271-273.

jail if breached.⁹¹ The staff of the Employment Advocate are drawn from the Public Service.⁹² Their powers include interviewing employees and inspecting work.⁹³

On introducing the *Workplace Relations Act 1996*, Minister Reith emphasised his desire for employers and employees to have a large choice of agreements to govern their employment relations.⁹⁴ At the time, some commentators regarded AWAs as a fair choice for highly skilled employees undertaking specialised tasks.⁹⁵ That may still be the case. But what has become striking is the trend of some employers to use AWAs at all levels of the hierarchy and arguably in an attempt to de-unionise their workforce. That was the apprehension towards non-union agreements of writers such as Bennett when EFAs were introduced in 1993.⁹⁶ The phenomenon is discussed in detail under the current provisions in chapters seven and following of this thesis. So is the related question of whether the choice of agreements is a mutual decision made between employer and employee or an election made by the employer, alone. These are the

⁹¹ Section 83BS *Workplace Relations Act 1996* (Cth).

⁹² Section 83BD *Workplace Relations Act 1996* (Cth).

⁹³ Section 83BH *Workplace Relations Act 1996* (Cth). Under the *Industrial Relations Act 1988* (Cth), the Australian Industrial Relations Commission had an Enterprise Bargaining Division. This Division was abolished under the *Workplace Relations Act 1996* (Cth).

⁹⁴ Hon. Peter Reith MP, Minister for Workplace Relations, *Second Reading of the Workplace Relations and Other Legislation Amendment Bill 1996*, (Parliament House, Canberra, 1996) 1-13 at 3. (<http://www.nla.gov.au/dir/reforms/speech.htm> – accessed on 23 May 1996).

⁹⁵ Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter Thirty Two) in Yorston, Fortescue and Turner (as it then was) *Australian Commercial Law* (21st ed: Law Book Company, 1997) 978-1016.

⁹⁶ Laura Bennett “Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction” (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 129-154.

supporting structures that go to bargaining strength of employees and, therefore, the effectiveness of whatever statutory protections have been devised as employee safeguards. But what is important for now is to appreciate the machinations of the no disadvantage test under the current law, as such is the primary employee safeguard.

The ‘No Disadvantage Test’ under the *Workplace Relations Act 1996*:

Both Certified Agreements and Australian Workplace Agreements must satisfy the no disadvantage test in order to become operative.⁹⁷ Unlike its predecessor, the current no disadvantage test appears in its own discreet part of the governing statute, Part VIE of the *Workplace Relations Act 1996*. Therein, section 170XA(1) and (2) provides:

- (1) An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment...
- (2) ...an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under:
 - (a) relevant awards or designated awards; and
 - (b) any law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant.

*Thus far, the no disadvantage test appears identical for both categories of agreement. But there are differences in the way it operates. (See **Diagram One** at the end of this Chapter). Some of these are embedded in the statute, itself. For example, as regards AWAs, section 170VPB(1) begins in strong terms: “The Employment Advocate must approve an AWA for which a filing has been issued if...the Employment Advocate*

⁹⁷ Section 170LT(2) and section 170VPB *Workplace Relations Act 1996*, respectively.

is sure that the AWA passes the no disadvantage test.” (emphasis added). However, it immediately goes on to discuss the importance of “undertakings” in section 170VPB(2), which appears in Part VID, Division Five:

- “170VPB(2) If the Employment Advocate has concerns about whether the AWA passes the no-disadvantage test, but those concerns are resolved by:
- (a) a written undertaking given by the employer and accepted by the Employment Advocate; or
 - (b) other action by the parties;
- the Employment Advocate must approve the AWA...”

*As mentioned throughout this chapter, if the Employment Advocate is not satisfied the AWA meets the no disadvantage test, then, and only then, is the AWA referred to the Industrial Relations Commission.*⁹⁸

In yet another part of the statute, namely Part VIB Division 4, s.170LT then qualifies the ‘no disadvantage test’ so far as Certified Agreements are concerned:

- “If:
- (a) the only reason why the Commission must not certify an agreement is that the agreement does not pass the no-disadvantage test; and
 - (b) the Commission is satisfied that certifying the agreement is not contrary to the public interest;
- the agreement is taken to pass the no-disadvantage test.”

The Commission also has power to accept undertakings from parties.⁹⁹ So both the notion of *public interest* and the receipt of undertakings apply when the Commission deals with AWAs that have been referred to it.¹⁰⁰

⁹⁸ Section 170VPB(3) and 170VPG *Workplace Relations Act 1996* (Cth).

⁹⁹ Section 170LV *Workplace Relations Act 1996* (Cth).

There are other interesting ‘quirks’ in the way the statute was drafted. As Justice Munro observed in one of his conference papers, the no disadvantage test, both as applied to Certified Agreements and AWAs, allows for businesses to reduce salary payments so as to ‘trade out of difficulties.’ However, that example appears in an actual section (section 170LT(4)) regarding Certified Agreements, while it is only a statutory notation to section 170VPG(4) for AWAs.¹⁰¹

As mentioned in the introduction to this chapter, retention of a no disadvantage test was not the Government’s preferred mode of employee safeguard; theirs was very much statutory minimum conditions. The test was retained in response to concerns of the Senate Economic Review Committee, which reviewed the bill, and of the Australian Democrats, who held the balance of power in the Senate. When Minister Reith referred to the Bill in a revised Second Reading, he emphasised the breadth of the test and hinted that it could still be a vehicle of reform:¹⁰²

“The test involves a global approach to the comparison of the agreement with the benchmark awards and laws. It is intended that an agreement should not fail the test merely because a particular condition of employment is reduced, provided that, on balance, the overall package of terms and conditions is not reduced.”

¹⁰⁰ Section 170VPG(2)-(4) *Workplace Relations Act 1996* (Cth).

¹⁰¹ Justice Munro “Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test” – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24 at 21, especially paragraph 67, where His Honour wonders whether this is just “sloppy drafting.”

¹⁰² *Workplace Relations and Other Legislation Amendment Bill 1996, Supplementary Explanatory Memorandum* (Senate, Parliament of Australia, Canberra) at 66.

The “Old’ and “New”No-disadvantage Tests - A Comparison:

The current no disadvantage test is different from its forebear under the *Industrial Relations Act 1988*. (See **Diagram Two** at the end of this Chapter):

1. In particular, the new test is broader as it is not anchored to awards. The original test involved a global assessment, but only after a line-by-line comparison with the award had been completed (ie what the *EFA Test Case* regarded as the first limb of the test). Only if that limb was failed would the agreement be considered as a whole – and it would still fail the no disadvantage test if that global package was against the public interest (limb two). In contrast, the new test involves no line-by-line appraisal of awards. It has only one stage – a global assessment of the agreement against a simplified award (not the original award). In the view of many writers, such as Justice Munro , Marles, Merlo and Judge (considered in detail in chapter six), therein lies the first problem with the new test. The benchmark is not the *actual* terms of employment of the employees (ie the current agreement, which may be complex), but those in the award. Whilst that was the same benchmark as the original no disadvantage test, the difference under the current law is that now awards are limited to twenty allowable matters and, due to the passage of time, are possibly out of date.
2. Although relevant to the old test, ‘public interest’ appears in a different context under the new provisions. The difference is that it formed an actual part of the old test and was an extra barrier against the certification of substandard agreements. (It was limb two). In the new order, public interest is found in a

different part of the act and only applies to certified agreements, not to AWAs. Further, 'public interest' now exists as a mechanism by which a certified agreement, which has already failed the test, may be deemed to have passed the test. This has prompted writers such as Merlo and Judge to question whether the concept now negates the protection of the no disadvantage test. The vagueness of 'public interest' was both a potential problem and a means of allowing creativity even under the old statute. Writers such as Justice Munro acknowledge that is still the case but have also noted that the double negative in the current public interest test may complicate the application of the test even more than if the 'public interest' concept stood alone.

3. Finally, there are questions as to whether the structure of the test – being scattered through three different parts of the statute – means that it applies differently for Certified Agreements and AWAs. This is a particular concern given the secrecy of the Employment Advocate's work and the limited scope for trade union involvement. Although there was a capacity for undertakings to be given as regards agreements under the previous legislation (for example, in *Toys R Us*, discussed in chapter four of this thesis) the question is whether this is further erosion of the no disadvantage test.

Chapter Six gives a detailed consideration of these criticisms along with the present writer's views on the no disadvantage test as an employee safeguard. Chapters seven and following then examine the structures that surround the test – that is, the involvement of unions and the Commission in the bargaining process.

DIAGRAM TWO:

NEW AND OLD NDT – A COMPARISON

The FORMER Test:

- *anchored to awards – line by line comparison with original award;*
- *public interest a part of the test – and was extra barrier against certification of substandard agreements.*

The WORKPLACE RELATIONS ACT Test:

- *not anchored to awards – global comparison against simplified award;*
- *public interest in different part of statute – only applies to certified agreements and is mechanism by which failed agreement can pass.*

DIAGRAM ONE: OPPORTUNITIES TO PASS THE NDT:

AUSTRALIAN WORKPLACE AGREEMENTS:

NDT (applied by OEA) → → Undertakings

↓

↓

AND (possibly in addition)

↓

↓

NDT (applied by Commission) → → Undertakings → → Public Interest

CERTIFIED AGREEMENTS:

NDT (applied by Commission) → → Undertakings → → Public Interest

VI. CHAPTER SIX:

The 'No Disadvantage Test' and the *Workplace Relations Act 1996*: A Critical Perspective.¹

The purpose of this chapter is to legally analyse the no disadvantage test under the *Workplace Relations Act 1996*. The main concentration in this chapter is on the application of the test to certified agreements (both those involving unions and also s.170LK non-union agreements). A detailed consideration of AWAs (and such issues as the no disadvantage test and the application of that test by the Office of Employment Advocate, rather than the Commission) is undertaken in Chapter Eight. Further, a consideration of alternative systems, such as bargains underpinned by statutory minimum conditions, is undertaken in that context.

For present purposes, there are three main criticisms central to the present study of the no disadvantage test, namely:

- ***Criticism One: Awards as a Benchmark*** – The current test measures a proposed agreement against a simplified award rather than the previous agreement (the latter representing the terms and conditions under which employees actually worked);

¹ Some of the material in this chapter has been published in: Louise Willans Floyd, "No Disadvantage Test (Introduction to Part VI and Commentary on s.170XA *Workplace Relations Act 1996*)" in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2002) 3275-3281.

- ***Criticism Two: A Nebulous Discretion?*** The current test involves a broad discretionary consideration of the proposed agreement against the award. That test can also be deemed to be passed if the agreement is adjudged as being not contrary to the public interest. Does the tandem operation of two discretions mean the test is ineffective as a safeguard of employee rights? Further, does it constitute a threat to the community standards considered in Chapter Four of this thesis?
- ***Criticism Three: Does the Efficacy of the Test depend on the Involvement of the Commission and Trade Unions*** – It was noted in the analysis of the original no disadvantage test in Chapter Four of this thesis that scholars such as Bennett, as well as Nolan and Nomchong, had misgivings about the existence of a non-union bargaining stream (EFA) and efficacy of the no disadvantage test when applied to such agreements. Contrastingly, Coulthard argued that unions had too many rights to intervene in the certification of non-union agreements to make them viable. This chapter concludes by considering whether the no disadvantage test functions more effectively when applied to non-union agreements. As noted in the introduction, that question even more importantly arises when considering the operation of the test to AWAs – that issue is considered in the chapter devoted to AWAs, Chapter Eight.

Criticism One: Simplified Awards as the Benchmark for Certification of Agreements

Both the old and new no disadvantage tests require the Commission to compare the agreement to the relevant award before certification. Despite the apparent similarity, the practicality of applying that test differs under the former and present law. Under the former statute, the *Industrial Relations Act 1988*, awards were expansive. Further, given what was, at that stage, the pioneering nature of enterprise bargaining, awards were more likely to be the actual terms that governed the employment relationship at the time the bargain was struck. However, under the *Workplace Relations Act 1996*, awards are simplified - they can deal only with the twenty allowable matters.² As discussed in Chapter Five of this thesis, although awards are still meant to provide a strong safety net,³ the allowable matters were designed to *encourage parties to put the bulk of their terms and conditions of employment into agreements*.⁴ What is more, enterprise bargaining is no longer in its initial phases. All of this means that awards are increasingly removed from the terms of employment that *actually govern* the employment relationship; they are more akin to the conditions of old.

It is worthwhile considering what this might mean in practice. When the first bargains were made, under the former *Industrial Relations Act 1988*, unions or employees would come to the bargaining table knowing one very important thing: *Every*

² S.89A *Workplace Relations Act 1996* (Cth) as discussed in Chapter Five of this thesis.

³ Refer discussion of *Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995* (Australian Industrial Relations Commission per Giudice P, Ross and McIntyre VPP, MacBean SDP and McDonald C, M Print P 7500, 23 December 1997) 1-173 in Chapter Five.

single term of employment under which they actually worked was both a bargaining chip and something that was taken into account when the Commission decided whether or not to certify the ultimate agreement.

*Today, that is simply not the case. Employees and unions do not come to the bargaining table able to use all the terms under which they actually work as bargaining chips, nor will each actual term of employment be used as a reference point for certification. Instead, employees and unions can only rely on the terms of simplified awards. These will sometimes be about a decade old; therefore, they will probably not reflect actual terms of employment and they might well be out of date. Although the safety net that awards represent must be strong, the point is that **there will be certain terms of employment under which people work for which they will have to bargain all over again just to retain.**⁵*

In a paper presented to the Industrial Law Section of the Bar Association of Queensland in 2001, “Predictions and Premonitions – Individual Contracts...A View to their Future”, ACTU Assistant Secretary, Richard Marles, was strongly critical of this

⁴ Refer discussion of award simplification and its purpose in Chapter Five.

⁵ It is interesting to note the manner in which the operation of the present test contrasts with the stated purpose for the original test, as described by then Minister for Industrial Relations, Hon Laurie Brereton MP in the Second Reading of the Industrial Relations Reform Bill: “In the bargaining process employees want and deserve the security of knowing they cannot be worse off – worse off in totality. The security of knowing that the conditions they currently enjoy are not to be traded off without something being offered in return.” Refer: “Second Reading of the Industrial Relations Reform Bill” in *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2778 and 2781. The passage is also discussed in Chapter Four of this thesis.

aspect of the no disadvantage test.⁶ Although his paper was more of the nature of an overview discussion of bargaining issues, rather than a detailed scholarly analysis, Marles provided an interesting and disturbing practical example of the problem outlined above. According to ACTU research, “awards are on average in terms of pay 15% below existing agreements.”⁷ In the view of the present writer, that statistic is critical to a consideration of both the no disadvantage test and the ‘rock sold guarantee.’ *All the no disadvantage test really assures workers is that their bargain will be no worse than the bulk of (but not the whole of) an award instrument, which is less favourable than the bargain under which they currently work. For that reason, the present writer supports the adoption of Marles’ preferred model for law reform – namely, the adoption of the most recent agreement as the benchmark for the no disadvantage test, instead of referring back to the award.*⁸

Due to the nature of his speech, Marles did not give further details of how such a change might manifest itself. But in the view of the present writer such could possibly be achieved by changing the language of s.170XA(2)(a) to; “relevant agreement or designated agreement” and then underlining the importance of the ‘public interest’ discretion. It is beneficial to take time to ponder how this new statutory provision might

⁶ Richard Marles “Predictions and Premonitions – Individual Contracts...A View to their Future” conference paper delivered at Queensland Bar Association (Industrial Law Section) Industrial Law Conference (22 April 2001, Gold Coast, Australia) 1-12 at 2-3. Copy supplied by Mr Marles and on file with author.

⁷ Richard Marles “Predictions and Premonitions – Individual Contracts...A View to their Future” speech delivered to the Queensland Bar Association (Industrial Law Section) Industrial Law Conference 2001 (22 April 2001, Gold Coast, Australia) 1-12 at 2-3.

work in practice. If bargains represent the *actual terms* and conditions of employment, rather than a *safety net* for bargaining, one possible (valid) criticism of employers might be that the legislative change is too costly to them, particularly if the bargain was struck at a time when business was strongly profitable and the market has subsequently, permanently shrunk. One needs only to consider the airline industry after major terrorist attacks; the SARS virus; and the oil crisis to see how such a sustained 'crash' might occur. In the view of the present author, such is not an insurmountable obstacle. As discussed in chapters four and five of this thesis and as will be examined in detail in the next section of this chapter, there is a public interest discretion that deems allowable agreements that would otherwise have failed the no disadvantage test. In the view of the present writer, that discretion would allow the Commission to certify agreements where sustained poor economic conditions required the new agreements to be closer to the old benchmark award, rather than the last agreement. Such an approach would also be justified by both s.90 and s.3 – the principal objects of the *Workplace Relations Act 1996*. Both of those provisions require the AIRC to take the national economic interest into account in performing its functions.

These changes to the no disadvantage test are especially interesting in so far as non-monetary terms of employment are concerned. By placing more emphasis on previous agreements, non-monetary terms of employment that go to productivity and quality of life and work in a modern workplace should be subject to lively bargaining.

⁸ Richard Marles "Predictions and Premonitions – Individual Contracts...A View to their Future" speech delivered to the Queensland Bar Association (Industrial Law Section) Industrial Law Conference 2001 (22 April 2001, Gold Coast, Australia) 1-12 at 9.

So, for instance, an employer might seek to 'tighten' the steps and qualifications for career progression in return for building on employee's parental leave entitlements. Such agreement may be allowed by the Commission taking into account the public interest; the bargaining relationship between the parties and the need to ensure both employers and employees (and the workplace) benefit from the bargaining process.

Of course, as with any change to a complex area of law, there would be unusual situations that might arise. For example, what if the Commission was considering the *first* agreement between the parties? What if there was no previous agreement to use as a guide? In those sorts of cases, surely again the public interest could be used to ensure the award was the benchmark and a system could be moulded that was true to employees without being unduly onerous on employers.

Before considering the discretionary nature of the no disadvantage test in more detail in the next section, it is useful to note that there are further academic writers who have also condemned the use of awards as benchmarks for the no disadvantage test. In his short but insightful essay, "Australian Workplace Agreements," James Judge⁹ shares this concern. Writing before Marles' paper was published, Judge does not go into a detailed analysis of the problem or offer comment on any specific call for law reform; however, his critique of awards as the benchmark for the no disadvantage test surely lends support for a review of this issue. So, then, might the work of Omar Merlo,

⁹ James Judge "Australian Workplace Agreements" (1998) 23 *Alternative Law Journal* 75-77 at 75, 77.

“Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining,” in which that latter author refers to the present situation as “the shrinking safety net.”¹⁰

Criticism Two: Is the No Disadvantage Test a Nebulous, Ineffective Discretion?

As noted at the end of Chapter Five of this thesis, there is a change in the structure of the no disadvantage test under the *Workplace Relations Act 1996*. Formerly, there was a first limb of the test, which required a line-by-line consideration of the agreement as against the award. If there was a reduction in award entitlements, one would then progress to limb two of the test. This was a global consideration of the agreement, whereby it still failed the no disadvantage test if “in the context of the terms and conditions of employment considered as a whole, the Commission considers that the reduction is contrary to the public interest.” Certification was, therefore, in the first instance, overtly anchored to awards. And “public interest” was an actual part of the no disadvantage test and a further way in which an agreement could *fail* the no disadvantage test – a further way in which employees were protected.

Whereas now, the test is found in a discrete part of the statute (Part VIE) and it is structured differently. Nowadays, the no disadvantage test is a single global discretion – an agreement will fail if, *on balance*, there is a reduction in *overall* terms and conditions of employment under relevant awards and laws (s.170XA). If an agreement does fail the no disadvantage test, then consideration turns to “public interest,” which is now a

¹⁰ Omar Merlo “Flexibility and Stretching Rights: ‘The No Disadvantage Test in Enterprise Bargaining’ (2000) 13 *Australian Journal of Labour Law* 207-235 at 223 et seq, 218-219, 228-229.

separate discretion found in a different part of the statute (namely, Part VIB, in particular s.170LT.) Under this provision, the agreement will still be deemed to have passed that test: “if certifying an agreement is not contrary to the public interest.” Unlike before, “public interest,” is another way the agreement can *pass* the no disadvantage test, even though an assessment has already been made that it, in fact, fails that test.

Recasting and restructuring the no disadvantage test in this way has, obviously, attracted scholarly attention and begs the question whether the test is, in fact, now simply too broad to be of any practical use. This portion of the chapter analyses the no disadvantage test to determine whether such criticism is true. It considers:

- (a) whether the no disadvantage test (under s.170XA) is too broad to be effective;
- (b) whether the new structure of the no disadvantage test (ie one that leads to a consideration of the public interest as a further means of passing the agreement) detracts from its relevance; and
- (c) whether the public interest test is, itself, too hard to define to be effective.

These questions are now analysed in turn.

(a) *Is the No Disadvantage Test Too Broad to be Effective?*

This question has been asked by scholars such as Merlo¹¹ and Judge,¹² but in the view of the present writer, that is not the case.

In the first place, one should recall the consideration of the development of conciliation and arbitration in Australia (undertaken in chapter two). In discussing the passage and purpose of the Conciliation and Arbitration Bill, the main elements of Sir Alfred Deakin's Second Reading Speech were highlighted. Australia had chosen to adopt a Commission system over alternatives, such as statutory minimum conditions, as such a Commission was seen as being a more flexible means of dealing with the many situations that could arise in the workplace. From its inception, the Commission was to operate under but one broad, guiding principle: "in the hearing and determination of every dispute the court shall act according to equity, good conscience and the substantial merits of the case."¹³ *The breadth of the Commission's traditional operation was the very essence and strength of the system* – something that made it as flexible as an elephant's trunk that could "pick up a pin or lift an enormous load."¹⁴ For Sir Alfred Deakin, then, it was clear:¹⁵

¹¹ Omar Merlo "Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining" (2000) 13 *Australian Journal of Labour Law* 207-235.

¹² James Judge "Australian Workplace Agreements" (1998) 23 *Alternative Law Journal* 75-77.

¹³ Clauses 46 and 47 of the original Conciliation and Arbitration Bill referred to in Chapter Three of this thesis.

¹⁴ Sir Alfred Deakin, "Second Reading of the Conciliation and Arbitration Act" *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) 2866, 2865 – as quoted in Chapter Three of this thesis.

“...It must be at once clear that however much Parliament might desire to take into its own hands the immediate regulation of industrial affairs, and to provide for the suppression of their vendettas, it would be incompetent to do so, notwithstanding all its authority, by reason of the immense complexity of the task cast upon it...

“...The rigid provisions of legislation, therefore, must necessarily be ineffective in dealing with a living society. The only way to cope with the ever-changing, ever-developing needs and forms of unfoldment in society and its industries is to create some authority of independent minds, able to follow its workings so far as their knowledge and ability permit, and to assist its progress by adapting forces to foster growth, not once, but from time to time...”

Chapter Two went on to consider academic commentaries and assessments of the arbitration system. So, for example, it will be remembered that, in their study of Australia's conciliation and arbitration system, Beatrice and Sidney Webb also took solace in the flexibility that the system exhibited. To them it showed:¹⁶

“...how elastic and how closely applicable to the details of each trade and town the once rigid law may be.”¹⁷

Of course, others were less impressed. They saw the breadth of operation of the Commission as placing too much power in the hands of the Commissioners, themselves. For example, Henderson wryly complained in his essay, “The Industrial Relations Club:”¹⁸

“...Here can be found men and women who are truly reasonable and moderate. They alone understand industrial realities; they alone know how the system works; and it is they who can do deals and fix

¹⁵ Sir Alfred Deakin, “Second Reading of the Conciliation and Arbitration Act” *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) 2865 – as quoted in Chapter Three of this thesis.

¹⁶ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927 (Introduction xxi - lvi at li; xxxvi).

¹⁷ The assessments of both Deakin and the Webbs are about 100 years old. Although that may make them seem ‘dated,’ one may well question whether the ephemeral nature of society has really changed.

¹⁸ Gerard Henderson “The Industrial Relations Club” (1983) 27 *Quadrant* 21-29, 23.

agreements. Within the Club there is no time for confrontation. Rather, sweet reasonableness prevails.”

Yet, despite such derision (and, all the while acknowledging the breadth of power the Commission has had at times and the rigidity it may have shown in once using its own decisions as precedents to create industry-wide common rules), the present writer hastens to add that the Commission is hardly something “as inscrutable as the sphinx.”¹⁹ The Commission acts on the basis of material placed before it by relevant parties and brings to bear on issues the expertise of its members. Hearings are open and reasons are published. Decided cases can always be raised by parties as a guide for determinations and there are avenues of appeal.²⁰

Referring these early critiques to the present debate surrounding the no disadvantage test, *it is the view of the present writer that the breadth and porous nature of the no disadvantage test is a continuation of the strength the Commission has always shown – it is the embodiment of its flexibility.* Further, when considering the

¹⁹ Lord Denning MR in *Ward v James* [1966] 1 *Queens Bench* 273 at 301 as cited in *Warren v Coombes* [1978-1979] 142 *Commonwealth Law Reports* 531 at 552 (per Gibbs ACJ, Jacobs and Murphy JJ). Lord Denning was actually referring to decisions of juries.

²⁰ In this context, it is important to acknowledge that there have been some applications of the no disadvantage test by the Commission which have, at best, been lamentable. In *Re Knightwatch Security Pty Ltd* (2002) 131 *Industrial Reports* 261-271 (per Giudice J, President, Ross VP and Whelan C), the AIRC heard an appeal against a decision of Commissioner Lewin not to certify an agreement. The handling of the case by Lewin C was somewhat troubling. The Commissioner referred the agreement to an external expert for the purposes of seeing whether the no disadvantage test had been complied with and did so without raising that prospect at the hearing. The Commissioner showed reliance on that external report to the point that the Full Bench felt it necessary to reconfirm that the job of the Commission was to *independently* assess agreements. Further, there was a delay of months in dealing with the agreement, which the Full Bench regarded as “inconsistent with the efficient discharge of the Commission’s duty” - *Re Knightwatch Security Pty Ltd* (2002) 131 *Industrial Reports* 261-271 (per Giudice J, President, Ross VP and Whelan C) at 269 et seq. The Full Bench noted that 85% of s.170LK agreements were certified in approximately six weeks, however, which would underline the normal efficiency of the jurisdiction.

actual drafting of the no disadvantage test in s.170XA, it should be noted that *the global comparison of awards and agreements does not amount to a whimsical decision by Commissioners*. The terms of awards are settled and transparent; parties concerned can make submissions on the certification of agreements before an open hearing; and the Commissioners, themselves, can require further steps to be taken to determine whether agreements are acceptable.

The second aspect of this critique of the new no disadvantage test relates to the fact that it is a one-stage, global discretion that is far less anchored to awards than its predecessor. Merlo, for instance, has questioned whether such a change means that the current test is so bent on delivering flexibility to business that it has forsaken worker protection.²¹

It has already been acknowledged that the current test is broader than its ancestor. But it should also be remembered that even it had a degree of imprecision. The second reading of the Industrial Relations Reform Bill, for instance, declared:²²

“The no disadvantage test has been an important innovation. Applying as it does to the overall package of employee entitlements, it allows for a wide range of variations to award conditions. It also allows for

²¹ Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235 at 208 charges: “(its) original purpose was to ensure that an agreement did not disadvantage ...employees. (However) this object has to some extent been redefined through various legislative reforms.” Merlo concludes his article with his sincere concern (at 234-235) as to whether: “the NDT has been effective in protecting the weaker party, or whether equity and fairness have been sacrificed to make room for increased efficiency and flexibility.”

²² Hon Laurie Brereton MP, Minister for Industrial Relations, “Second Reading of the Industrial Relations Reform Bill 1993” *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2781.

agreed reductions if these are judged not to be against the public interest, for example, as part of a strategy for dealing with a short term business crisis and revival..." (emphasis added).

And, in the *EFA Test Case*,²³ the court, in explaining the test, acknowledged:

"Given the need to balance a range of factors the determination of whether or not the no disadvantage test has been met in a particular case will largely be a *matter of impression and judgment of the Commission member at first instance.*" (emphasis added).

From its inception, then, the no disadvantage test deliberately introduced into the bargaining process an element of imprecision – such is not just the hallmark of the current system. *That imprecision made relevant the judge's impression of the agreement's overall fairness, so as to imbue the system with the necessary element of flexibility that a mechanical check of each award condition could not provide.* This type of flexibility was not meant to forsake workers, but simply reflect the hybrid system of labor relations of which the test was a part. Chapter Four of this thesis cited a number of passages of Minister Brereton's second reading of the *Industrial Relations Reform Act* 1993 in which worker protection was championed. The Minister boldly declared that his act was not "for those whose God was greed;"²⁴ likewise "employees want and deserve the security of knowing they cannot be worse off."²⁵ The paradox was, of course, that the test was meant to win the trust of workers so that they would embrace the bargaining

²³ *Enterprise Flexibility Agreement Test Case, May 1995* (1995) 59 *Industrial Reports* 430-477 (Australian Industrial Relations Commission per Ross VP; Maher DP and Cox C) at 457.

²⁴ Hon Laurie Brereton MP, Minister for Industrial Relations, "Second Reading of the Industrial Relations Reform Bill 1993" *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2777.

²⁵ Hon Laurie Brereton MP, Minister for Industrial Relations, "Second Reading of the Industrial Relations Reform Bill 1993" *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) at 2778, 2781

system at a time when bargaining had not rapidly spread.²⁶ The test was always something of a catalytic agent, then, as well as a protective device. It was a device by which fairness and flexibility were to become mutually supportive, rather than exclusive goals.

The worth of the no disadvantage test as a protective device for employees and the virtues of its flexibility as a means of dealing with the many issues that arise in the workplace may be demonstrated by the decided cases: *Bermkuks Pty Ltd Certified Agreement [2003]*²⁷ and *Coles Myer Pty Ltd*.²⁸

*Bermkuks Pty Ltd Certified Agreement [2003]*²⁹

Shortly after this decision was handed down on 28 January 2004, it was observed in the newsletter, *Workplace Express*:³⁰

²⁶ Interestingly and ironically, that point is actually noted by Merlo, himself!!! Refer: Omar Merlo "Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining" (2000) 13 *Australian Journal of Labour Law* 207-235 at 209-210: "...Section 115 was considered too weak to foster such a transition (to bargaining), and it was felt that amendments were needed to facilitate the commission's approval of agreements and to ensure that certified agreements become a real alternative to awards, rather than being reserved for 'exceptional circumstances.' A key element of the new provisions was that an agreement must not disadvantage the employees it covered in respect of their terms and conditions of employment."

²⁷ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41.

²⁸ *Coles Myer Pty Ltd* (Australian Industrial Relations Commission per Whelan C, Print R3504 31, March 1999) 1-22.

²⁹ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41.

³⁰ Workplace Express "Subway Ruling Highlights AIRC's Scrutiny of Non-union deals" (*Workplace Express* 5 February 2004)

“A s.17OLK agreement the AIRC has refused to certify has highlighted the scrutiny non-union agreements face in the Commission as it seeks to assess whether they pass the no disadvantage test.”

A scholarly analysis of the decision confirms what the news letter suggests – the case demonstrates the rigor with which the Commission applies the no disadvantage test and the fact that *Commissioners will take a pro-active role in proceedings to determine whether or not the test is satisfied.*

Basically, the proprietors of a Subway sandwich shop tried to certify a non-union agreement that had caused Commissioner Deegan angst throughout the early hearings as to whether the no disadvantage test was satisfied. The shop employed mostly part-time employees and those workers were fairly young in age. Some of the basic features of the agreement that had troubled the Commissioner included the relinquishing of numerous loadings; penalty rates; and paid leave entitlements, as well as non-financial benefits like predictability of hours for part-timers. There was an increase in basic pay rates compared to the award. And the employer produced detailed tables purporting to show how employees would not be disadvantaged financially under the agreement even in a worse case scenario (in terms of rosters). The employer did not provide the Commissioner with an *actual or proposed* roster for employees, though. Instead, they submitted an *indicative* roster – an indication of how they *said* they would utilise and roster their staff.³¹

http://www.workplaceexpress.com.au/workp...2825&in_version=&in_type=PrinterFriendly – last accessed 19 February 2004).

³¹ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 3 (paragraphs 12 et seq).

Importantly, *Commissioner Deegan performed a number of calculations, using this indicative roster, through which she compared the entitlements and pay of the employees under the award and agreement.* The Commissioner was concerned because there were instances when the employees appeared to be only cents ahead of the award – and that was despite the fact they had lost both monetary penalties and loadings, as well as non-material benefits in the form of certainty of hours.³²

Due to these concerns, the Commissioner first sought to have the agreement sent to an organisation which could produce sample rosters and undertake a comparison between award and agreement entitlements. When she found such an exercise was not practicable, the Commissioner made the following comments:

“Upon making enquiries about *having the Agreement examined by the organisation that at times performs such a service for the Commission* it became apparent that this could not be done for some considerable period. In those circumstances I determined not to wait but to *examine every clause of the Agreement against the Retail Award* and decide whether I could be satisfied that the higher ordinary hourly rate compensated for the loss of other award entitlements. (Emphasis added).”³³

This passage of the Commissioner’s findings is crucial. It demonstrates the resources available to the Commission – it can send agreements to independent parties for analysis and does not simply rely on comparative tables developed by the employer, however detailed such might appear to be. When this referral option was not practicable, *the Commissioner, in this case, undertook a detailed comparison of the agreement*

³² *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 4 (paragraph 17).

³³ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 4 (paragraph 18).

against the award, quoting at length all of the relevant provisions of both the award and the agreement. *That close consideration of the two instruments demonstrates that the no disadvantage test, although discretionary, is not a whimsical decision, nor is it an exercise through which awards as a safety net are given merely a cursory glance.* The specific findings of Commissioner Deegan are considered below in greater detail. That study, it is submitted, exemplifies how the breadth of the global no disadvantage test is the strength of the bargaining system:

- Of enormous concern to Commissioner Deegan was that the provisions of the agreement dealing with regular part-time work made no allowance for pro-rata entitlements to paid leave or leave loadings nor did they provide for predictability of hours. Under the agreement, rosters were only possibly settled one week before work and were able to be changed with the bare 24 hours notice. This compared poorly to the award, which contained leave and loadings, and a system by which rosters were settled up to a month before the work was to be undertaken.³⁴
- In addition to *considering the weight to be attached to such a non-financial employee benefit*, Commissioner Deegan noted, when considering the agreement's dismissal provisions, that such *imposed obligations through use of a handbook which could impose obligations that were changeable.*³⁵ Such uncertainty of operation on an important issue was a cause for concern for the Commissioner.

³⁴ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 5-7 (especially paragraph 20).

³⁵ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 8-9 (especially paragraph 23).

- Under the award, ordinary hours of work were clearly identifiable, for example, 7am through to 6pm of a weekday. Clause 11 of the agreement, however, provided: “Ordinary Hours of work for full and part time employees will not exceed thirty eight hours per week on average over 52 weeks and can be worked between 6am to...midnight Monday to Sunday...” The Commissioner noted the obvious broadening of the concept of ordinary hours under the agreement.³⁶
- That clause of the agreement also caused problems in calculating any overtime. Under another clause, clause 15 of the proposed agreement, “all time worked outside the ordinary hours of Clause 11 shall be Overtime.” The remainder of that provision detailed the further circumstances in which overtime could be claimed. The employer’s prior agreement was needed, for instance, and employees could not be required to work overtime. It was in considering the meaning of clause 15 that, it is submitted, the Commissioner best demonstrated the benefits of relying on a flexible, discretionary no disadvantage test:

“I do not consider the overtime clause in the Agreement to offer any real protection to employees. The award provides that where overtime is worked it is paid. Under the award overtime hours are easily identifiable. Under the Agreement it would be very difficult for an employee to determine whether time worked was actually overtime, and even more difficult to make a claim. It is noted that the employer’s prior agreement is *required*, and the overtime must be *claimed* in advance and *in writing* yet no written record need be kept of the employee’s agreement to work overtime at ordinary rates. Although employees cannot be required to work particular hours or days under the Agreement I do not consider that this provision offers much protection. Junior employees (as I was informed most of them are) are unlikely to be in a position to demand their rights, particularly in a situation where they have no guaranteed minimum number of hours of work per week and can have their rosters changed with no consultation and little notice.”³⁷

³⁶ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 10-11 (especially paragraph 25).

³⁷ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 12-14 (especially paragraph 27).

In making the above remarks, Commissioner Deegan showed a thorough understanding of the provisions of the proposed agreement. Moreover, she showed cognisance of the nature of the workforce in question (particularly its youth and the tenuous nature of their employment) and the difficulties they might have in bargaining due to the power imbalance that they suffered.

- In terms of leave entitlements, the agreement married the entitlements of full-time staff to the *Annual Holidays Act 1944* and made no provision for loadings. Part-timers had no paid leave and were encouraged to take unpaid leave!! Commissioner Deegan found that at law, the *Annual Holidays Act 1944* had no application to the workers in question!! As to the position of the part-time workers, the Commissioner held similar sentiments as to the importance of leave as a community standard as did Commissioners in the earlier cases discussed in Chapter Four of this thesis:

“Part-time employees have no paid annual leave entitlements, but are purportedly paid in lieu. There are public policy considerations which militate against such provisions. Some State and territory annual leave legislation prohibits such payments, except in restricted circumstances. As the Agreement allows for part-time employees to work up to 38 hours per week I am reluctant to approve an agreement that provides that all annual holidays are paid out and only *encourages* employees to take unpaid leave. I note that the Agreement does allow an employee to take up to four weeks unpaid leave if the employee wishes to do so.”³⁸

³⁸ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 16-18 (paragraph 29-30).

Commissioner Deegan held similar reservations regarding the treatment in the agreement of sick leave and the employer had agreed to alter those latter provisions.³⁹

As stated above, in the result, Commissioner Deegan found that this agreement failed the global no disadvantage test. Any pay rise that employees received did not compensate for the loss of penalties and loadings as well as non-monetary considerations, like predictability of rosters and hours of work. What is also important for this thesis is that in applying the global no disadvantage test, the Commissioner:⁴⁰

- gave awards close consideration;
- made an independent analysis of the effect of the agreement on different rosters, despite the best efforts of employers to sway her with their own submissions and 15 pages of tables;
- took into account the specific issues for the particular workplace, namely, its employment of predominantly young people on a part-time basis;
- acknowledged a power imbalance between workers and employers; and
- acknowledged the importance of observing community standards pertaining to leave entitlements.

³⁹ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 18-21 (especially at paragraph 31).

⁴⁰ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41 at 23 (the global nature of the test was referred to at paragraph 40).

Her application of the no disadvantage test, it is submitted, demonstrates the rigor with which such is applied and the use to which its flexibility can be put. Another decision which demonstrates the strengths of the present test is *Coles Myer Pty Ltd*.⁴¹

*Coles Myer Pty Ltd*⁴²

This decision is considered further in the context of the discussion of community standards. For present purposes, what is important to note is that Commissioner Whelan, in her judgment, acknowledged something alluded to by Commissioner Deegan (above). The no disadvantage test is both *qualitative* and quantitative.⁴³ It concerns the *personal* and financial wellbeing of employees as to such additional matters as rest breaks, forms of leave without pay and maximum hours of work. The test may have to consider the position of a diverse group of employees and possibly future recruits. In the view of the present writer, while these exigencies illustrate the problems in applying the test, they also suggest the need for some degree of flexibility in settling conditions of employment.

⁴¹ *Coles Myer Pty Ltd* (Australian Industrial Relations Commission per Whelan C, Print R3504 31, March 1999) 1-22.

⁴² *Coles Myer Pty Ltd* (Australian Industrial Relations Commission per Whelan C, Print R3504 31, March 1999) 1-22.

⁴³ *Coles Myer Pty Ltd* (Australian Industrial Relations Commission per Whelan C, Print R3504 31, March 1999) 1-22 at 16-17 et seq (paragraphs 98 et seq).

(b) Does the further option of deeming an agreement passed in the public interest make the no disadvantage test, itself, irrelevant?

In both Chapter Five and the beginning to this analysis, attention was drawn to the fact that an agreement that fails the no disadvantage test can still be *deemed* to have passed the test if the Commission decides such is not contrary to the public interest. This is a change from the original no disadvantage test, and this new structure is a cause for further concern for a number of commentators. Reflecting on the two discretions involved in certifying agreements, Judge objects, “the no-disadvantage test must in effect be ignored if the employer can show that approval would not be contrary to the public interest.”⁴⁴ Likewise, Merlo suggests that “...the NDT has somehow assumed a secondary role in the industrial relations and labour law literature, being briefly and parenthetically referred to on some occasions or totally disregarded on others...”⁴⁵

It is hard not to argue that the existence of two discretions relevant to passing agreements makes an already broad certification process seem even broader. But, in the view of the present writer, the existence of a second discretion does not deprive the no disadvantage test of its worth. To this end, helpful insights may be gained from the thoughts of Justice Munro in his conference paper, *Section 170LK Agreements, Australian Workplace Agreements and the No Disadvantage Test*.⁴⁶ In that discussion,

⁴⁴ James Judge “Australian Workplace Agreements” (1998) 23 *Alternative Law Journal* 75-77 at 77.

⁴⁵ Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235 at 208.

⁴⁶ Justice Munro “Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test” –lecture presented to the members of the Australian Industrial Relations Commission

His Honour both accepts the awkwardness of the present structure, but suggests a solution may be found in the approach of Commissioner Simmonds in *Daviesway Pty Ltd Enterprise Agreement 1999*.⁴⁷

Daviesway Pty Ltd Enterprise Agreement 1999.⁴⁸

In this case, Commissioner Simmonds was confronted by a s.170LK agreement which changed the fund into which employee superannuation contributions were made from one specified under the Metal Industry Superannuation Award 1989 (the award) to a new fund, D & D Group Staff Superannuation Plan. This change did not alter the employer contribution made under the provisions of the Superannuation Guarantee Act Legislation or even the Metal Industry Superannuation Award 1989. However, it did mean that the amount actually credited to the employee's individual accounts would decrease because D & D's administrative charges were higher than those of the existing fund.

Commissioner Simmonds observed that the agreement, "on its face," failed the no disadvantage test because it "(provided) for no other benefits to the employee" leaving

(2001) 1-24. (Copy given to the present writer by her friend and mentor, Hon David Hall, President Industrial Court of Queensland – on file with author) at 22 et seq (in particular paragraph 71).

⁴⁷ *Daviesway Pty Ltd Enterprise Agreement 1999* (Section 170LK certification – Australian Industrial Relations Commission per Simmonds C, Print R9030, 14 September 1999) 1-4 – as quoted in: Justice Munro "Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test" – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24.

⁴⁸ *Daviesway Pty Ltd Enterprise Agreement 1999* (Section 170LK certification – Australian Industrial Relations Commission per Simmonds C, Print R9030, 14 September 1999) 1-4.

“nothing against which the Commission may balance it.”⁴⁹ However, the Commissioner acknowledged that the matter did not end there because the agreement could still be deemed to pass the test if certifying the agreement was not against the public interest. On this point, Commissioner Simmonds was circumspect:

“I must confess some difficulty with the juxtaposition of the two concepts of (a) non-compliance with the no-disadvantage test and (b) the public interest test. Failure to meet the no-disadvantage test involves not providing a benefit prescribed by an award or a relevant law. On its face the contravention of an award or a law is contrary to the public interest, at least when it does not, on balance, provide equivalent or better entitlements. On this analysis no failure to meet the no-disadvantage test could be taken to be “not contrary to the public interest.” The two concepts can only be reconciled by accepting that the legislation presumes that compliance with what would otherwise be the requirements of an award or the law is consistent with the public interest, but that in relatively extreme circumstances non-compliance would also not be contrary to the public interest. This interpretation is supported by the example given in (s.170LT(4)).”⁵⁰

In the case before him, Commissioner Simmonds found no evidence that there were extreme circumstances behind the adoption of the new fund. There was evidence of correspondence that stated the funds were altered after AMP gave a presentation on the topic to the employees, but no further evidence as to the nature of the presentation or the reason for giving it were provided. There was also a suggestion that the move to adopt the new fund came from the employees. However, because that could not be proven, Commissioner Simmonds adjourned the matter so that submissions could be led on this issue when the hearing reconvened.

⁴⁹ *Daviesway Pty Ltd Enterprise Agreement 1999* (Section 170LK certification – Australian Industrial Relations Commission per Simmonds C, Print R9030, 14 September 1999) 1-4 at 2 (especially paragraph 5).

⁵⁰ *Daviesway Pty Ltd Enterprise Agreement 1999* (Section 170LK certification – Australian Industrial Relations Commission per Simmonds C, Print R9030, 14 September 1999) 1-4 at 2-3 (paragraph 7). This passage was cited in: Justice Munro “Section 170LK Agreements, Australian Workplace Agreements and

Justice Munro suggests there is much value in Commissioner Simmond's remarks, and such is an endorsement with which the present author agrees. It is stating it too highly to say that the public interest test makes the no disadvantage test irrelevant. The reconciliation of the two discretions is difficult, but surely lies in having a guarded, yet not unyielding approach to public interest.⁵¹ That is something Commissioner Simmonds exemplified in *Daviesway*, even to the point of seeking out further evidence when there was already a suggestion that the *employees* wanted to alter the fund. Another obvious example of where the option of deeming an agreement to pass the no disadvantage test might arise is, in fact, the one in the statute itself – where conditions are dropped as a means of dealing with a short term crisis for the business, the agreement may be deemed to pass the no disadvantage test. This is clearly a meritorious approach to certification as it may sustain a business in hard times and consequently preserve employment opportunities.

(c) public interest – another broad discretion

Not only is there the problem that public interest gives parties a second chance to pass the no disadvantage test, there is the further problem of what 'public interest' actually means, itself. In this connection, it is important to note that there is no definition of the concept in the *Workplace Relations Act 1996*. So, as noted in the decision of

the No-Disadvantage Test" – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24 at 22 (paragraphs 71- 72).

⁵¹ The concept of "public interest" is discussed in greater detail later in this chapter.

Australian Workplace Agreements Reference 1997 1 – 3,⁵² reliance is placed on the observations of Mason CJ, and Brennan, Dawson, and Gaudron JJ in *O’Sullivan v Farrer*.⁵³

O’Sullivan v Farrer:⁵⁴

That decision was not an industrial law case. It related to objections, under s.45 *Liquor Act 1982* (NSW), to applications for the removal of liquor licenses on “public interest” grounds. Interestingly, the concept of “public interest” was not defined in that legislation, either; hence the High Court’s consideration of the matter in these terms:

“Where a power to decide is conferred by statute, a general discretion, confined only by the scope and purposes of the legislation, will ordinarily be implied if the context (including the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made...

“The public interest considerations which may ground an objection under s.45(1)(c) are, in terms, confined to considerations ‘other than the grounds specified in paragraphs (a) and (b) and subsections (2) and (3)’ {of s.45} But, these limits aside, the Act provides no positive indication of the considerations by reference to which a decision is to be made as to whether the grant of an application would or would not be in the public interest. Indeed, the expression, ‘in the public interest,’ when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable...given reasons to be

⁵² *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 360 (per Duncan DP).

⁵³ *O’Sullivan v Farrer* (1989) 168 *Commonwealth Law Reports* 210-226. This decision was also referred to in: *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 360 (per Duncan DP); James Judge “Australian Workplace Agreements” (1998) 23 *Alternative Law Journal* 75-77 at 76; and Justice Munro “Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test” – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24.

⁵⁴ *O’Sullivan v Farrer* (1989) 168 *Commonwealth Law Reports* 210-226.

[pronounced] definitely extraneous to any objects the legislature could have had in view...⁵⁵

Essentially, the High Court was noting that the notion of “public interest” generally is a value judgment – a discretion. The only real limits on that discretion, when none are contained expressly in the statute, are the objects and scope of the legislation, and the nature of the subject matter of the decision. Outside of those implied restrictions, matters extraneous to the legislation may be taken into account.⁵⁶

That decision and its applicability to the *Workplace Relations Act 1996* ‘public interest’ test means that the *certification of agreements under the no disadvantage test involves not one, but two porous discretions. Further, ‘public interest’ – already a lofty concept in itself – is linked to the principal objects of the statute, which reflect the hybrid nature of the Australian labor system and are, themselves, difficult to reconcile.*⁵⁷ In that latter regard, section three provides:

“The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

- (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

⁵⁵ *O’Sullivan v Farrer* (1989) 168 *Commonwealth Law Reports* 210-226 at 216.

⁵⁶ That quotation has been referred to time and again in industrial law on the question of public interest, for example: *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 360 (per Duncan DP); James Judge “Australian Workplace Agreements” (1998) 23 *Alternative Law Journal* 75-77 at 76; and Justice Munro “Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test” – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24 at 8 (paragraph 28).

⁵⁷ See, for example: Louise Willans Floyd “The Principal Object of the Act (Commentary on s.3 *Workplace Relations Act 1996* (Cth)) in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2000) 2132 – 2146.

- (b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and
- (c) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and
- (d) providing the means:
 - (i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and
 - (ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment.⁵⁸

Clearly, seeking to foster agreements at a workplace level, whilst also maintaining awards as an effective safety net, is the truest expression of the arbitration-come-bargaining system that we have today. The difficulties involved with practically applying the ‘public interest’ test were discussed in the decision of *Australian Workplace Agreements Reference 1997 1 – 3*.⁵⁹ Although this case clearly deals with AWAs (which are considered in detail in the Chapter Eight of this thesis), a discussion of the decision is important to undertake in this context, as it is the first case dealing with the problem of public interest, the principal objects and the no disadvantage test.⁶⁰

⁵⁸ *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 361 et seq (per Duncan DP). The instructions of s.170VCA *Workplace Relations Act 1996* (Cth) were noted earlier in the judgment at 357-358. Those instructions are: (1) The Commission must, as far as practicable, perform its functions under this Part in a way that furthers the objects of this Act. (2) Section 90 does not apply to the performance of functions of the Commission under this Part. (3) In performing its functions under this Part, the Commission may not act under paragraph 111(1)(g) on the grounds specified in subparagraph (i), (ii) or (iii) of that paragraph.

⁵⁹ *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 360 et seq (per Duncan DP).

⁶⁰ It is interesting to note the commentary of: CCH Australia *Australian Industrial Law Reports* (1997) 42 *Federal Cases* ¶3-618, that *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 (per Duncan DP) was “the first decision of its kind.” The case has been the subject of scholarly analysis by the leading scholars in the area: James Judge “Australian Workplace Agreements” (1998) 23 *Alternative Law Journal* 75-77; Justice Munro “Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test” – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24; and Omar Merlo “Flexibility and Stretching

*Australian Workplace Agreements Reference 1997 1 – 3.*⁶¹

The AWAs referred to the Australian Industrial Relations Commission were in identical terms and, even with undertakings, failed the no disadvantage test “fairly comprehensively”.⁶² Under the agreements, penalty rates were abolished and there was no limit on the amount of hours that could be worked per day. Consequently, there was a financial disadvantage to those who worked hours outside of day shifts, Monday-Friday. The apparent lack of offset for this loss meant the agreement did not pass the test under s.170XA(2) (see also s.170VPG(2) and (3)).

As a result, the Commission had to consider whether passing the agreement was “not contrary to the public interest” under s.170VPG(4). Poignantly perhaps, the Commission noted what has troubled academic writers about that concept, namely: “There is no statutory guidance on how it is established that approval is *not* contrary to the public interest.”⁶³ Relying on the passage of the High Court decision, *O’Sullivan v Farrer* (cited earlier in this chapter),⁶⁴ the Commission drew direction from the principal

Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235.

⁶¹ *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 (per Duncan DP).

⁶² *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 362 (per Duncan DP).

⁶³ *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 360 (per Duncan DP).

⁶⁴ *O’Sullivan v Farrer* (1989) 168 *Commonwealth Law Reports* 216-226 at 216 as cited in *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 360 (per Duncan DP).

object of the *Workplace Relations Act 1996*, s.3. The Commission then went about establishing how the objects and the notion of the “public interest” was to be determined in this particular case. The following quotation is lengthy, but important in highlighting the complexity of that task:⁶⁵

“Although the bargaining agent for the employer submitted that approval would further all the objects set out above the position is not clear cut. Thus 3(a) seeks amongst other things, improved living standards, if that is taken at individual level it would be the case that individual living standards might not be improved by approving an AWA which failed to pass the no-disadvantage test. Similarly, and more directly 3(d)(i), would not be furthered for the same reason. The philosophy of 3(d)(i) is enshrined in the no-disadvantage test. On the other hand when taken as simple objects both 3(b) and 3(c) would be furthered by approving the agreement. At the very least what is sought is entirely consistent with objects 3(b) and 3(c).

“In these circumstances it is appropriate to adopt the approach to whether or not approval is contrary to the public interest of balancing the benefits to be derived from approving the agreement against the likely detriment from the point of view of the general public interest (cf. The observation by Dalglish J in *re Associated Booksellers* [1962] NZLR 1057 at 1065).

“Further, where, as is the case here, a consideration of the objects of the legislation is indeterminate, the guide provided by the note following s.170VPG(4) is most pertinent...

“The example must be taken as an indication of what is *not* contrary to the public interest. Drawn from it is the conclusion that circumstances may create a situation where an AWA which does not pass the no-disadvantage test may be approved without that approval being contrary to the public interest. *The example looks at the circumstances of the employer directly and, implicitly, at the value of employment for employees* (my emphasis)”

In applying those principles to the evidence in the instant case, which involved a crisis in the business which the year-long AWAs were meant to address, the Commission acknowledged the difficulty and the lack of precision involved in such a task:⁶⁶

⁶⁵ *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 361-362 (per Duncan DP).

⁶⁶ *Re Australian Workplace Agreements (Reference 1997 1-3)* (1997) 76 *Industrial Reports* 357-363 at 362-363 (per Duncan DP).

“... (The length of the agreement and crisis confronted by the business) are all matters to be taken into account when considering the public interest and whether or not approval would be contrary to that interest. They may be contrasted with the matters relevant under the statutory injunction of the no-disadvantage test.

“Against all this is the fact that the agreement fails the no-disadvantage test and fails it fairly comprehensively. This fact may be taken as contrary at least to object 3(d)(i) in that it departs from a foundation of minimum standards. The possibility of a decline in living standards, the opposite of the object 3(a) (improved living standards) is offset by the evidence of increased security of employment and the fact that there is evidence that this agreement is the ‘primary responsibility’ of the parties at the workplace level (3(b)) and it is, in practice, in a form appropriate for particular circumstances (3(c)).

“In sum, considering the objects of the legislation, one is left without a firm conclusion. The fact that the agreements are the result of a crisis and designed to meet that and the further fact that, while they may go on, the agreements are not expressed to be long term, brings the principles behind the statutory example into play and these principles are clearly met in the situation before the Commission.

“On balance the Commission concludes that to approve the AWAs in question would not be contrary to the public interest. It is emphasised that this determination is based on the circumstances existing at this time. Such an agreement as this, even at the same site, might not be approved under s.170VPG(4) in different circumstances. (My emphasis)”

James Judge, in his article “Australian Workplace Agreements: problems with maintaining minimum award conditions,”⁶⁷ is highly critical of this decision and its implications for the no disadvantage test, especially as it is applied to AWAs. In his view, the test is too broad, especially given the political nature of labour law:⁶⁸

“Several significant issues arise from this decision...Given that a decision as to whether an AWA is not contrary to the public interest is a discretionary matter for the AIRC, there is a lack of precision in evaluating the probable outcome of any referred matter. This is especially so when the decisions are being made in a field like industrial relations, characterised by firmly held but completely conflicting views as to what measures will ultimately produce the better public benefit.

⁶⁷ James Judge “Australian Workplace Agreements” (1998) 23 *Alternative Law Journal* 75-77.

⁶⁸ James Judge “Australian Workplace Agreements” (1998) 23 *Alternative Law Journal* 75-77 at 77.

“Second, in attempting to balance the benefit derived against the detriment to the public interest, the conflicting objects of the Act in s.3 only add to the general confusion. While some economic theories argue that driving down wages will promote employment, such a policy will not necessarily result in improved living standards. The answer is, as always, ‘flexibility’ does not necessarily result in fairness. The way the legislation has been framed and interpreted in relation to AWAs means that fairness has become a subordinate concern. It is also important to note that the unusual framing of the public interest test probably represents a lesser burden to those seeking to have AWAs approved than if the test was positively framed (then the test would be to show approval was actually in the public interest).

Clearly, there are difficulties involved with the operation of the public interest discretion and, clearly, its operation places much importance on the role of the Commission. But in the view of the present writer all is not lost. The discussion of the development of the Australian Industrial Relations Commission in Chapter Two of this thesis showed clearly that public interest was always part of the jurisdiction of the Commission. It is not a mythical concept with which the Commissioners have no experience in dealing.⁶⁹ Heart may also be taken from the writings of Justice Munro on this point. Although His Honour has some reticence towards the public interest test,⁷⁰ he also *highlights a number of cases which show the positive results that have been handed down by Commissioner’s using their experience to apply the test.* Two such cases (nominated by the judge) are considered by the present writer now in some detail, namely: *Commercial Surveillance Pty Ltd*⁷¹ and *Wallara Industries Enterprise Agreement 2000*.⁷²

⁶⁹ Refer Chapter Two of this thesis.

⁷⁰ Justice Munro “Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test” – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24 at 24, paragraph 80: “... ‘public interest’ is a concept of variable scope, vague definition and eventually largely subjective. When to that is added the ‘not contrary to’ test, the performance of the Commission’s functions under ss170LT(3) and 170VPG(4) is rendered difficult and attended by doubt.”

⁷¹ *Commercial Surveillance Pty Ltd* (Australian Industrial Relations Commission per McIntyre VP, MacBean SDP and Cargill C, Print S2571, 19 January 2000) 1-3. That decision was an appeal from the decision of Harrison SDP in *Kadmore Pty Ltd t/as Cougar Security Services* (Australian Industrial

*Commercial Surveillance Pty Ltd*⁷³

This decision considers the notion of “public interest” and, within that broad concept, the meaning of “short term business crisis.” The case determines that such is not to be construed so as to defeat the objects of the *Workplace Relations Act 1996* in viewing awards as an effective “safety net.” The case is also interesting in the sense that employers were seeking below-award agreements after having been investigated by government regulators for breaching the relevant awards.

The consideration of the no disadvantage test, itself, was straight forward. By the employers’ filed declarations and documents, it was clear the agreement disadvantaged employees compared to the relevant award. For example, the wage rates were below the award rates and the employees had agreed not to pursue further amounts during the life of the agreement, despite the possibility of safety net increases being granted. Other disadvantage pertained to hours of work and overtime. Short falls were sizeable and benefits from ‘cashing in’ certain entitlements, such as long service leave, were questionable as many employees were casuals with no career path.

Relations Commission, Print S0953, 16 November 1999) 1-7. The Full Bench adopted the reasoning of Harrison SDP in the appeal decision (at 3 – paragraph 14).

⁷² *Wallara Industries Enterprise Agreement 2000* (Australian Industrial Relations Commission per Boulton J, Print S7568, 27 June 2000) 1-5.

⁷³ *Commercial Surveillance Pty Ltd* (Australian Industrial Relations Commission per McIntyre VP, MacBean SDP and Cargill C, Print S2571, 19 January 2000) 1-3. That decision was an appeal from the decision of Harrison SDP in *Kadmore Pty Ltd t/as Cougar Security Services* (Australian Industrial Relations Commission, Print S0953, 16 November 1999) 1-7. The Full Bench adopted the reasoning of Harrison SDP in the appeal decision (at 3 – paragraph 14).

The central consideration for the Commission, therefore, was whether the Agreement could be justified on public interest grounds. The employers had argued that they required the below award conditions to survive in the industry – very few other security businesses paid award wages, so they faced a business crisis. Further, the employers suggested that by the end of the agreement's three year duration, the pay levels would have reached the level of the award – rises being staggered over a three year period. In this connection, they said they would appoint an independent third party to oversee matters.

In rejecting that argument, the Commission dwelt upon the length of this agreement. Three years was too long to be paying below award wages. One of the objects of the *Workplace Relations Act 1996* was to maintain an effective award safety net (cf. S.3(d)(ii), ss.88A and 88B). Such object would be defeated if the agreement were certified, particularly as there was no actual guarantee that award rates would ever be met, in fact. The Commission stated that the period of one year might be acceptable, but three years was not.

The Commission also rejected the argument that reduced pay was necessary to compete in the industry. Importantly, in terms of acknowledging the flexibility of the Commission's operation under the test and how beneficial that can be, the Commissioner hearing the case *relied on his panel experience* and noted that numerous agreements were concluded, in the security industry, by companies paying award rates. The view of

the Commission was that this agreement was a response to an investigation of the security industry by the government, which uncovered violation of the award. Further, the Commission noted that the agreement would apply in circumstances where contracts with the employers' clients were constantly being renewed – so the below-award wages would be perpetuated. If it really was the case the industry generally was unable to comply with the award, then the better course would be to seek a change to the award, rather than a long term agreement that would pay below it.

*Wallara Industries Enterprise Agreement 2000*⁷⁴

This was another case considered favourably by Justice Munro. It demonstrated the utility of public interest in novel situations – when there might not be a designated award against which the no disadvantage test can be considered.

The applicant sought a determination of the designated award (under s.170XF) in conjunction with the certification of their agreement. The business being run was a not for profit organisation employing disabled persons. It was established under s.12A and 13 of the *Disability Services Act 1986*, and the focus was on providing training - employment opportunities being superimposed thereupon.⁷⁵ The establishment was excluded from the Supported Wage System and, to that point, no industrial regulation

⁷⁴ *Wallara Industries Enterprise Agreement 2000* (Australian Industrial Relations Commission per Boulton J, Print S7568, 27 June 2000) 1-5.

⁷⁵ This description is drawn from the applicant's description of the place of work cited at: *Wallara Industries Enterprise Agreement 2000* (Australian Industrial Relations Commission per Boulton J, Print S7568, 27 June 2000) 1-5, 2 (paragraph 5).

existed in such businesses anywhere in Australia. For that reason, there was no award for the purposes of the no disadvantage test, and it was submitted it was not possible to determine designated awards (for the given reasons and due to the proliferation of types of work being performed in the business.)

The Commission accepted the latter submission. Given that the main purpose of the establishment was training and developing workers' capacities to undertake a variety of functions over time, it was difficult to determine designated awards in relation to all the various kinds of work being done or to be undertaken in the future.⁷⁶

The absence of a designated award creates problems for the certification of an agreement – the pre-requisite no-disadvantage being predicated on a comparison of the agreement as against the award. However, the Commission went on to consider the certification of the agreement under the 'public interest ground' (s.170LT(3)).

As mentioned above, the Supported Wages System provided under federal awards for people with disabilities did not apply to the applicant. The wages provided under the agreement were based on the federal minimum wage. The assessment of the capability of workers for the purpose of determining wage levels to be accorded to individual employees is conducted through an internal process with review mechanisms and is consistent with current arrangements. The level of benefits and conditions provided under the agreement was the same or better than those currently provided to the

⁷⁶ *Wallara Industries Enterprise Agreement 2000* (Australian Industrial Relations Commission per Boulton J, Print S7568, 27 June 2000) 1-5, 3 (paragraphs 8 and 9).

employees concerned and met relevant legislative requirements. There was also a wide process of consultation and negotiation leading to the making of the agreement, including with employee representatives, carers and family members.⁷⁷

On this basis, His Honour, Justice Boulton, concluded that it was not contrary to the public interest for the agreement to be certified.⁷⁸

“In the circumstances of the employment of these workers and having regard to the abovementioned matters, I have reached the conclusion that, whether or not there is a failure in regard to the no-disadvantage test, the certification of the agreements would not be contrary to the public interest. Subsection 170LT(3) therefore applies to the agreements. In so deciding, I have taken the view that the making of the agreements is part of a commendable strategy to regularise and document the terms and conditions of employment of the workers concerned under negotiated agreements, to provide scope for the improvement of those terms and conditions through enterprise bargaining and agreement making and to provide further opportunities for the organisation to obtain suitable and varied work to be performed by workers with a disability.”⁷⁹

Public Interest and Community Standards:

The final major concern raised about the present public interest discretion concerns the capacity of that test to safeguard community standards. In this regard,

⁷⁷ These factors are set out in: *Wallara Industries Enterprise Agreement 2000* (Australian Industrial Relations Commission per Boulton J, Print S7568, 27 June 2000) 1-5, 3-4 (paragraph 11).

⁷⁸ *Wallara Industries Enterprise Agreement 2000* (Australian Industrial Relations Commission per Boulton J, Print S7568, 27 June 2000) 1-5, 4 (paragraph 12).

⁷⁹ As cited in: Justice Munro “Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test” – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24 at 15 (paragraphs 44).

Merlo questions whether community standards, so strongly regulated under the original test, have been *abandoned* under the current rendition of the no disadvantage test.⁸⁰

“The question is whether it is socially desirable to have these ‘artificial restrictions’ removed, particularly for those in weak bargaining positions, and whether employees come out disadvantaged from the introduction of this form of ‘flexibility.’ As discussed earlier, evidence suggests that concerns in this regard are well-founded and justified. Moreover, it is clear that the original objectives of the NDT have been somehow deformed. While in 1993 the minister was careful in noting that ‘the provision is intended to protect well established and accepted standards which apply across the community,’ the NDT under the WR Act has relinquished this aim, allowing instead for the erosion of community standards such as sick leave and annual leave”

To support his claims, Merlo relies on, amongst other things, three cases mentioned in a press release by then Minister Reith in which the flexibility of the new system as regards cashing in of leave is trumpeted.⁸¹ Merlo’s analysis of that press release and those cases was expressed in these terms:

“...(Following) the enactment of the WR Act, a number of agreements have been approved by the commission providing for the cashing out of sick leave and annual leave. The s.170LK *Greyhound Pioneer Australia Ltd Certified Agreement*,⁸² for example, provided for half the sick leave accumulated during the term of the agreement to be paid out if requested by the employee...Similarly, the *Mounicastle Pty Ltd Enterprise Agreement*⁸³ provided for the cashing out of accrued leave entitlements remaining after 10 days of sick leave is retained.

⁸⁰ Omar Merlo “Flexibility and Stretching Rights: ‘The No Disadvantage Test in Enterprise Bargaining’” (2000) 13 *Australian Journal of Labour Law* 207-235 at 228.

⁸¹ Hon. Peter Reith MP, Minister for Workplace Relations, “Cashing Out Leave Entitlements” (Press Release, Canberra, 11 November 1997) as cited in Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235 at 228. That press release and the cases mentioned therein is also referred to in: *Enterprise Bargaining Commentary* in CCH Australia *Australian Labour Law Reporter* (Volume Four) ¶ 55-000, 56-140, in particular the sections headed “Protection of Community Standards” and “Cashing in Leave under the Workplace Relations Act 1996.”

⁸² *Greyhound Pioneer Pty Ltd* (Australian Industrial Relations Commission per Gay C, Print P8624, 5 February 1998) 1-18.

⁸³ *Textile, Clothing and Footware Union of Australia and Mounicastle Pty Ltd (Mounicastle Pty Ltd Enterprise Agreement 1998)* (Australian Industrial Relations Commission per Hoffman C, Print M2260, 22 December 1998) 1-9.

The modified NDT under the WR Act has also allowed for annual leave entitlements to be cashed out. Under *Silver Chain Registered Nurses Agreement*⁸⁴ employees may cash out all or part of their annual leave, provided their supervisor is satisfied that doing so is safe and does not affect the performance of their job.⁸⁵

No-one can dispute that the new no disadvantage test is broader than its predecessor and allows some degree of cashing out to occur. However, in the view of this author, it does not necessarily follow that those standards are “relinquished.” This emerges when one actually reads the cases concerned.

*Textile, Clothing and Footwear Union of Australia & Mountcastle Pty Ltd*⁸⁶

Unlike the celebrated cases on ‘cashing in’ decided under the *Industrial Relations Act* 1988, *Mountcastle* involved an agreement between an employer and a trade union. The matter was dealt with by the Commission pursuant to section 170LS *Workplace Relations Act* 1996 and, interestingly, the relevant award was annexed to the agreement and operated in conjunction with it. Under clauses ten and twelve of the agreement, entitlements to both long service leave and annual leave contained no provision for cashing in. There was a mechanism for the cashing in of sick leave, but only in circumstances where part of the accrued leave was cashed in and some residual

⁸⁴ *Silver Chain Registered Nurses Agreement 1997* (Australian Industrial Relations Commission per Dight C, Print S1403, 27 May 1997) 1-24.

⁸⁵ Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235 at 227.

⁸⁶ *Textile, Clothing and Footwear Union of Australia and Mountcastle Pty Ltd (Mountcastle Pty Ltd Enterprise Agreement 1998)* (Australian Industrial Relations Commission per Hoffman C, Print M2260, 22 December 1998) 1-9.

entitlement to leave remained. Clause eleven of the agreement dealt with the issue in these terms:⁸⁷

“11.1. Employees covered by this agreement are entitled to 8 days leave in each 12 month period from 1 January to 31 December.

11.2. Employees who, at the 1st of January 1999 have an unused entitlement of 10 days sick leave accrued, may at the end of 1999, cash in any unused portion of their 1999 sick leave entitlement. This means that they will continue to retain their unused entitlement of 10 days sick leave.

11.3. Employees who, at the 1st of January 1998 had an unused entitlement of 10 days sick leave accrued, may at the end of 1998, cash in any unused portion of their 1998 sick leave entitlement. This means that they will continue to retain their unused entitlement of 10 days sick leave.

11.4 Employees who, at the end of 1999 and at the end of each year thereafter, have more than 20 days (152 hours) accrued may cash in 10 days. They must retain a minimum balance of 10 days. The company's intention in this provision is to recognise previous good attendance.”

Other interesting clauses in the agreement included a statement, in Clause Thirteen, that: “Involuntary retrenchments will be a last resort.”⁸⁸ Provision was made for the company to “positively promote membership of the Union” in Clause Eighteen.⁸⁹ Under Clause Nineteen, the making of Australian Workplace Agreements was said to be

⁸⁷ *Textile, Clothing and Footware Union of Australia and Mountcastle Pty Ltd (Mountcastle Pty Ltd Enterprise Agreement 1998)* (Australian Industrial Relations Commission per Hoffman C, Print M2260, 22 December 1998) 1-9.

⁸⁸ *Textile, Clothing and Footware Union of Australia and Mountcastle Pty Ltd (Mountcastle Pty Ltd Enterprise Agreement 1998)* (Australian Industrial Relations Commission per Hoffman C, Print M2260, 22 December 1998) 1-9 at 4 (Clause 13).

⁸⁹ *Textile, Clothing and Footware Union of Australia and Mountcastle Pty Ltd (Mountcastle Pty Ltd Enterprise Agreement 1998)* (Australian Industrial Relations Commission per Hoffman C, Print M2260, 22 December 1998) 1-9 at 7 (Clause 18 'Rights of Representation).

“inconsistent with the terms of this agreement.”⁹⁰ The union was to play a major role in the settlement of disputes (Clause Twenty). Interestingly, the enterprise bargain opened with acknowledgement that “the company depends for its success on...a skilled and dedicated workforce...”⁹¹

Reading the agreement, therefore, it is difficult to see how such could be construed as threatening community standards. Further, the very institutions Merlo champions as defenders of workers and the community (namely, awards and unions) are, in fact, protected and promoted by the agreement.

*Silver Chain Registered Nurses Agreement 1997*⁹²

This was a 170LK agreement, which bound the relevant union, the Australian Nursing Federation (under section 170M(3) *Workplace Relations Act* 1996), and superseded the award. In something of a contrast to *Arrowcrest Group Pty Ltd*,⁹³ which was decided under the *Industrial Relations Act* 1998 and forbade the cashing in of one half of annual leave entitlements, *Silver Chain* did allow the cashing in of *accrued* annual

⁹⁰ *Textile, Clothing and Footwear Union of Australia and Mountcastle Pty Ltd (Mountcastle Pty Ltd Enterprise Agreement 1998)* (Australian Industrial Relations Commission per Hoffman C, Print M2260, 22 December 1998) 1-9 at 8 (Clause 19).

⁹¹ *Textile, Clothing and Footwear Union of Australia and Mountcastle Pty Ltd (Mountcastle Pty Ltd Enterprise Agreement 1998)* (Australian Industrial Relations Commission per Hoffman C, Print M2260, 22 December 1998) 1-9 at 3, 8 (Clauses 8, 20).

⁹² *Silver Chain Registered Nurses Agreement 1997* (Australian Industrial Relations Commission per Dight C, Print S1403, 27 May 1997) 1-24.

⁹³ *Arrowcrest Group Pty Ltd* (Australian Industrial Relations Commission per Watson DP, Print L 44310, 12 July 1994) 1-13.

leave, at the election of the employee and with the consent of the employer.⁹⁴ Certainly, this decision modifies a community standard, but there were the aforesaid safeguards, nonetheless.

*Greyhound Pioneer Pty Ltd*⁹⁵

In this non-union agreement, half of the sick leave accrued during the life of the agreement could be paid out at the employee's request. Any annual, sick and long service leave accrued at the commencement of the agreement could likewise be cashed in "at the enhanced rate."⁹⁶ One of the important and amusing parts of the judgment involves the evidence of the Greyhound CEO, Mr Jones, who spoke of this agreement and alternatives to it:

"If it's a choice it's Hobson's choice, you know. There is no choice...I appreciate, know and understand that that doesn't buy Weeties at the corner store, nor does it pay your rent. But in the absence of being able to have any other thing to offer, that is all the company has to offer its employees at this time...I don't like this agreement any more than anyone else does, it's simply that I've got no options, or if there are other options I would really like to know what they are."⁹⁷

As intimated in these words, the Greyhound company was in dire financial straits at the time of making the agreement, requiring previously unseen profits sustained over the

⁹⁴ *Silver Chain Registered Nurses Agreement 1997* (Australian Industrial Relations Commission per Dight C, Print S1403, 27 May 1997) 1-24 at 11 et seq (Clause 21 "Annual Leave", subheading "cashing in.")

⁹⁵ *Greyhound Pioneer Pty Ltd* (Australian Industrial Relations Commission per Gay C, Print P8624, 5 February 1998) 1-18.

⁹⁶ *Greyhound Pioneer Pty Ltd* (Australian Industrial Relations Commission per Gay C, Print P8624, 5 February 1998) 1-18 at 15.

⁹⁷ *Greyhound Pioneer Pty Ltd* (Australian Industrial Relations Commission per Gay C, Print P8624, 5 February 1998) 1-18 at 13.

coming two year period in order to be viable. Commissioner Gay allowed the agreement on public interest grounds – as a measure to resuscitate a troubled company. Clearly, the case involves glaring changes to the old idea of community standards. However, once again, there is an additional factor (namely possible insolvency) that is not discussed by Merlo.

A further problem with the study conducted by Merlo is his consideration of the decision in *Coles Myer Pty Ltd*.⁹⁸ Merlo uses the case to show that employers can use enterprise bargaining to achieve socially undesirable outcomes, such as the increasing of working hours for nominal increases in pay, which negatively affects women. Merlo quotes from the Commissioner in that case, Commissioner Whelan in these terms:

“I have difficulty with finding that the ability for a full-time, part-time or casual employee to work 50 hours per week can be considered an advance on existing conditions...I have read numerous articles which suggest that the working women also take responsibility for the overwhelming proportion of domestic labour, sometimes called the ‘double shift’. I have been unable to find any study which suggests that women wish to be able to work 50 hours per week or to work at any hour of the day or night on any day of the week.”⁹⁹

However, Merlo fails to portray that the agreement was, in fact, *not certified* due to that very concern and that the application was set down for further hearing at a later date.

⁹⁸ *Coles Myer Pty Ltd* (Australian Industrial Relations Commission per Whelan C, Print R3504, 31 March 1999) 1-22.

⁹⁹ Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235 at 221-222 citing *Coles Myer Pty Ltd* (Australian Industrial Relations Commission per Whelan C, Print R3504, 31 March 1999) 1-22 at 18 (paragraph 108 et seq).

Further, Merlo does not highlight that the leave entitlements in the agreement were more generous than those in the relevant award.¹⁰⁰

If the notion of the community standard is not “relinquished” but certainly ‘cashing in’ is more widespread under the *Workplace Relations Act 1996*, then surely the interesting final question on this issue is the place of *Tweed Valley*,¹⁰¹ under the new regime. In their short but insightful commentary, the CCH editors acknowledge the breadth of the *Workplace Relations Act 1996* provisions, but also recall one important portion of the judgment in *Tweed Valley*:¹⁰²

“while the Act does not prohibit reductions in entitlements or protections with the status of community standards, the Commission must, in the exercise of its discretion in relation to the no disadvantage test, accord them substantial weight.”

While that former legislation placed more importance on sustaining leave than the present statute, it was at least envisaged that a change *might* be made.

In the view of the present writer, one might also venture to suggest that the *Tweed Valley* case would not have been decided any differently under the new legislation. As outlined in chapter four of this thesis, *Tweed Valley* involved the complete trading in of

¹⁰⁰ *Coles Myer Pty Ltd* (Australian Industrial Relations Commission per Whelan C, Print R3504, 31 March 1999) 1-22 at 17 (paragraph 106 et seq).

¹⁰¹ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235 (Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C).

¹⁰² *Enterprise Bargaining Commentary* in CCH Australia *Australian Labour Law Reporter* (Volume Four) ¶ 55-000, 56-140, in particular the sections headed “Protection of Community Standards” and “Cashing in Leave under the Workplace Relations Act 1996.”

sick leave without any reserves being retained and without any discussion of employee welfare – it was a trade in on monetary grounds alone. In the view of this author, that case would still have been rejected under the present legislation as being contrary to the public interest.

Criticism Three: Is the Efficacy of the Test dependent on the Commission & Unions ?

Clearly, the argument advanced in this thesis, particularly this chapter, sees the role of the Australian Industrial Relations Commission as pivotal to the operation of the no disadvantage test. The tribunal's expertise is crucial to utilising the broad discretions of the test in a constructive way. Likewise, the form of the test - as a broad discretion - allows the Commission to continue an important role in the system, weighing the merits and public interest in accordance with the permutations of the many different cases and employment relationships that come before it. [In fact it is argued that the facilitation of such flexibility quashes earlier criticisms of the Commission (considered in Chapter Three) that the Commission was at one stage too rigid in its approach through using its own decisions as precedents that created industry-wide common rules.]

The residual question, of course, which is to be addressed presently, is whether the successful operation of the test is also dependent on the involvement of trade unions and, if so, to what extent.

In the view of the present writer, the approach to be taken to that question varies depending on whether one is referring to certified s.170LJ agreements involving unions; non-union certified s.170LK agreements; or Australian Workplace Agreements (AWAs). In the following chapter, Chapter Seven, the present writer examines the position of unions regarding the no disadvantage test, particularly in terms of the failure of an employer to bargain with a union seeking a s.170LJ agreement. An argument is put for law reform that would fortify the position of unions negotiating such agreements. By definition, those agreements require the involvement of unions – such are a party to the agreement – so there should be a mechanism to stop employers ‘stone walling’ against responsible unions in an unfair attempt to de-unionise, for instance. Likewise, in Chapter Eight, a strong argument is put for major amendments to the AWA legislation as it is submitted the no disadvantage test is cold comfort to individual workers involved in ‘negotiations’ for such. That leaves s.170LK non-union agreements as the focal point of discussion for the remainder of this chapter.

If one regards EFAs as the prototype for the current s.170LK agreement stream, then the criticisms of Bennett,¹⁰³ as well as Nolan and Nomchong,¹⁰⁴ considered in Chapter Four of this thesis, become central to a consideration of things, once again. It will be recalled from that earlier discussion that such authors had numerous concerns over the non-union bargaining stream. There was a question as to whether individuals

¹⁰³ Laura Bennett “Bargaining Away the Rights of the Weak – Non-union Agreements in the Federal Jurisdiction” (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 129-153.

¹⁰⁴ Jim Nolan and Kylie Nomchong “Enterprise Flexibility Agreements and Threats to Unions Under the New Federal Act” (Chapter Seven) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 154-183.

bargaining with employers would ever have the knowledge and resources to understand submissions put to them by their employer, or the bargaining power to object and actually influence bargaining if they disagreed with their employer's demands. Any provision for majority votes to pass non-union agreements was seen as inadequate protection – if one did not understand complex issues, the question arose as to how one could vote in an informed way. It was especially Bennett who was critical of the no disadvantage test in the context of EFAs. According to Bennett, the test not only relied on the rigor of particular Commissioners, but it was flawed in itself as much of the information coming before tribunal members emanated from the employer. Above all, in Bennett's eyes, there was simply not enough opportunity for unions to protect workers in the non-union bargaining stream. Despite some acknowledged failings, unions were an employee's best chance for protection. In contrast, further scholars such as Coulthard¹⁰⁵ concentrated on the rights of unions to intervene in that EFA bargaining process and blamed that for the slow take-up rate of such agreements. On the other hand, Vice-President Ross found the system to be one which worked well, as it was.¹⁰⁶

In the view of the present writer, Bennett's critique, although very well worth considering, is much more than a criticism of the no disadvantage test and workers' rights, *it is a condemnation of the very existence of a non-union bargaining stream*. It is an argument implying that employees can rarely successfully bargain for themselves

¹⁰⁵ Amanda Coulthard "Non-Union Bargaining: Enterprise Flexibility Agreements" (1996) 36 *Journal of Industrial Relations* 339-358.

¹⁰⁶ Iain Ross "Bargaining in the Federal System" (Chapter Two) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Australia, 1995) 31-51, especially 45.

(without unions as parties principal to agreements) and that the Commission, alone, is insufficient help.

Throughout this work, the present writer has obviously been cognizant of the innate problems of being an employee. Likewise, she has been vigilant about saving their position. But, despite the obvious worth in much of Bennett's critique, the present writer *is supportive of the continued existence of a non-union bargaining stream with s.170LK agreements. That is because she accepts that the no disadvantage test works effectively due to its dependence on the Commission and the fact the opportunities for unions to intervene are taken seriously and accorded weight.* Further, a collection of negotiating employees is more than simply a collocation of individuals – it is more organised and cohesive than a random group of strangers just pulled off the street. This is evidenced by for example the Bond University Staff Association.

As mentioned above and in greater detail in Chapter Four, scholars such as Coulthard were highly critical of the extent to which unions could intervene in the former EFA certification process, arguing that sometimes the system could be almost 'hijacked.' Vice President Ross offered a third opinion of the EFA regime – that the system actually worked well.

In addition to those alternative views to Bennett, the present writer would also rely on an examination of some cases that have been decided as recently as this year to demonstrate three points:

- In the first place, the Commission can and does undertake its own assessments of agreements and perform its own calculations to see whether the no disadvantage test is satisfied.
- In the second place, the opportunities the legislation provides for unions to represent their members in negotiations are taken seriously by the Commission and accorded substance, not just form.
- And thirdly, there is always the thought that if a non-union employer operates effectively and treats its staff well, should it be forced to negotiate with a union that even the employees may not want?

Earlier in this chapter, *Bermkuks* (or perhaps more colloquially the *Subway Sandwich case*) was considered.¹⁰⁷ What is crucial to remember about that case is that the Commission actually sought to engage independent auditors to make calculations under the proposed agreement to determine whether or not employees were disadvantaged. When that option was not available, the Commissioner made her own calculations, comparing the agreement with the award on an almost line-by-line basis. In so doing, Commissioner Deegan utilised the breadth of the no disadvantage test to take into account such variables as the age of employees and the effect that would have to challenge the statements made by their employer.

In addition to those cases, which demonstrates the rigor with which the Commission applies the no disadvantage test to non-union agreements, another 2004

¹⁰⁷ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41.

decision shows the weight the Commission places on the current rights of unions to be heard.

*Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003.*¹⁰⁸

This case is a significant answer to the criticism of Bennett. *It demonstrates the importance the Commission places on whether or not employees were fully informed of their right to have a trade union represent them in bargaining (where the employee is a union member) under s.170LK(4) Workplace Relations Act 1996.* The failure of the company in this case to specifically highlight that fact caused the Commissioner to reject this agreement *even although the representative the employees had elected had endorsed the bargain and even though the agreement met the no disadvantage test.*¹⁰⁹

In hearing this application, Senior Deputy President O'Callaghan advised parties that the agreement "had not been reached through a process consistent with that set out in section 170LK of the (*Workplace Relations*) Act. Critical to this was the absence of **written advice**, as part of the notice of intention to make the agreement, to the effect that employees who were members of an appropriate union had the opportunity to seek that

¹⁰⁸ *Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (Australian Industrial Relations Commission per O'Callaghan SDP, Print PR 943578, 12 February 2004) 1-5.

¹⁰⁹ *Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (Australian Industrial Relations Commission per O'Callaghan SDP, Print PR 943578, 12 February 2004) 1-5 at 2 (paragraph 14). See also: Workplace Express "Commission Details Employer's 170LK requirements" *Workplace Express* - 17 February, 2004 <http://www.workplaceexpress.com.au/workplace/nav?id=64243&no=69094543411333> (last accessed 19 February 2004).

they be represented by that union. (Emphasis added)”¹¹⁰ The problem stemmed from the manner in which employees were informed of their rights regarding the bargaining process. According to a statutory declaration of the ultimate employee representative, employees were:

“made aware of section 170LK...which states that if workers are members of an organisation of employees they are entitled to be represented by a union or representative for the employees industrial interests before the agreement is made.

This information was made aware to us at the beginning of bargaining period in May 2003 and all construction workers said that they would prefer not to involve any other party but elect a representative from within the construction group to help negotiate their agreement. [Emphasis added]”¹¹¹

Senior Deputy President O’Callaghan found such an allusion to be insufficient for the purposes of the *Workplace Relations Act 1996*. So as to avoid further confusion and also meet the object that the Commission facilitate the making of the agreements (eg in the objects to Part VIB and s.3(c)), the Senior Deputy President published a judgment whereby he reminded parties that s.170LK required there be a written notice of intention to bargain which is provided to every person to be covered by the proposed agreement (s.170LK(2)). It should give at least 14 days notice of the intention to make an agreement and either enclose or give ready access to a copy of the agreement.¹¹²

Importantly, so far as unions are concerned, the notice should state:

¹¹⁰ *Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (Australian Industrial Relations Commission per O’Callaghan SDP, Print PR 943578, 12 February 2004) 1-5 at 1 (paragraph 5). The Senior Deputy President also noted attention that union rights of consultation and representation had been given in the recent case: *Australia Construction Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Harrison DP, PR941051).

¹¹¹ *Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (Australian Industrial Relations Commission per O’Callaghan SDP, Print PR 943578, 12 February 2004) 1-5 at 3 (paragraph 15).

¹¹² *Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (Australian Industrial Relations Commission per O’Callaghan SDP, Print PR 943578, 12 February 2004) 1-5 at 3 (paragraph 20).

- *if an employee is a member of a union; and*
- *that union is entitled to represent the employee in relation to work that will be covered by the agreement*

*the employee may request the union to represent them in meetings and conferring with the employer about the agreement.*¹¹³ *If the employer is advised that a union has been requested to represent an employee, the employer must give the union a reasonable opportunity to meet and confer about the agreement before it is made.*¹¹⁴ *Before certification of the agreement attention should be paid to whether or not there had been coercion in the agreement making process.*¹¹⁵

In the submission of the present writer, this case demonstrates that the no disadvantage test operates effectively in the context of the non-union stream of agreements. The Commission is vigilant to ensure that employees are not simply given a cursory outline of their rights. Rather, the Commission examines the substance of documents to ensure that parties have been given every chance to be impartially advised.¹¹⁶ The further legislative safeguards against coercion (also briefly noted in Chapters Four and Five) act as a further buffer.

¹¹³ *Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (Australian Industrial Relations Commission per O'Callaghan SDP, Print PR 943578, 12 February 2004) 1-5 at 3 (paragraph 20).

¹¹⁴ *Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (Australian Industrial Relations Commission per O'Callaghan SDP, Print PR 943578, 12 February 2004) 1-5 at 4 (paragraph 23). See also: s.170LK(5) *Workplace Relations Act 1996* (Cth).

¹¹⁵ *Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (Australian Industrial Relations Commission per O'Callaghan SDP, Print PR 943578, 12 February 2004) 1-5 at 4 (paragraph 28).

¹¹⁶ Certainly, s.43 *Workplace Relations Act* (Cth) limits union intervention in s.170LK agreements to those unions "requested to represent a person as mentioned in subsection 170LK(4)." That is to be expected – it is the very essence of a *non-union* bargaining stream. But, interestingly, there have been some decisions which have given that restriction a narrow practical operation. In *Grocon Pty Ltd Enterprise Agreement*

Another case that is interesting in this context is *Diab Services (Pizza Hut Stores) Agreement 2003*.¹¹⁷ Although it actually involved a union agreement, it demonstrates that the checks and balances for the operation of the no disadvantage test, like valid majority, are accorded real weight by the Commission – sometimes even more so than by the union.

Diab Services (Pizza Hut Stores) Agreement 2003.¹¹⁸

The case is interesting because it involves the certification of a *union* s.170LJ agreement to which *both* parties agreed. Essentially, it was conceded by both parties that the agreement did not pass the no disadvantage test – the agreement was, on balance, less favourable to employees than the relevant award, the Shop Employees' (State) Award (New South Wales). The issue was, therefore, whether passing the agreement was not contrary to the public interest.

The change in nature of Pizza Hut restaurants from largely eat-in restaurants to simple shops that sold pizza that would be picked up or delivered had caused problems for the employer concerned in terms of the conditions offered to workers. Importantly,

(Vic) (2003) 127 *Industrial Reports* 13, Ross VP allowed the CFMEU a right of intervention where the union argued that the proposed non-union 'agreement' was not validly made and, hence, not an "agreement" at all for the purposes of the s.43 limitation. Interestingly, when the Minister for Workplace Relations tried to appeal that decision, *he* was denied standing under s.109 *Workplace Relations Act* (Cth).

¹¹⁷ *Diab Services (Pizza Hut Stores) Agreement 2003* (Australian Industrial Relations Commission per Duncan SDP, Print PR948852, 2 July 2004) 1-5.

¹¹⁸ *Diab Services (Pizza Hut Stores) Agreement 2003* (Australian Industrial Relations Commission per Duncan SDP, Print PR948852, 2 July 2004) 1-5.

the staff employed at the time of the application were already being paid between \$37-\$42 less than the award and most other Pizza Hut employees. Adopting this certified agreement would grant an immediate pay rise and was meant to be the basis of further negotiations to further regulate conditions. In essence it was characterised as an interim award.

Despite that, the Commission rejected the agreement. Crucial to the decision was *the union's admission* that the agreement, while granting a pay rise, was still less than the award *and an actual comparison between the award and the agreement was never explained to employees who voted on the agreement*. In the view of the Commission, therefore, any valid majority was not an informed valid majority and so the agreement should be disallowed.¹¹⁹ The agreement did not pass the no disadvantage test and the parties were never told so before they voted on the agreement.¹²⁰

In concluding this part of the argument, the present writer raises one final possibility: if employees are working well and being treated well in a non-union workplace and they, themselves, do not want a union to negotiate on their behalf, then should an employer be compelled to negotiate with a union whom nobody wants? The case that raises that question is *Asahi* and it is considered in the following chapter for the purposes of this argument. However, the issue it poses is surely an argument for the

¹¹⁹ See also: *Suncorp Metway Staff Pty Limited and GIO Australia Limited* (Australian Industrial Relations Commission per Duncan SDP, Print PR929388, 25 March 2003).

¹²⁰ See also: *Coles Supermarkets Australia Pty Ltd* (Australian Industrial Relations Commission per Ross VP, Williams SDP and Smith C, Print T2319, 19 October 2000).

retention of a non-union bargaining stream, the further cases discussed above demonstrating that the supporting structures for the no disadvantage test in such a stream in fact do work effectively.

CONCLUSION:

This Chapter is an argument in favour of the current no disadvantage test, with only minor amendments to be made in terms of the instrument against which it is judged. Certainly, the present writer does accept the criticisms of Justice Munro,¹²¹ Judge¹²² and Merlo¹²³ that the test is broad. It is a global discretion, which if failed, may be deemed to have been passed if the second broad discretion of public interest is satisfied. But the present writer disputes that such a situation neuters the no disadvantage test and robs it of all effectiveness. Instead, the present writer looks upon the global nature of the test as its strength. It not only preserves a role for the Commission in the bargaining process, but it allows the tribunal to operate in a flexible manner – which, it is submitted, is what was always meant to be.¹²⁴

¹²¹ Justice Munro “Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test” – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24.

¹²² James Judge “Australian Workplace Agreements” (1998) 23 *Alternative Law Journal* 75-77 at 77.

¹²³ Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labour Law* 207-235 at 217-219.

¹²⁴ Refer discussion of the Deakin Settlement in Chapter Four of this thesis and again in this Chapter.

In further developing the argument in favour of the no disadvantage test, the present writer emphasises some recently decided cases to show that the Commission's approach to the no disadvantage test is both strong as regards employee protection and flexible. *The current writer cannot stress enough that some of the major critics of the no disadvantage test, namely Judge, but especially Merlo, fail to discuss any cases that reflect on the test in a positive light.*¹²⁵ It is submitted such accounts are unnecessarily negative of the test and in some instances incorrect. For instance, Merlo cites cases, such as *Silver Chain*¹²⁶ and *Greyhound Pioneer*,¹²⁷ as proving that community standards and leave entitlements have been abandoned under the current law. However, after actually reading all those decisions on which Merlo relies, the present writer has demonstrated that in all cases some entitlement to leave was retained and community standards were, in fact, acknowledged. Likewise, on reading newer cases, such as cases involving s.170LK agreements (*Subway*¹²⁸ and *Ahrens*¹²⁹) and those involving unions (*Diab Services*),¹³⁰ there is a strong argument that the Commission (in applying the no disadvantage test) examines each term of an agreement *and the way in which the agreement was negotiated*.

¹²⁵ But, to be fair, James Judges' article was a reasonably specific study, concentrating on one case. In contrast Merlo provided a roving discussion of the all aspects of the test.

¹²⁶ *Silver Chain Registered Nurses Agreement 1997* (Australian Industrial Relations Commission per Dight C, Print S1403, 27 May 1997) 1-24.

¹²⁷ *Greyhound Pioneer Pty Ltd* (Australian Industrial Relations Commission per Gay C, Print P8624, 5 February 1998) 1-18.

¹²⁸ *Bermkuks Pty Ltd Certified Agreement 2003* (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41.

¹²⁹ *Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003* (Australian Industrial Relations Commission per O'Callaghan SDP, Print PR 943578, 12 February 2004) 1-5.

¹³⁰ *Diab Services (Pizza Hut Stores) Agreement 2003* (Australian industrial Relations Commission per Duncan SDP, Print PR948852, 2 July 2004) 1-5.

Further, it will even undertake independent mathematical calculations to ensure not only that the no disadvantage test is satisfied, but that the processes leading up to any 'valid majority' were substantively fair.¹³¹ Justice Munro, in his excellent and (sadly) unpublished paper also acknowledges numerous examples where the Commission has utilised the innate flexibility of the no disadvantage test to certify innovative and fair agreements. The case immediately coming to mind is *Wallara Industries*.¹³² The previously unregulated nature of work in an area in which disabled employees were ensconced meant that the prerequisite for the no disadvantage test, an award, did not exist and the test was failed. By relying on the broad public interest to pass the proposed agreement, regulation of the work in question was facilitated and employment strengthened.

The only change to the current test that the present writer would advocate is the adoption of the position of Richard Marles of the ACTU – to change the benchmark against which the no disadvantage test is judged from the award to the agreement.¹³³ By so doing, the test would require comparison of the proposed agreement with the actual terms on which people are employed, rather than just safety net conditions. That approach should lead to vibrant negotiation of all the monetary and non-monetary conditions of employment. Where financial considerations, for example, required

¹³¹ Many located in the news letter *Workplace Express* – as referred to earlier in this chapter.

¹³² *Wallara Industries Enterprise Agreement 2000* (Australian Industrial Relations Commission per Boulton J, Print S7568, 27 June 2000) 1-5.

¹³³ Richard Marles "Predictions and Premonitions – Individual Contracts...A View of their Future" conference paper delivered at Queensland Bar Association (Industrial Law Section) Industrial Law Conference (22 April 2001, Gold Coast, Australia) 1-12.

compliance with the old award, rather than the agreement, that would be accommodated by the Commission's reliance on 'public interest.'

The present writer concluded her analysis in this chapter by examining the role of the unions in the non-union bargaining stream. Whilst acknowledging the worth of unions, the present writer does support the existence of a non-union stream because, amongst other things, the Commission ensures that the rights of unions to be heard are accorded substance, not just form. However, on the issue of union involvement for the union bargaining stream and for AWAs, the present writer does favour law reform to, for example, further strengthen the rights of unions. The arguments on those issues are considered in the following chapters.

Part C:

*The Structural Reforms – The Real Problem
for Workers?*

VII. CHAPTER SEVEN:

Grafting Individualism onto a Traditionally Collective System – Is Structural Change the Real Achilles Heel?

In his 1998 article, “The Evolving Industrial Relations Regime: The Federal System – 1992-1998,”¹ Ludeke noted the change in the Principal Objects of the Australian industrial legislation. Under the previous statute, the *Industrial Relations Act* 1988, the principal object was to provide:²

“...a framework for the prevention and settlement of industrial disputes...”

Whereas the *Workplace Relations Act* 1996 espouses the provision of:³

“...a framework for *co-operative* workplace relations...”

Ludeke’s marrowy observation was that *such* “change is not merely a gesture, as may be seen by reference to some of the principal features of the legislation.”⁴ Basically, in making that claim, Ludeke was acknowledging that the *essence* of the *Workplace*

¹ Terry Ludeke “The Evolving Industrial Relations Regime: The Federal System – 1992-1998” (1998) 72 *The Australian Law Journal* 863-870 at 866-867.

² S.3 *Industrial Relations Act* 1988 (Cth).

³ S.3 *Workplace Relations Act* 1996 (Cth). (Emphasis added.)

⁴ Terry Ludeke “The Evolving Industrial Relations Regime: The Federal System – 1992-1998” (1998) 72 *The Australian Law Journal* 863-870 at 867. (Emphasis added.) See also: Louise Willans Floyd, “The Principal Object of the Act (Commentary on s.3 *Workplace Relations Act* 1996 (Cth).)” in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2000) 2132 – 2146 at 2137.

Relations Act 1996 (Cth) is fostering systemic change that colours the entire jurisdiction. Some of the more positive aspects of legislative change have been discussed in detail in chapters four through to six of this thesis. Particularly, it has been argued that the basic move towards enterprise bargaining along with the no disadvantage test has allowed the Commission to demonstrate how positive and flexible it can be, whilst at the same time showing how strong a guardian of workers' rights it still is.

But there are some more concerning aspects of the many fundamental changes brought together under the yolk of the *Workplace Relations Act 1996 (Cth)*. The principal objects of the statute go on, in s.3(c), to declare that employers should be able to “choose the most appropriate form of agreement for their particular circumstances, *whether or not that form is provided for by this act.*” The legislation also introduces a new type of *individual agreement*, the AWA or Australian Workplace Agreement, that is *administered by the new body, the Office of Employment Advocate, rather than being certified by the Commission.* The combined effect of those developments is, of course, to raise questions as to the relevance of the Commission in some circumstances. Likewise, there are questions as to the relevance of unions and their rights to be bargained with - *even in the union bargaining stream.* All-in-all, the *Workplace Relations Act 1996 (Cth)* has made Australian labour law more individualistic than it is has been before, and underlying that change, acceptance of the notion of the vulnerability of workers (discussed in chapter two of this thesis and long accepted as a basic premise of Australian labour law) is also being challenged.

Part C of this doctoral essay analyses those latter, further structural changes (to unions and as regards AWAs) to advance one of the major arguments of this thesis, namely: *that the real weakness in the no disadvantage test comes not from the discretionary nature of the test, but rather from the changes to the traditional systemic worker protections on which the no disadvantage test relies.* As noted in chapter one of this thesis, the “rock solid guarantee” was limited.⁵ It was a promise not to “cause a cut in the take-home pay of Australian workers.” Other conditions of employment and the key structural features of the Australian system were outside its grasp. In fact, chillingly some might say, the speech in which the ‘guarantee’ was given actually **championed extensive structural change.** This chapter, chapter seven, examines the changes to the role of unions, particularly so far as that relates to the union certified bargaining stream. The following chapter, chapter eight, deals with the major structural change which is new to the Australian system – namely the advent of Australian Workplace Agreements (AWAs) which are administered by the Office of Employment Advocate and not certified by the Commission. They are the first ever individual agreements sanctioned under the Australian legislation. *Following such analysis, it is argued that the precarious position of unions in the union bargaining stream and the secretive operation of the Office of Employment Advocate as regards AWAs is cause for concern. They cast doubt on the effectiveness of the no disadvantage test and merit law reform.*⁶

⁵ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 5. (Copy supplied by Prime Minister’s Office and on file with author). This speech was discussed in depth in Chapter One of this thesis.

⁶ In the context of discussing Ludeke’s article, it is interesting to note that one further consequence of the declining jurisdiction and role of the Commission concerns the notion of the general public interest. Obviously, public interest is relevant to the operation of the no disadvantage test, and the present writer applauds that. But, it will be recalled from the discussion of the Deakin Settlement in Chapter Three, that the Commission has considered the general public interest in making many of its decisions. Lessening the

The Declining Role of Trade Unions

The point has been made throughout this thesis that the Australian system is a hybrid system. While enterprise bargaining, per se, might represent the positive manifestation of that hybrid, there are further consequences of recent legislative change that are still unfolding. Those consequences are particularly interesting for unions. The inherently *collectivist* unions are adapting to an environment that champions *individualism*. That is no easy fit, in itself, and it has been made harder by the abolition by the *Workplace Relations Act 1996* (Cth) of trade union preference. Under s.122 of the former *Industrial Relations Act 1988* (Cth), unionists were preferred in engagement and retention of employment. This provision had the effect of fostering unionism and giving unions an enshrined place in our system. In place of that latter protection for unions, the *Workplace Relations Act 1996* (Cth) contains the Part XA – Freedom of Association provisions – which embrace both the freedom to join and significantly the *freedom not to join unions*. One of the issues that has been litigated under the broad banner of the freedom of association legislation is the meaning of unionism and whether there is an obligation on employers to bargain with particular unions. Recent case law is at odds on

relevance and jurisdiction of the Commission also means, therefore, that the general public interest has decreasing significance in broader industrial decision making. That issue goes beyond the scope of this thesis, but for an interesting perspective see: Terry Ludeke “The Evolving Industrial Relations Regime: The Federal System – 1992-1998” (1998) 72 *Australian Law Journal* 863-870 at 864-867. Ludeke probably overstates the problem as the law presently stands, but the question is interesting should the role of the Commission lessen further. It is re-iterated that the immediate concern of this thesis is the *actual* lessening of the role of the Commission and the effect that has on the no disadvantage test. That is discussed in this chapter and following.

that question. In *Australian Workers' Union v BHP Iron Ore Pty Ltd*,⁷ Justice Kenny of the Federal Court held that a refusal to bargain with unions was not a breach of freedom of association laws and that unionism meant no more than the right to hold a union *ticket* – irrespective of what *industrial function* the union had left. The subsequent competing single Federal Court judge decision of Justice North in *Belandra*⁸ may provide a way around that problem. *But the cases raise a genuine question as to how effective a no disadvantage test can be in a union bargaining stream, if unions can just be ignored.* The following is an analysis of the freedom of association provisions of the *Workplace Relations Act 1996* (Cth) and their effect on the position of unions in the union bargaining stream. That analysis is used ultimately as the basis of an argument for law reform (to make the no disadvantage test more effective in this context). The analysis of this issue is enhanced by examining the earlier decisions of the Commission under the original enterprise bargaining provisions of the former *Industrial Relations Act 1988* (Cth), namely: *Asahi Diamond Industrial Australia Pty Limited and Automotive, Food, Metals and Engineering Union of Australia Pty Limited*⁹ and *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others*¹⁰ Although the

⁷ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J). Such was the final decision in a series of decisions: *BHP Iron-Ore Pty Ltd v Australian Workers' Union and Others* (2000) 97 *Industrial Reports* 266-292 (Full Court, Federal Court per Black CJ, Beaumont and Ryan JJ); and *Australian Workers' Union and Others v BHP Iron-Ore Pty Ltd* (2000) 96 *Industrial Reports* 422-448 (per Gray J).

⁸ *Australian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J).

⁹ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O'Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C).

¹⁰ *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission - O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C).

latter case was heralded by unions as “the story of how seventy five workers defeated the world’s most powerful mining company’s campaign to crush the unions,”¹¹ *it effectively signalled the importance of the structural trade union supports – preference and the largely unfettered arbitration power – to the unions’ survival*. Indeed, the combined effect of the decisions serves as a prelude to the issues litigated and being determined today. No longer do those structural supports exist. The only real ‘crutch’ for unions is the notion of freedom of association. And that begs the question of where unions stand. The further interesting part of such analysis is to acknowledge that the Labor Party *Industrial Relations Reform Act* “paved the way for” the system we have today, yet the seeds of the problems now faced by unions could have laid in that very act.¹²

¹¹ This phrase is, in fact, the subtitle of the book: Patrick Gorman *Weipa: Where Australian Unions Drew their ‘Line in the Sand’ with CRA* (Published by the Weipa Industrial Site Committee and distributed on their behalf by the national office of the Construction, Forestry Mining and Energy Union (CFMEU) Mining and Energy Division, Sydney, 1996) 1-57.

¹² Terry Ludeke “The Evolving Industrial Relations Regime: The Federal System – 1992-1998” (1998) 72 *The Australian Law Journal* 863-870 at 865. In fact Ludeke quotes at length (at 864) former Prime Minister Paul Keating as to the policy direction: “Let me describe the model of industrial relations we are working towards. It is a model which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals. It is a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net...Over time, the safety net would inevitably become simpler. We would have fewer awards, with fewer clauses... We would have an Industrial Relations Commission which helped employers and employees reach bargains, which kept the safety net in good repair, which advised Government and the parties of emerging difficulties and possible improvements, but which would rarely have to use its compulsory arbitral powers. Instead parties would be expected to bargain in good faith... We need to find a way of extending the coverage of agreements from being add-ons to awards, as they sometimes are today, to being full substitutes for awards.”

The forerunner disputes & their significance to present issues:

*Asahi Diamond Industrial Australia Pty Ltd v Automotive Food Metals and Engineering Union.*¹³

The Full Bench decision involved an appeal against an order of Commissioner Hodder, pursuant to s.170QK of the former *Industrial Relations Act 1988* (Cth), that the employer, Asahi, “shall negotiate in good faith” with the Automotive, Food, Metals and Engineering Union (AFMEU).¹⁴ Section 170QK was a provision which elaborated the types of order that could be made under s.111(1)(t), such latter provision affording the Commission a power to make orders necessary for the expedient determination of an industrial dispute. In particular, s.170QK(2)(a) stated that such s.111 orders can be made “for the purpose of ensuring that the parties negotiating an agreement...do so in good faith.”¹⁵

The order was appealed by the company, Asahi, supported by the Commonwealth Government; the state governments of Victoria, New South Wales, South Australia,

¹³ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C).

¹⁴ *Automotive, Food, Metals and Engineering Union v Asahi Diamond Industrial Australia Pty Limited* (Print L7818, decision; and Print 7819, order – 19 December 1994 – Australian Industrial Relations Commission per Hodder C).

¹⁵ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 at 423. (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C). As the issue had been raised in the Full Bench hearing, the Full Bench ultimately decided that s.170QK “does not confer any power.”

Western Australia, Tasmania and the Northern Territory; the Australian Chamber of Commerce and Industry (ACCI); the Business Council of Australia (BCA); and the Australian Chamber of Manufacturers (ACM). Only the actual union, the AFMEU, supported by the Australian Council of Trade Unions (ACTU) defended the order.¹⁶

In what has been called “a strong rebuke”¹⁷ to the Commissioner at first instance, the Full Bench allowed the appeal. The facts of the case were telling in that decision. Asahi was bound by the Metal Industry Award 1984,¹⁸ to which the AFMEU was respondent along with a number of other trade unions. The AFMEU had no members at Asahi, despite having visited the Asahi workplace four times and attempting to recruit the employees. Such visits had been facilitated by Asahi and there was no evidence that Asahi had coerced its employees not to join the union. There was no evidence of disharmony at the Asahi workplace and no employees had ever called upon the union for assistance. From 1980-1983, Asahi had not had involvement with the unions.¹⁹ Despite

¹⁶ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 388.

¹⁷ Richard Naughton “Bargaining in Good Faith – The Asahi Decision” (1995) 8 *Australian Journal of Labour Law* 166 – 168 at 166. Indeed, that was the effect of the decision (see also, for example, *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C). The Full Bench was, however, gracious enough to acknowledge that the Commissioner at first instance was confronted by a difficult task interpreting the fledgling enterprise bargaining provisions (at 389).

¹⁸ They are a party pursuant to section 149(1)(f) *Industrial Relations Act* 1988 – refer: *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 410.

¹⁹ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 410-411, 392 et seq.

all of those factors, the union wanted to *compel* Asahi to negotiate for an enterprise agreement.

Treating the matter as a test case, given that it raised a matter of “fundamental importance to the Commission’s powers and the operation of the Act,”²⁰ the Full Bench found that the Commission had no power to force parties to negotiate, in circumstances where those parties did not wish to negotiate. Commissioner Hodder, was, therefore, in error in ordering the parties to “negotiate in good faith;” in fact, according to the Full Bench, even had such powers existed, the making of the order would have been an error in the exercise of discretion in the circumstances of this case (ie the lack of union involvement at Asahi, as outlined above).²¹

The Full Bench gave two reasons for its decision.²² The first stemmed from the changing nature from the Australian Industrial Relations system. Unlike the *compulsory arbitration* system, the *bargaining regime was voluntary*.²³ The parties, themselves,

²⁰ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 389 - this is despite the fact the matter was not referred to the Commission under s.107 *Industrial Relations Act* 1988 (Cth).

²¹ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 427-428.

²² *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 420 et seq.

²³ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial

were to take responsibility for their own industrial relations and the terms and conditions of employment relevant to their workplace.²⁴ Consequently, the Commission was to adopt a *facilitative, rather than interventionist approach*.²⁵ The second reason for allowing the appeal went to the definition of the word, “negotiate.” According to the Full Bench, “negotiation normally involves the making of concessions so as to achieve an agreement.”²⁶ A facilitative Commission, therefore, cannot force parties to make concessions, especially in circumstances where they do not wish to reach an agreement at all.²⁷ In making this latter finding, the Full Bench was reaffirming its earlier conclusion in the *Australian Broadcasting Commission Case*.²⁸ In accordance with its findings, the

Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 420-421.

²⁴ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 420-422. The Bench was quoting, in particular, the Second Reading Speech in the Senate for the Industrial Relations Reform Bill (Senate Hansard *Commonwealth of Australia Parliamentary Debates* 24 November 1993 at 3580). Such debate referred to flexibility and productivity growth flowing from a partnership between employer and employee: “In short, employers, employees and their unions are encouraged to negotiate their own agreements – with less reliance placed on third party intervention by the industrial Relations Commission.” This notion was discussed at length in Chapter Four of this thesis.

²⁵ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 422.

²⁶ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 422.

²⁷ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 422. The Full Bench relied on the earlier milestone decision, the *Appeal by the Public Sector, Professional, Scientific, Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission (Australian Broadcasting Corporation Case)* (Australian Industrial Relations Commission, Full Bench (O’Connor P, Ross VP, Acton DP, Merriman C, and Harrison C) 31 August 1994 Print L4605): “Whilst the Commission’s role is to facilitate an agreement this should not involve *requiring* that concessions be made by a negotiating party.”

²⁸ *Appeal by the Public Sector, Professional, Scientific, Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission (Australian Broadcasting Corporation*

Full Bench ordered the parties to “meet and confer” as to the matters in dispute between them.

The broader significance of the Asahi decision underlines the changing role of the Commission and unions in an enterprise bargaining system and, more importantly in the view of this writer, embeds the importance of the underlying arbitral structure to the survival of both of these institutions. The unions did have a new role indeed and awards were only a safety net, but both of these bodies were still firmly in place.

In the course of submissions in *Asahi*, the issue of wonton refusal to negotiate had been raised. In other words, if there was no compulsion to negotiate, could not one party walk away from negotiations simply because they did not get an order they liked? If such was the case, how would that ever amount to effective bargaining? *In dealing with such quandary, emphasis was placed on the fact that legitimate claims could still be compulsorily pursued through the arbitral award-making process.*²⁹ In acknowledging

Case) (Australian Industrial Relations Commission, Full Bench (O'Connor P, Ross VP, Acton DP, Merriman C, and Harrison C, Print L4605,) 31 August 1994).

²⁹ Interesting rejoinder (between counsel for the Appellant, Mr West, and Vice President Ross) on this question was extracted in *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O'Connor P; Ross VP; McIntyre VP; McBean SDP; and McDonald C) at 390-391, where Ross VP asks: “...(If)...the employer...does not like (the) order, do they then just say ‘we do not want to participate in the negotiations any more’ and therefore the order is null?...So, in effect, a party can determine by whether or not they participate in negotiations, whether an order has any impact at all?” To this, West replies: “...the Commission has no less power now than it had before Part VIB was put in the Act. *This Commission has all of its plenary powers in conciliation and arbitration...If...there is no agreement possibly because the parties will not agree, then the way around that is to come back to the Commission reformulate the process and seek an award....(There) is no question of any employee suffering anything at all...*” (Emphasis added).

that the Commission was only a supporting safety net or facilitator in bargaining, the Commission insisted such a finding was reasonable.³⁰

"We should, in the light of some of the submissions in this appeal, say that we see nothing inappropriate in the Act not making negotiation compulsory (assuming, for the moment, that it were possible to do so). Our main reason for this view is that the award system remains in place to regulate the wages and conditions of employees to the extent that they are not covered by an agreement. Award wages and conditions are, from time to time, adjusted in accordance with the Act and the Commission's principles.

Section 90AA (2) requires the Commission, in performing its functions under Part VI – Dispute Prevention and Settlement and Part VIC – Paid Rates Awards, to ensure, as far as it can, that the system of awards provides for secure, relevant and consistent wages and conditions of employment...Another reason for our view that there is nothing inappropriate in the Act not making negotiation compulsory is that, subject to the provisions of the Act, a union may be able to take industrial action that is protected action to try and persuade an employer to negotiate..."(Emphasis added)³¹

The other matter of broader importance raised in *Asahi* went to the changing role of trade unions. In arguing for an order compelling negotiation, the AFMEU and the ACTU highlighted the fact that the Australian system, although evolving, remained nonetheless a collective system.³² As such there was still a place for the encouragement

³⁰ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O'Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 422-433.

³¹ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O'Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C). The Commission refers to the repartee between Commissioner Ross and the lawyer for Asahi, Mr Adrian West QC. Ross VP raises specifically the point that if a party does not like a Commission order, then such party can effectively nullify the order by refusing to negotiate if there is no compulsion to negotiate. Mr West relies on the arbitral powers of the Commission to note that such not occur. On that point, refer also: Ron McCallum "Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws" (2002) 57 *Relations Industrielles* 225-249 at 231.

³² *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial

of trade unionism. Particularly, the unions represented past, present and future members and could make demands against employers, even when no union members currently were employed at the particular workplace. In advancing this argument, the unions relied on two authorities instructive of the award system: *Burwood Cinemas Ltd v Australian Theatrical and Amusement Employees Association*³³ and *The Metal Trades Employers and Others v The Amalgamated Engineering Union and Others*.³⁴ The combined effect of those decisions was that unions were a party principal to industrial disputes and awards under Australian industrial relations legislation; and those awards would govern the conditions of all Australian workers so as to insure against the undermining of fair conditions of employment by cheap non-union labour.³⁵ As Professor McCallum would

Relations Commission per O'Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 407 et seq.

³³ *Burwood Cinema Limited v The Australian Theatrical Amusement Employees' Association* (1925) 35 *Commonwealth Law Reports* 528.

³⁴ *Metal Trades Employers v The Amalgamated Engineering Union* (1935) 54 *Commonwealth Law Reports* 387.

³⁵ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O'Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 418-419. The court summarised that the effect of both of these decisions had been noted by Gibbs CJ in *R v Cohen; Ex parte The Attorney General for the State of Queensland and Others* (1985) *Commonwealth Law Reports* 331 at 336-337: "In *Burwood*..., it was held that the delivery of a log by an organisation of employees in a particular industry on employers in that industry who do not employ any members of that organisation, may create a dispute between the organisation and the employers as to the wages and conditions of the members of the organisation if and when they are employed. The principle was extended in *Metal Trades*..., where it was held that a dispute may be raised by an organisation of employees in an industry with employers in that industry who employ none of its members as to the conditions on which they employ persons who are not members of the organisation. That decision rested on the principle that (the interest which an organisation of employees possesses in the establishment or maintenance of industrial conditions for its members gives a foundation for an attempt on its part to prevent employers employing anyone on less favourable terms)..."

one day describe it, under the award system, unions represented the interests of the entire working class.³⁶

In rejecting the union argument, the Full Bench drew a sharp distinction between the role of unions under the award system and their changing role under the new bargaining laws. *Burwood* and *Metal Trades* were said to be irrelevant – they dealt with award making and not with agreement making under the new enterprise bargaining provisions of the act. The latter type of agreement is specific to a particular enterprise only.³⁷ So, just as the Commission and the award system was relegated to being and maintaining a safety net, so too, now, were trade unions. They were instrumental in the establishment of the safety net across an industry, but not instrumental in the determination of enterprise bargains – which are the actual terms governing the employment relationship.

Because the court looked upon the decision as a test case, it is important to note, briefly, some of the general principles established in *Asahi*. The Commission stated that its powers under section 170QK were part of its conciliatory powers. Orders would be made under the section where doing so was in accordance with the objects of the act

³⁶ Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249 at 231.

³⁷ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 419.

(which embraced a level of bargaining); taking into account the conduct of the parties (for example their honesty and reasonableness *cf.* s.170QK(3)); and such factors as:³⁸

- (a) whether or not any of the employees at the workplace are members of the union seeking orders;
- (b) where such a union has members, the degree to which the relevant employees are unionised;
- (c) whether or not there is a history of union involvement at the workplace;
- (d) the wishes of the employees;
- (b) the attitude of the employer;
- (c) whether there is any jurisdictional impediment to the certification of an agreement, such as the absence of a court finding;
- (d) whether a bargaining period has been notified under s.170PD.

Orders requiring a person to do something “in good faith”³⁹ should not be made because such do not make clear what the person subject to the order is required to do. Instead s.170QK requires an order to specify clearly what a person must do in order to meet the section’s requirement of negotiating in good faith.

³⁸ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 427.

³⁹ *Asahi Test Case, March 1995 – Asahi Diamond Industrial Australia Pty Limited v Automotive, Food, Metals and Engineering Union* (1995) 59 *Industrial Reports* 385 – 429 (Full Bench, Australian Industrial Relations Commission per O’Connor P; Ross VP; McIntyre VP; MacBean SDP; and McDonald C) at 427.

In his case note, “Bargaining in Good Faith – The Asahi Decision,”⁴⁰ Naughton made the point that the *Asahi decision* was a rather narrow interpretation of the Commission’s good faith bargaining jurisdiction. While he agreed with the decision of the full bench to overrule Commissioner Hodder, *Naughton questioned whether the same result could not have been reached with the broader reasoning, namely, that there was a power to order parties to negotiate, but the discretion to make such orders was wrongly exercised in this case.* Basically, Naughton argued that the definition of ‘negotiate’ adopted by the full court “is not borne out in most dictionary definitions of the (word) ‘negotiate.’”⁴¹ Had the full court retained a discretion to order parties to negotiate, such would have involved a consideration of the objects of the act and whether or not the order was likely to facilitate an agreement. By taking into account the factors listed above (such as the presence or otherwise of union members at the place of work), Commissioner Hodder’s decision was still untenable. (For example, the absence of union members meant it would not be certain on whose behalf the union was negotiating.) But, the power would have been open for use and interpretation at a future time.

Naughton’s view – that *Asahi* was a narrow interpretation of the law - was later supported by Professor Ron McCallum in his article, “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws.”⁴² However, Professor McCallum

⁴⁰ Richard Naughton, “Bargaining in Good Faith – The Asahi Decision” (1995) 8 *Australian Journal of Labour Law* 166 – 168.

⁴¹ Richard Naughton “Bargaining in Good Faith – The Asahi Decision” (1995) 8 *Australian Journal of Labour Law* 166-168 at 167.

⁴² Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249 at 236.

was less inclined to criticise the AFMEU than either Naughton (or the present writer). Rather, his exclusive concern with *Asahi* was its discarding of any legal mechanism to mandate bargaining. By so doing, the case opened the door for anti-union employers to *refuse* to bargain with a union that was *actually supported by employees*. McCallum, one gathers, regards the original bargaining provisions as a somewhat naive attempt to graft American-style ideas of decentralisation onto the Australian system, without realising the complexity of that task:⁴³

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

So, to McCallum, the bargaining provisions left unions vulnerable to being ignored and, even if they were not, their industry-based organisational structure was a mismatch for the new enterprise-based system. *The only protection offered by the legislation, as he saw it, was the fact the Commission could still make market rates awards, and the fact that “trade unions with award coverage of the employees could*

⁴³ Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) *57 Relations Industrielles* 225-249 at 235.

intervene in certification proceedings before the federal Commission and argue that certification should be withheld.”⁴⁴

*Australian Manufacturing Workers’ Union and Others v Alcoa of Australia Limited and Others*⁴⁵

Facts:

In this case, the Commission considered a system of employment in which employees were effectively paid in accordance with their decision whether or not to bargain collectively for terms of employment or to sign an individual contract. The evidence was that employees remaining on an award and having their conditions settled collectively by a union were paid less than a contract employee even when such award employee was equally, or sometimes more, competent.⁴⁶ One of the more troubling examples of this conduct (of the many supplied) involved a *trainer, Mr Rutherford, who was paid less than the apprentices whom he trained simply because he remained on the award system* and the apprentices accepted the offer of contract employment.⁴⁷ That the

⁴⁴ Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) *57 Relations Industrielles* 225-249 at 234-235.

⁴⁵ *Australian Manufacturing Workers’ Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O’Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C).

⁴⁶ Ample evidence of this is found in the judgment at *Australian Manufacturing Workers’ Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O’Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 177- 189. One telling example is discussed further in the body of the text of this chapter.

⁴⁷ *Australian Manufacturing Workers’ Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O’Connor P;

issue went to the nature of the Australian labour law system, and whether arbitration remained its centre piece, was borne out by the questions asked of Comalco witnesses by the Bench during the hearing of the dispute. In regard to the trainer, the President of the AIRC asked: "...The reason that that situation exists is because Mr Rutherford has chosen to stay on the award system?" To this, the witness replied: "That is correct, your Honour."⁴⁸ Elsewhere in proceedings in relation to another example of disparity of pay between award and contract workers, the President enquired: "So it is only the system that creates the lack of value, not the people?" The witness agreed: "The two systems dictate what pay each will receive within the systems."⁴⁹ Another Comalco witness even colourfully exclaimed: "There can be excellent employees within a two party relationship and a collective...and there can be very grotty employees within both..."⁵⁰ In other words, choice of system was the determinative of salary – ability was irrelevant.

The reason why Comalco placed such value on contract employment (with dispute reference to an internal arbiter and not the AIRC) was a recurrent theme of witness testimony. There was said to be a new and heightened trust between the

MacBean and Polites SDPP; Harrison DP; Merriman C) at 184 - the discussion of the payment of the trainer, Mr Rutherford.

⁴⁸ Transcript quoted in judgment at *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 183, 185.

⁴⁹ Transcript quoted in judgment at *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 183.

⁵⁰ Transcript quoted in judgment at *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 179.

employee and the company once a contract was signed. This was a contrast to the arbitration system, which was said to be inherently adversarial. Although it was acknowledged by Comalco witnesses that change was possible through that centralised system, its regulatory processes were said to make that change more costly and slow over time. Witnesses were adamant that the arbitration collective system failed to take into account individual styles and talents. Contracts were for the company, therefore, a “qualitatively different work methodology” that could be melded to the particular needs of the corporation – and its staff.⁵¹ The corporation’s witnesses pointed to their New Zealand operations as a particularly successful example of this.⁵² *Yet curiously, even disturbingly, in the view of the present writer, none of those witnesses were able to bring to the Commission’s attention evidence that these individual contracts of employment – so essential to the utilisation of individual employee talents – were actually negotiated with any employee. For all the world it appeared that the identical contract was given to each one!*⁵³

In this context it is important to note that Comalco’s zealous support of contract employment was (subsequent to the determination of this case) reflected by their commissioning of the Hon JT Ludeke to write a book on the worth of contracts as an

⁵¹ *Australian Manufacturing Workers’ Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O’Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 171 et seq.

⁵² *Australian Manufacturing Workers’ Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O’Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 171.

⁵³ Compare: *Australian Manufacturing Workers’ Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O’Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 161 et seq, in particular 163.

employment instrument: *The Line in the Sand: The Long Road to Staff Employment in Comalco*.⁵⁴ Ludeke's study added two important dimensions to the present analysis. First, Comalco rejected that contracts were being used as a method of deunionising workplaces. Instead, corporate officials maintained that employees could freely choose between unions and the company to understand their interests; and that there was, in fact, no imbalance of power between the company and its employees – the company being willing to earn trust.⁵⁵ Secondly, Ludeke notes something which, in the view of the present writer, cannot be understated as it may well amount to the “chink” in the “protective armour” of contract employment. Comalco prided itself on having engaged management experts and behavioural consultants, such as Sir Roderick Carnegie, to review its workplace relations and the importance of increasing employee job satisfaction and, therefore, the profitability of the company over time.⁵⁶ The observations of one former CRA human resources executive are poignant.⁵⁷

“(We) found that our approach demanded very high quality management and a very substantial investment of resources by the company to develop the skills and knowledge of our managers. It required a different management style from traditional command and control. Managers had to let go control to allow their team members to do the right work. They had to become builders and shapers, rather than controllers and directors.”

⁵⁴ Terry Ludeke *The Line in the Sand: The Long Road to Staff Employment in Comalco* (Wilkinson Books Melbourne, 1996) 1-170.

⁵⁵ Terry Ludeke *The Line in the Sand: The Long Road to Staff Employment in Comalco* (Wilkinson Books, Melbourne, 1996) 1-170 at 3.

⁵⁶ Terry Ludeke *The Line in the Sand: The Long Road to Staff Employment in Comalco* (Wilkinson Books Melbourne, 1996) 1-170 at 7-8, 13-14.

⁵⁷ Terry Ludeke *The Line in the Sand: The Long Road to Staff Employment in Comalco* (Wilkinson Books Melbourne, 1996) 1-170 at 13-14.

The trouble with this observation is obvious: what happens to the employees of those companies offering only contract employment in circumstances where there is neither the will nor the funding to hone management's insight and trust?

It is also interesting to note that the union, in this case, was not intransigent. The evidence was that the bargaining process for the enterprise bargain was efficient.⁵⁸ However, the evidence also disclosed “a reluctance by the Unions, in the period leading up to the breakdown over enterprise bargaining in April 1994, to recognise the need to adopt greater flexibility at the workplace.”⁵⁹ Such reluctance, according to one witness, was demonstrated by demarcation disputes – protests over which union would supply workmen to effect even relatively minor changes.⁶⁰

Decision:

This case was decided under the former Industrial Relations Act 1988 (Cth), under which: trade unions were afforded preference (s.121); the arbitration powers of

⁵⁸ *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 146-147.

⁵⁹ *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 149.

⁶⁰ *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 149. Further evidence of demarcation disputes at Weipa was discussed in: Patrick Gorman *Weipa: Where Australian Unions Drew their Line in the Sand with CRA* (published by the Weipa Industrial Site Committee and distributed on their behalf by the national office of the Construction Forestry Mining and Energy Union (CFMEU) Mining Division, Sydney, 1999) 1-57 at 13 – 14, (and x, xi, xii).

*the AIRC were not limited;⁶¹ and the principal objects, whilst encouraging bargaining, still provided a system for the prevention and settlement of industrial disputes (s.3).⁶² Relying heavily on those systemic protections, which gave unions and the Commission an enshrined place,⁶³ the Commission found the Company's system of wage fixation invalid. In a passage, which is worth quoting at length, the Commission explained the basic hybrid nature of the Australian system. *There was scope for bargaining, but (at least under the Industrial Relations Act 1988) the traditional collectives were still firmly entrenched, and those remaining within their embrace were not to be discriminated against.*⁶⁴*

'This policy, we conclude, is unfair and discriminates against the award employees concerned based solely on their choice to enter into collective bargaining through their respective union, rather than "negotiate" one to one on the basis of the Company's two party staff system. A policy which holds that employees who are members of unions must, as a group, be discriminated against on the grounds that they wish to be represented by their union in collective bargaining, is inconsistent with the Act.

The recent amendments made in the Reform Act have, as a central plank, a framework for collective bargaining between parties to an industrial dispute and, as we have already concluded, *the present Act is based on a system of collective regulation in which registered organisations of employers and employees acting as party principal are an integral part of the collective processes which operate under the Act.*

⁶¹ Compare s.89A *Workplace Relations Act 1996* (Cth), discussed herein and also in chapter four of this thesis.

⁶² See discussion earlier in this chapter.

⁶³ *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 154 – 157, where the main sections relied on to give the court jurisdiction were set out and discussed. Whilst the objects underlined the importance of facilitating bargaining at the workplace level (see sections 3(a) and section 170LA), the importance of awards as a vital safety net was evergreen – section 3(e), 88A(a), 90AA *Industrial Relations Act 1988* (Cth).

⁶⁴ *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 180-181.

...The Company's policy, as we have stated earlier in our decision, is "inconsistent with the central role that registered unions are given under the IR Act in the prevention and settlement of industrial disputes" and the implied obligations to bargain collectively in good faith. *There is a statutory obligation under the Act for the Commission to encourage the organisation of registered bodies and facilitating the development of such organisations (s 3(e)).*" [Emphasis added].

There is also an obligation on the Commission in the performance of its functions to ensure that labour standards meet Australia's international obligations. Such an obligation is contained in s 3 (b)(ii) of the objects...and the specific obligations themselves are found in the Schedules to the Act. In the particular circumstances of this case, the relevant international obligations are set out in Sch 16 to the Act concerning the Convention entitled, "The Application of the Principles of the Right to Organise and to Bargain Collectively". In deciding this matter, we have had regard to these obligations and, in particular, to Art 1 and 4 of the Convention. The decision in this manner will therefore ensure that the statutory obligations contained in s 3 (b)(ii) of the objects and s 90AA have been met.

Section 90AA of the Act has been reproduced earlier in these reasons for decision. It obliges us, when performing our functions under Pt VI of the Act, to do so in a way that furthers the objects of the Act."

Having reaffirmed the relevance of trade unions, the Commission proclaimed that such were not mutually exclusive with a robust system of bargaining and the availability of individual contracts.⁶⁵

"We should make it clear that our decision should not be interpreted as having any implications regarding the operation of staff contracts and/or performance based schemes which operate outside awards beyond Weipa. Staff contracts and performance based pay schemes have operated successfully and continue to do so for both the employers and the employees concerned in many industries over a long period of time. Many operate without union co-operation and, in other cases, with union participation.

"This is not a decision which seeks to restrict or prohibit the use of staff contracts operating alongside, or in conjunction with, the award system. The Commission's intervention is only warranted where there is an identifiable unfairness in their operation or they are found to be inconsistent with the scheme of the Act."

⁶⁵ *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 181.

*So, it seemed the Commission's role was to preserve choice. Workers were to be assessed on quality of work regardless of the system to which they belonged, so that the "levers of choice" were in their hands.*⁶⁶

Despite the fact that those governed by the contract system had no complaints in respect thereof,⁶⁷ the Commission accepted the trade union's evidence that such productivity increases were possible under the collective system.⁶⁸

A Cautionary Note:

As noted above, this case was heralded by the trade union movement as a victory of epic proportions – one in which “75 workers defeated one of the world's most powerful mining company's campaign to crush the unions.”⁶⁹ In the view of the unions, Sir Roderick Carnegie's management approach had little to do with a dispute they saw as attempted de-unionisation. By making attractive conditions of employment available

⁶⁶ The expression “the levers of choice” was coined in: Ron McCallum “Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249 at 236. The commentary within that article is discussed later in this chapter.

⁶⁷ *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 164-166.

⁶⁸ *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C) at 174 et seq. That evidence related to productivity increases that unions had managed to attain at the Alcoa Point Henry smelter. The operation held similar values of teamwork as the Weipa Comalco plant and managed to hold them in a collective context.

⁶⁹ This is the subtitle of the book: Patrick Gorman *Weipa: Where Australian Unions Drew their Line in the Sand with CRA* (published by the Weipa Industrial Site Committee and distributed on their behalf by the national office of the Construction Forestry Mining and Energy Union (CFMEU) Mining Division, Sydney, 1999) 1-57.

only to non-union contract labour, and doing so *irrespective of individual merit*, the CRA ‘management approach’ was seen as a device to jettison arbitration – no less than the actions of a company that had “the smell of blood in its nostrils.”⁷⁰ The fear of the unions was that if contracts became a more attractive mode of employment (for now), workers might forgo joining unions and the latter would be destroyed. Were that to occur, there would be nothing (except the individual bargaining power of the individual worker) preventing the company from reducing conditions of employment in future contracts. Without a third party, the unions feared the battles of the past⁷¹ would ultimately have to be waged all over again.⁷²

While Weipa was, clearly, a win for unions, in the view of this author, the union’s success was based in large part on the nature of the Australian system at the time and its systemic supports for unions and arbitration. In those days, under the Industrial Relations Act 1996, there was still: union preference; no limitation on the arbitration powers of the Commission; there was no such option as AWAs;⁷³ and, although the objects of the act included bargaining, the principal object was still preventing and settling industrial disputes. The deliberately lengthy extract of the

⁷⁰ Patrick Gorman *Weipa: Where Australian Unions Drew their Line in the Sand with CRA* (published by the Weipa Industrial Site Committee and distributed on their behalf by the national office of the Construction Forestry Mining and Energy Union (CFMEU) Mining Division, Sydney, 1999) 1-57 at 31.

⁷¹ Refer to Chapter Three of this thesis.

⁷² Patrick Gorman *Weipa: Where Australian Unions Drew their Line in the Sand with CRA* (published by the Weipa Industrial Site Committee and distributed on their behalf by the national office of the Construction Forestry Mining and Energy Union (CFMEU) Mining Division, Sydney, 1999) 1-57 at 6.

⁷³ Although then Opposition Industrial Relations spokesman, Hon Peter Reith MP, made the point on the documentary program, *Lateline*, that “this is all happening under their act” – that is without any non-union option. Refer: *Lateline – Hard Bargaining* (Australian Broadcasting Corporation) (edition 34: 19 – 1995) (Video tape on file with author).

Commission's decision emphasises, it is submitted, the significance of those systemic protections on the ultimate result.

Today, things are different. As has been stated throughout this chapter, those systemic protections no longer exist and, instead, the only real protections that exist for unions are the freedom of association provisions of Part XA of the Workplace Relations Act 1996. Further, the principal objects now actively embrace arrangements other than those covered by the arbitration system. The Weipa decision showed that unions could not simply be ignored under the former system – the levers of choice being in the hands of the employees. The interesting question is whether the unions may simply be shunned under the new system, today – in whose hands does the choice lie today?

The following is an analysis of the cases which raise that issue - *Australian Workers' Union v BHP Iron Ore Pty Ltd*⁷⁴ and *Belandra*.⁷⁵ Preceding an analysis of those decisions is a discussion of the Part XA, on which these cases and today's union protection is based.

⁷⁴ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J).

⁷⁵ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-243.

*Today's "Union" Security: Freedom of Association?*⁷⁶

As noted throughout this work, union preference and unfettered arbitration powers are no longer law in Australia. Instead, the main 'union protection' is now the freedom of association provisions found in Part XA of the *Workplace Relations Act* 1996.⁷⁷ The main provisions of that Part are sections 298K and 298L. Under s.298K:

"An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

- (a) dismiss an employee;
- (b) injure an employee in his or her employment;
- (c) alter the position of an employee to the employees prejudice;
- (d) refuse to employ another person;
- (e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person."

Section 298K must be read in conjunction with section 298L(1), which provides:⁷⁸

"Conduct referred to in subsection 298K(1)...is for a *prohibited reason* if it is carried out because the employee...concerned:

- (a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or
- (b) **is not, or does not propose to become, a member of an industrial association; or...**
- ...
- (d) **has refused or failed to join in industrial action; or**
- (e) **...has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which an industrial association of which the employee is a member would be a party; or**
- (f) **has made, proposes to make or has at any time proposed to make an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or...**

⁷⁶ Some material in this section has been published in: Louise Willans Floyd : "Freedom of Association (Introduction to Part XA)" in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Australia, 2000) 3809 – 3810.3.

⁷⁷ The phrase 'union protection' has been placed in inverted commas because, as will be seen in the following discussion in the main text, there is an issue as to how much 'protection' of unionism exists under the present regime.

⁷⁸ Emphasis added.

- ...
- (e) is entitled to the benefit of an industrial instrument or an order of an industrial body;
 - (f) has made or proposes to make an inquiry or complaint to a person or body having the capacity under an industrial law to seek
 - (i) compliance with that law; or
 - (ii) the observance of a person's rights under an industrial instrument; or
 - (g) has participated in, proposes to participate in or has at any time proposed to participate in a proceeding under an industrial law; or
 - (h) has given or proposes to give evidence in a proceeding under an industrial law; or
- ...
- (m) ...has absented himself...from work without leave if:
 - (i) the absence was for the purpose of carrying out duties or exercising rights as an officer of an industrial association; and
 - (ii) the employee or independent contractor applied for leave before absenting himself...and leave was unreasonably refused or withheld..."

A further prohibition is created by s.298M, which provides:

"An employer...must not (whether by threats or promises or otherwise) induce an employee...to stop being an officer or member of an association."

Pursuant to s.298V, where conduct is alleged to have been carried out for a particular reason or with a particular intent, *such reason or intent is presumed*, unless the contrary is proved. In other words, the onus is on the defendant to prove they lacked the guilty intent once an allegation is made.

Whilst affording some protection to trade unions, the s.298K and L provisions are a stark contrast to the old preference provisions in that Part XA emphatically protects *both* the freedom to join and the freedom *not to join* a union.⁷⁹ In fact, in introducing Part

⁷⁹ There have been numerous celebrated examples of trade union victories in reliance in of Part XA, for example, *Patrick Stevedores Operations No 2 Pty Ltd and Others v Maritime Union of Australia and Others* (1998) 195 *Commonwealth Law Reports* 1-95.

XA in the Second Reading of the *Workplace Relations Act*, then Minister, Hon Peter Reith MP, described Part XA as *reflecting structural change within the Australian system - from centrist conciliation and arbitration, where unions were enshrined, to one in which there was 'free choice unionism' and individualism, promoted by enterprise bargaining and AWAs.*⁸⁰ Preference, it seemed, was relegated to the old days, where trade unions were more fragile – back in the early days of the compulsory arbitration system.⁸¹ To facilitate the transition to the new bargaining system, preference had to be buried in the past.

The Relevance of International Freedom of Association Standards to the Present Australian Debate:

Ironically, some themes, considered by many as iconic in Australian labour, ripple their way through international law, such that some consideration of certain international labour standards enhances an analysis of Australian provisions. Trade union security is such a theme.

⁸⁰ See Second Reading as discussed in: Louise Willans Floyd "Freedom of Association (Introduction to Part XA)" in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Australia, 2000) 3809 – 3810.3 at paragraph s.198A.0.5.B (Historical Rationale). It is interesting to note that in the *Four Corners* documentary "At the End of the Day" (ABC Television, 6 May 1996), then Minister Reith described preference as a "crutch" – something that existed *for the good and perpetuity of the system, rather than the participants in the system, namely the workers.*

⁸¹ These sentiments as to the early fragility of unions and their significance to compulsory arbitration were discussed in (respectively): Mason J *General Motors Holden Pty Ltd v Bowling* (1976) 12 *Australian Law Reports* 605 at 616; and *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 *Commonwealth Law Reports* 88 at 94. On preference, see generally: Richard Mitchell "The Rise and Fall of the Preference Power: The Practice of the Federal Commission 1970-1987" (1988) 1 *Australian Journal of Labour Law* 224-246; and Phillipa Weeks *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (The Federation Press, Sydney, 1995) 1-282.

Well after Australia's 'Deakin Settlement,' in the late 1940s, the International Labour Organisation (ILO) enacted two treaties of relevance to trade unions: *Freedom of Association and Protection of the Right to Organize 1948 (No 87)*; and *The Right to Organize and Collective Bargaining Convention 1949 (No 98)*. The basic effect of these treaties was to provide workers and employers with a right to form and join unions.⁸² Although this right was bestowed upon both employers and employees, it was, as Valticos notes, for many years seen as being particularly important to *employees*.⁸³ The ILO had been established after World War One to promote a peaceful and stable world. By giving workers, whom it was said had little power, the right to organise and hence have a 'voice,' they could enjoy reasonable living standards and that, in turn, would promote stability throughout the world.⁸⁴

Australia has adopted or ratified both of these treaties.⁸⁵ At first blush, one might think that Australia's traditional promotion of unions and its egalitarian ethos of arbitration sat in perfect harmony with ILO standards. Yet, the former system was challenged in the early 1990s as being too pro-union by the Australian Chamber of

⁸² Compare: Article 2 *Convention 87 – Freedom of Association and Protection of the Right to Organise 1948*: "Workers and employers without distinction whatsoever shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

⁸³ Nicolas Valticos, *International Labour Standards* (Kluwer, The Netherlands, 1979) 1-267 at 79.

⁸⁴ For a discussion of the establishment of the ILO and its quest for a peaceful society, with dignity for workers see: Nicolas Valticos, *International Labour Standards* (Kluwer, The Netherlands, 1979) 1-267 at 17 et seq.

⁸⁵ Refer ILO website on adoption of treaties: <http://www.ilo.org> (last visited 20 August 2003).

Commerce and Industry (*The ACCI Complaint*).⁸⁶ In tandem with that complaint was the raising of questions in international law jurisprudence, itself, as to whether the closed shop approach to unionism was appropriate – this was the case of *Young James and Webster v UK*.⁸⁷ In essence, then, the debate or tension as to the balance between the freedom to associate and not to associate – the freedom to join and not to join a union – is, at once, a live issue and one with some history. The *ACCI Complaint* and *Young James and Webster* are considered briefly below, before consideration of the major and most recent Australian decisions, *BHP*⁸⁸ and *Belandra*.⁸⁹ Essentially, it will be argued in the remainder of this chapter (through a consideration of these cases) that there is a valid freedom not to associate and not to join a union. But that freedom must not be interpreted so broadly as to render the freedom to actually join a union useless. The remainder of the chapter then considers what devices might be adopted as a legislative safeguard for unions in relation to this problem.

⁸⁶ The author notes her gratitude to Mr Brian Noakes, Australian Chamber of Commerce and Industry, for supplying some brief notes outlining the basic nature of the complaint, *Employment and Labour Relations Forum* (Number 3, October 1995 at 112 and 133). (Copy on file with author).

⁸⁷ *Young James and Webster v United Kingdom* (1982) 4 *European Human Rights Reports* 38.

⁸⁸ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J).

⁸⁹ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-243.

*Young James and Webster*⁹⁰

The case was a complaint brought by three British Railway employees who had been dismissed in a “closed shop” for not joining a trade union. The associated dismissal laws had allowed for dismissal in such circumstances, but also referred to some forms of conscientious objection.

As to the specific grounds of the objection of the individual applicants, Mr Young did not want to join the particular union because he did not subscribe to the political views of the union concerned – money being used by the union to publish a newspaper biased in favour of the Labour Party. He also believed that unionism should be a matter of free choice. The second complainant, *Mr James, had been a union member and was willing to join, but deferred his choice until he established how the particular union concerned dealt with members’ problems.* He formed the view that they did not handle his problem well and, consequently, he did not join. Finally, Mr Webster had similar concerns. He did not think unions acted in the best interests of workers or the country generally and “found it utterly repugnant to be obliged to participate in any strike which caused loss to the general public or workers elsewhere.” [He] believed that the individual should enjoy freedom of choice as regards union membership, and should be able to express and abide by opinions and convictions, without being threatened with the

⁹⁰ *Young James and Webster* (1981) 4 *European Human Rights Reports* 38.

loss of his livelihood as a result of the closed shop practice, which would not remedy the disabilities inherent in the trade union system.⁹¹

The applicants had argued that the ‘freedom to associate’ (under the relevant human rights convention) guaranteed not only the right to join a union, but by implication implied a negative right not to be compelled to join an association. The court did not consider it necessary to answer this question. However, it is interesting to observe their remarks that:⁹²

“To construe [the article] as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee.”

In fact, according to Novitz and Skidmore in their book, *Fairness at Work*, the *Young James and Webster* decision makes it “(legally) hard to make the case for restoring the closed shop” and demonstrates that it is not (legally) unreasonable to ensure the democratic accountability of trade unions.⁹³

Far beyond noting the legal status of the decision, Ben-Israel is damning in her criticism of the case in her exposition of freedom of association, especially the right to strike, entitled *International Labour Standards: The Case of Freedom to Strike*.⁹⁴ In the view of Ben-Israel, the movement against trade unionism reflects a trend towards

⁹¹ *Young James and Webster* (1981) 4 *European Human Rights Reports* 38 at 39 et seq.

⁹² *Young James and Webster* (1981) 4 *European Human Rights Reports* 38 at 48.

⁹³ Tonia Novitz and Paul Skidmore *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights* (Hart Publishing, Oxford, 2001) 1-195 at 6.

individualist philosophies and those of the monetarist school of economics.⁹⁵ Against that background, *Young James and Webster* exemplifies stage one of a “bi-phased process in which the philosophy concerning the concept of trade unionism is changing.”⁹⁶

According to Ben-Israel:⁹⁷

“In the first of the two phases this new philosophy still gave preference to trade unionism as is required by the international labour standard concerning freedom of association. At the same time, however, it was looking to protect not only the positive freedom of association but also the negative one, emphasising the worker’s right not to be a member of a trade union. Up to now, this has been carried out only in so far as thought necessary to maintain pluralist values... It must be stressed, however, that this changed attitude aims to weaken trade unions’ muscle but not to obliterate unionism or strikes.

By contrast, at the second stage of this changing policy, the philosophy voiced turned into a preference for non-unionism.”

In concluding her brief commentary of the case, Ben-Israel states:⁹⁸

“This new trend contains a strong individualistic strand indicative of a fundamental hostility towards both trade unions and any concerted activities on their behalf. The idea of promoting collective bargaining is replaced by attempts sought to promote individual liberty, at the expense of trade union organisational strength and the stability of collective arrangements. The *Webster Case* mentioned above, where a closed shop provision was rejected, is a good example of preference being given to the individual interest rather than to the collective one.”

⁹⁴ Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer, USA, 1988) 1-133 at 8 - 9.

⁹⁵ Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer, USA, 1988) 1-133 at 10.

⁹⁶ Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer, USA, 1988) 1-133 at 8.

⁹⁷ Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer, USA, 1988) 1-133 at 8-9.

⁹⁸ Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer, USA, 1988) 1-133 at 9-10.

In other words, Ben-Israel viewed the *Webster case* as the beginning of the end of trade unions and the lurching into the individualistic philosophies discussed earlier in chapter two and three of this thesis as being a challenge to the rights of workers.

*The ACCI Complaint:*⁹⁹

Shortly after the passage of the *Industrial Relations Reform Act 1993*, the Australian Chamber of Commerce and Industry lodged a complaint with the International Labour Organisation alleging that such legislation, itself, breached the freedom to associate – namely the employer’s rights to bargain and freely associate. The complaint alleged this occurred in the following ways:¹⁰⁰

- the general system of compulsory conciliation and arbitration;
- the entrenchment of the award system;
- the procedures for approval of agreements;
- the limitations on non-union agreements;
- the overriding of awards and agreements made in State jurisdictions; and
- the complexity of the legislation.

In essence the *ACCI Complaint*, like the complainants in *Young James and Webster*,¹⁰¹ was alleging that the freedom to associate necessarily implied a freedom not to associate.

⁹⁹ Australian Chamber of Commerce and Industry *Employment and Labour Relations Forum* (Number 3, October 1995 at 112, 133).

¹⁰⁰ Australian Chamber of Commerce and Industry *Employment and Labour Relations Forum* (Number 3, October 1995 at 133).

¹⁰¹ *Young James and Webster* (1981) 4 *European Human Rights Reports* 38

On 24 June 1995, the ILO Governing Body responded in these terms:¹⁰²

“In Case No. 1774 concerning Australia, the Government requested, in a communication of 12 May 1995, that a high level direct contacts mission to Australia be conducted in order to examine the operation of the industrial relations system at first hand and to prepare a report for the Committee’s information. The Committee accepts the Government’s proposal and will examine the case on the basis of the mission report.”

ACCI ultimately welcomed that decision. However, the Complaint was later abandoned, the change of Government and its laws on bargaining (with the advent of AWAs) making the Complaint redundant.

Both Webster and the ACCI Complaint show a move away from enshrining unions, both internationally and in Australia. In the view of the present writer, that view is not necessarily problematic – after all, why should a worker be compelled to join an ineffective or corrupt union? Should not the aim of the system be the protection of workers rather than the perpetuation of ‘the system’ itself?¹⁰³ However, the present writer would also insist, that the freedom not to join a union should not be interpreted so widely as to render the freedom to join an effective union a legal fiction. It is in that context that a critical analysis of BHP and Belandra is necessary.

¹⁰² Australian Chamber of Commerce and Industry *Employment and Labour Relations Forum* (Number 3, October 1995 at 133).

¹⁰³ To that end, the present writer welcomes recent changes to laws on trade union governance in Schedule 1B *Workplace Relations Act* 1996 – as amended by the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act* 2002. Under that legislation unionists are under duties akin to those owed by company directors in dealing with union funding, for example. There is a further (yet brief) commentary on those provisions by the present writer in: Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter Thirty Two) in Clive Turner *Australian Commercial Law* (Thomson, Australia) forthcoming 2005 edition.

*Australian Workers' Union v BHP Iron Ore Pty Ltd*¹⁰⁴

This case involved the tandem offer by BHP Iron Ore of favourable conditions of employment only to those employees willing to sign individual employment agreements, and a refusal by that company to collectively bargain with the relevant unions. Justice Kenny, in the Federal Court, refused to grant injunctions against such conduct upon application by the unions under sections 298K and L, as well as section 298M.¹⁰⁵ In so doing, Her Honour overturned the interlocutory decisions of Justice Gray,¹⁰⁶ at first instance, (who decided for the union on all grounds); and the Full Federal Court¹⁰⁷ (which decided in favour of the unions on the basis of s.298M).

Such a finding is, to say the least, interesting. While Noakes and Cardell-Ree point out this single judge decision is still not “set in stone,”¹⁰⁸ they also acknowledge that the case raises crucial issues for trade union relevance in this country. First, by emphasising that “(in) contrast to former provisions of the IR Act, [the *Workplace*

¹⁰⁴ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J).

¹⁰⁵ That is, it was argued the employer injured an employee in their employment or altered their position to their prejudice (s.298K(b) and (c) *Workplace Relations Act* 1996 (Cth)) because they were union members or were entitled the benefit of an industrial instrument (s.298L(1)(a) and (h) *Workplace Relations Act* 1996 (Cth)); and that the employer had induced parties not to be members of a union by offering more favourable AWA terms (s.298M *Workplace Relations Act* 1996 (Cth)).

¹⁰⁶ *Australian Workers' Union v BHP Iron Ore Pty Ltd* (2000) 96 *Industrial Reports* 422-448 (per Gray J).

¹⁰⁷ *BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 97 *Industrial Reports* 266-292 (Full Court, Federal Court per Black CJ, Beaumont and Ryan JJ).

¹⁰⁸ David Noakes and Andrew Cardell-Ree “Individual Contracts and the Freedom to Associate” (2001) 14 *Australian Journal of Labour Law* 89-96 at 89. This is especially the case given the subsequent decision of Justice North in *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-243 considered later.

Relations Act 1996] contains no provision requiring an employer to enter into negotiations with a union for an agreement,”¹⁰⁹ Kenny J’s decision “potentially means that employers may utilise individual contracts to oust unions from any bargaining role in determining pay and conditions, so long as the contracts do not also remove benefits for any particular employee.”¹¹⁰ Or, as McCallum would one day go on to observe: for all the talk (in its principal objects) of the *Workplace Relations Act* placing choice in the hands of the employer *and* employee as to how their terms and conditions of employment will be governed, the “levers of choice (are) in the hands of employers.”¹¹¹ Secondly, the case begs the question originally debated by Wedderburn¹¹² and Hayek¹¹³ (and discussed in chapter two of this thesis) - what is the role of a trade union? Is it just a friendly society or something that has actual power to bargain for workers against an employer? That the BHP decision raises that concern was inferred by the above authors, Noakes and

¹⁰⁹ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 421.

¹¹⁰ David Noakes and Andrew Cardell-Ree “Individual Contracts and the Freedom to Associate” (2001) 14 *Australian Journal of Labour Law* 89-96 at 89.

¹¹¹ Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249. At 236. Professor McCallum is referring to s.3(c) of the *Workplace Relations Act 1996* which aspires to enable “employers and employees to choose the most appropriate form of agreement for their particular circumstances...”

¹¹² See, for example: Lord Wedderburn *The Worker and The Law* (3rd ed, Penguin Books, England, 1986) 1-1026 – this was discussed in greater detail in chapter two of this thesis.

¹¹³ See, for example: Friedrich Hayek *The Road to Serfdom* (Routledge and Keegan, London, 1944) 1-223.

Cardell-Ree as well as McCallum, and was of particular concern to Richardson,¹¹⁴ and also Riley.¹¹⁵

Before embarking on a detailed consideration of this case, it is appropriate to acknowledge the obvious similarities between this case at BHP and the 1996 Weipa dispute. Once again, workers were at the behest of a mining company offering favourable conditions of employment to contract workers, not award employees. Equally, it is appropriate to ask whether the only reason for the contrary decisions in the cases (Weipa was decided in favour of the unions, while BHP was not) was the systemic change to the law affected by the *Workplace Relations Act* 1996 in the intervening period. In the view of the present author, there is an additional factor that should be addressed - that is to consider the role of trade union intransigence and economic downturn in the company's offering contract employment. *In the view of the present writer, the BHP case definitely poses some concern in its treatment of unions and demonstrates a need to follow the reasoning of Justice North in Belandra¹¹⁶ and possibly also adopt legislative change to better protect the rights of trade unions. But the unions were not blameless in this case. Further, pragmatic, economic factors were telling in the company's approach.*

¹¹⁴ Sarah Richardson "Freedom of Association and the Meaning of Membership: An Analysis of the BHP Cases" (2000) 22 *Sydney Law Review* 435-450, especially 444 et seq.

¹¹⁵ Joellen Riley "Individual Contracting and Collective Bargaining in the Balance" (2000) 13 *Australian Journal of Labour Law* 92-98 at 93, 98. However, it is important to note that the latter case note was written after the first instance interlocutory decision, which found in favour of the unions on all grounds

¹¹⁶ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-243 (per North J) considered later in this chapter.

Facts:

Essentially, BHP Iron Ore (BHPIO) offered the equivalent of AWAs (that is, Workplace Agreements or WPAs under the Western Australian state industrial legislation) to their employees at the expiration of the relevant (third) enterprise bargaining agreement. Consequently, they did not pursue negotiations with the union for a fourth enterprise agreement. The workplace agreements offered higher wages and incentives, for example the paying out of accrued sick leave.¹¹⁷ However, the agreements were subject to changes in the staff handbook, which could be varied from time to time. So, although there were advantages in the agreements, there may well have been drawbacks as well.¹¹⁸ The company supplied materials with the offer, which stated:

- “It is your choice as to whether you are a union member - this is not affected by your accepting the staff offer;” and
- “Your acceptance of the offer is completely up to you.”¹¹⁹

The offer of workplace agreements came against a background of upheaval for the company. In 1999, there had been a 10% decrease in the iron ore price and accompanying iron ore tonnage cuts. BHPIO had spent much of the first half of the year in merger talks with Hammersley Iron. During that process (of due diligence and the

¹¹⁷ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 412-413.

¹¹⁸ This point was noted by the judge at first instance: *Australian Workers' Union and Others v BHP Iron-Ore Pty Ltd* (2000) 96 *Industrial Reports* 422-448 at 432-433 (per Gray J).

¹¹⁹ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 453.

like), BHPIO management came to the decision that the company had not been performing as well as first thought. Comments had been made by Hammersley Iron that BHP would take ages to change things if change was necessary and that Hammersley considered itself more flexible and productive. Although the merger plans were scrapped, BHPIO executives held extensive talks thereafter to determine what changes the company would have to make in order for it to become as profitable.¹²⁰ In addition to those economic considerations, there was also a severe demarcation dispute going on between the unions at BHP. *The ACTU had been called to deal with the union wrangling and some members were questioning the effectiveness of their union's representation.*¹²¹

Approximately half the workforce accepted the agreements, at which time the union applied for an injunction, alleging that the offers were contrary to sections 298K, 298L and 298M *Workplace Relations Act* 1996.¹²²

Legal Argument and Decision:

In respect of the allegation that the offer of workplace agreements breached sections 298K(1)(b) and (c) and 298L(1)(a) and (h) of the Workplace Relations Act 1996 (that is, injury or prejudice to a unionist or one entitled to the benefit of an

¹²⁰ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 440 et seq.

¹²¹ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 443-444, 446, 449.

¹²² *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 411-413. See also: *Australian Workers' Union and Others v BHP Iron-Ore Pty Ltd* (2000) 96 *Industrial Reports* 422-448 (per Gray J) at 422-423.

agreement), the unions argued that the offers “(diminished) the influence and effect of collective action by...group members” which, at the very least, amounted to a prejudice of their position.¹²³ In other words, bargaining strength came from numerical strength, this would be diminished if employees took up contract employment. Further, it was argued that employees who did not accept workplace agreements were not, for example, given the option of paying out their sick leave.¹²⁴

*In rejecting the union’s section 298K(1)(b) and (c) argument, Kenny J*¹²⁵ followed the earlier reasoning of the Full Federal Court in the interlocutory hearing of the case and acknowledged that the injury referred to in s.298K was broad, but insisted that the wording of the provision required that it was an intentional act directed at an *individual* employee. Her Honour stated that the BHP offers did not damage any individual employee. The actual offer changed no-one’s conditions of employment, only acceptance did; and those who declined the offer were no worse off than they had been, already. As to the diminution of collective bargaining strength, that did not flow *directly* from BHP’s actions, but from *acceptance of the offers* by the employees. Besides, bargaining strength is relevant to creating new rights under an industrial instrument. Her

¹²³ *Australian Workers’ Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 424.

¹²⁴ *Australian Workers’ Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 424.

¹²⁵ *Australian Workers’ Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 424-429.

Honour relied on *Burnie Port Corporation v MUA*¹²⁶ to conclude that the damage must be to a present right. Her Honour noted that no anti-union conspiracy had been alleged.

As to s.298L(1)(a) and (h) – prohibited reason (trade union membership and entitlement to the benefit of an industrial agreement), there was held to be no prejudice against unionists because at the time the offers were made, nearly all the employees were unionists. That, according to the judge, highlighted the fact that the injury complained of flowed from the independent acts of the employees who accepted the offer. *Her Honour also implied that trade union membership was simply the right to belong to a union – the concept did not embrace the incidents of union members or the functions of a trade union.*

*The next plank of the union’s argument lay under s.298M - that the beneficial terms in the workplace agreements were an inducement to leave the union.*¹²⁷ The applicants did not claim that there had been direct threats and promises regarding trade union membership. Rather, it was alleged BHPIO knew that offering workplace agreements elsewhere had led unionists to give up their membership and that such was BHP’s purpose – so they could prevent unions from bargaining on behalf of employees in the future.

¹²⁶ *Burnie Port Corporation Pty Ltd v Maritime Union of Australia* (2000) 103 *Industrial Reports* 153.

¹²⁷ *Australian Workers’ Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 429.

Justice Kenny found that intent was an evidentiary factor only in cases of indirect inducement.¹²⁸ Her Honour acknowledged that the company envisaged no organisational role in workplace change for the union, and that such would impact the traditional nature of the union's role. However, *the Judge emphasised that BHP had not ruled out the prospect of unions representing their members in, for example, the grievance procedure process (although that prospect was not specifically mentioned in the agreements)*. So, *Kenny J* suggested there might be a departure from the traditional role of the unions, but this fact did not justify attributing illegal intent to the employer. Rather, it was simply a change consistent with the new system of industrial relations. The judge noted that the core of the applicant's case was the proposition that an employee who accepted a workplace agreement had little reason to remain in his or her union and "on any fair view this would almost inevitably lead those employees to withdraw from the union."¹²⁹ The judge rejected that argument, also, stating that the employees made up their own minds.¹³⁰

As interesting as the actual finding in the case were the 'twists and turns' of the evidence. The case was not 'clear cut' – unlike the evidence pertaining to Mr Rutherford in the Weipa dispute¹³¹ – there was no 'pro' or 'anti' union 'smoking gun.' Instead, there was a profusion of contrasting statements about, on the one hand, trade union

¹²⁸ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per *Kenny J*) at 429-432 et seq

¹²⁹ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per *Kenny J*) at 474.

¹³⁰ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per *Kenny J*) at 476.

intransigence and, on the other, the company's potential to work with unions in the future so long as it was profitable.

So, for example, the Judge accepted evidence that the company spent time considering *both* a 'revolutionary enterprise bargain' *and* workplace agreements, before settling upon the latter option, even though there had been slides at a BHP meeting that stated:¹³²

"BHP Iron Ore could not reach its full potential with a unionised workforce. It could improve but the unions would always force a compromise, which will prevent achieving the best. (Therefore, they should) 'Plan the EBA strategy against the benchmark of workplace agreements."

The judge did not find this slide showed evidence of an intent to de-unionise because she accepted further evidence of a BHPIO manager who said the phrase, "unionised workforce," referred to a workforce, the terms of employment of which were settled by a trade union on a collective basis (under an award or an enterprise bargain through union negotiators and officials) – as opposed to union membership. According to the judge, other evidence demonstrated that dealing with the union remained in the contemplation of the parties for some time after that meeting, for example, other slides at that same meeting that spoke of "Minimal Awards." There were, of course, also the covering letters emphasising that it was an employee's choice whether or not they should take an

¹³¹ Referred to earlier in this chapter.

¹³² *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 438, 441-442 and 469.

individual agreement.¹³³ Further, the decision as to whether to adopt workplace agreements took place while there was a demarcation dispute going on at BHPIO and while the economic outlook for the company was deteriorating. Unlike Weipa in 1996, there was not an overwhelmingly identifiable ideological agenda; rather, evidence of economic concerns was said to be found in employer documents:¹³⁴

CONFIDENTIAL
BUSINESS CASE – WORKPLACE AGREEMENTS

1. An increasingly changing world economic environment needs us to be able to make change more quickly than in the past – we sell in a highly competitive international market and our customers' markets can change quickly.
2. In the past we have been too slow to make change – union policy is always to slow change and extract a price for it...
3. To be competitive we need our workforce aligned with our business, rather than with the union they belong to – hence all workers in the business need to be on the same arrangements (as Staff).
4. We are getting the message that individual employees want a) to ensure their job security, and b) more control over their earnings/increase earnings.
5. There are indications that employees are looking to be more accountable for their work performance...
6. More money for performance will, over time, focus people on doing the job they do best better...
7. Union officials have agendas often determined by their own career aspirations in union politics and State politics rather than the direct interest of their members' employment.
8. Convenors over recent years have been more concerned with their own privileges (ie) time off work, meetings, trips away etcetera, than the real issues of their members. Because of this they have never been held in a lower level of regard by their members as they do at present.
9. Since March '99, the BHPIO unions have been on the back foot...

An early and timely introduction of workplace agreements within BHPIO would considerably reduce the ability of any resurgent union to garner serious support for an industrial campaign. Even a 50% take-up of workplace agreements over the next 6 months should be enough to 'swing the odds' Management's way.

¹³³ The evidence of these letters was discussed earlier in this chapter. See also: *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 453.

¹³⁴ *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J) at 449.

This is an important point. We would undoubtedly have some management complexities with a 50/50 split arrangement, but the unions would have far more significant difficulties – we would therefore be further ‘backfooting’ them.

‘There is a tide in the affairs of men, which taken as a flood leads to fame and fortune.’ (Shakespeare). – if passed up, leads to ‘stuff-ups’ (colloquial).”

The Critique of the Case:

The decision of Justice Kenny in *BHP* has been roundly criticised for its narrow interpretation of the freedom of association protections. Commentators such as Noakes and Cardell-Ree; McCallum; Richardson; and Riley have all questioned whether the decision leaves these provisions (which have been responsible for such union ‘victories’ as the 1998 waterfront dispute) as only theoretical options for unionised employees in cases where employers are offering individual contract employment.¹³⁵

In terms of the actual interpretation of the statutory provisions, Professor McCallum, as well as Noakes and Cardell-Ree, are damning in their critique of the judgment. According to McCallum, Justice Kenny’s emphasis on the singularity of the

¹³⁵ See, particularly: David Noakes and Andrew Cardell-Ree “Individual Contracts and the Freedom to Associate” (2001) 14 *Australian Journal of Labour Law* 89-96 at 90; Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249 at 238 et seq. See also Sarah Richardson “Freedom of Association and the Meaning of Membership: An Analysis of the BHP Cases” (2000) 22 *Sydney Law Review* 435-450; and Joellen Riley “Individual Contracting and Collective Bargaining in the Balance” (2000) 13 *Australian Journal of Labour Law* 92-98. For a discussion of the previous victories unions have attained using the freedom of association provisions see: Louise Willans Floyd “Freedom of Association (Commentary on Part XA *Workplace Relations Act* 1996 (Cth))” in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2001) at paragraph s298A.0.40. The waterfront dispute is reported at: *Patrick’s Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 *Commonwealth Law Reports* 1-95. In Louise Willans Floyd “Weipa and the Wharves: Australian Strike Law and its Effects on Trade Union Power” (1999) 18 *University of Tasmania Law Review* 65-125, the present writer argues the freedom of association provisions did obviously assist the union. However, the union was also assisted by a freakish trail of evidence, namely, a written alleged anti-union conspiracy plan, which was later given to the media and published nationally!

language in s.298K and L (which flowed from the earlier interpretation of the Federal Court Full Court) was a “rather narrow reading of these provisions.” It:

“...means that when offering more beneficial individual contracts, employers can never be held to have injured or prejudiced non-accepting employees.”¹³⁶

Noakes and Cardell-Ree agree, stating that the approach adopted:¹³⁷

“...does not allow ss298L...the scope of operation which the words of the statute imply. As a practical matter, however, her Honour was bound to follow the restrictive interpretation given to the operation of ...298K...by the earlier Full Court proceedings...(It) remains to be seen whether future decisions of the Federal Court will read down the provisions as narrowly.”

Their attitude towards Justice Kenny’s interpretation of s.298M seems equally disheartened. The authors suggest that Her Honour’s concentration on the need to show intention in cases of alleged indirect inducement fails to note the emphasis that provision places on the actual concept of inducement, itself. They note the difficulties Her Honour faced in dealing with Full Court decisions that went before her, but suggest a better approach might be that adopted by Justice Finkelstein in the *Commonwealth Bank case*. Noakes’ critique is worth quoting at length:¹³⁸

¹³⁶ Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249 at 240. Professor McCallum made this comment specifically in the context of discussing the Full Court’s reasoning.

¹³⁷ David Noakes and Andrew Cardell-Ree “Individual Contracts and the Freedom to Associate” (2001) 14 *Australian Journal of Labour Law* 89-96 at 92-3, especially at 93. Professor McCallum also notes that Kenny J was somewhat hamstrung by the earlier Full Court decision: Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249 at 240.

¹³⁸ David Noakes and Andrew Cardell-Ree “Individual Contracts and the Freedom to Associate” (2001) 14 *Australian Journal of Labour Law* 89-96 at 94-95. The Full Court’s reasoning in relation to s.298M was also criticised by Professor McCallum in: Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249 at 240: “Their reasoning is difficult for this commentator to follow...” The reasoning of Finkelstein J (on s.298M) in *Finance Sector*

“Kenny J’s decision demands a direct causative link between the conduct of the employer and the decision by an individual employee to resign before the prohibition on inducing an employee to resign from a union found in s 298M will have been breached. According to Kenny J, unless there is evidence of direct inducement by the employer intention is a necessary element of proving a breach of s 298M. Therefore, because the unions alleged that the inducement to resign union membership was caused indirectly by the act of the employer, her Honour required proof of the intention of the employer...

It is here that, it is respectfully submitted, the court has interpreted s 298M too narrowly. In doing so, Kenny J appeared to be following the Full Court in the *BHP Case* in regarding intention as a necessary element of a breach of s 298M. However, whether this is correct is unclear on at least one view of the Full Court’s decision. The Full Court stated:

‘Construed in its context...it appears to us that s 298M will be contravened by conduct that leads or moves, by persuasion or influence, an employee to stop being a member of a union. It further appears to us that it is essentially a question of fact, to be determined by looking at all the circumstances of the case. To this extent, we do not find it helpful to analyse the issue, as the primary judge did, in terms of an absolute prohibition is irrelevant. On the contrary, in resolving the question of fact which we have just identified, the existence of a particular intention may be a significant consideration ((2000) 102 FCR 97 at 116; 171 ALR 680 at 696).’

Finkelstein J, in the *Commonwealth Bank* case, noted that one interpretation of the Full Court’s decision was not that ‘intention may be a significant consideration’, but that intention is a necessary element to a finding of inducement under s 298M. However, his Honour, in making some logical criticisms of the reasoning of the Full Federal Court, indicated that s 298M seemed to be ‘directed much more to conduct than to intention’ ([2000] 1372 FCA at 40). In particular, his Honour noted – as a matter of construction – the fact that there is no express reference to intent in s 298M....

In interpreting s 298M, Kenny J required the union(s) to show, on the one hand, (only) that a reason for the employer offering individual contracts was to (attempt to) induce employees to leave the relevant union, and on the other, that the employer intended to deprive the union of any role in the workplace (see [214] and [218]-[220] in Kenny J’s judgment). However, demonstrating the first intention would be far simpler than demonstrating the second intention. By requiring evidence that the intention of the employer is to deprive the union of any role, Kenny J narrowed the scope of a 298M beyond its plain and ordinary meaning.”

“Ultimately, where to draw the line between ‘intention’ and ‘conduct’ under s 298M reflects a classic industrial law/jurisprudential dilemma. It is at least arguable that, as a practical matter, employees who accept an offer of an individual contract subsequently resign their union membership because of the ‘ideology’ bound up in the process of accepting that offer. It may also be argued that (particular) employers are aware of this fact and may be shown, by appropriate evidence, to utilise individual contracts for this very reason. However, the question remains whether ‘the law’ can operate on the basis of this sort of sociological analysis. It may be that the issue of the necessary link between the action(s) of an employer and the action(s) of any employee will remain unresolved until there is a Full Court direction or legislative change to make it clear what is the ‘intention’ of s 298M.”

Scholarly reaction to the broader ramifications of the decision have been equally glum.

Richardson, in “Freedom of Association and the Meaning of Membership: An Analysis of the BHP Cases,”¹³⁹ devoted the best part of this 16 page case note to the effect of the BHP decision on the meaning of trade union membership. By essentially finding that there was no breach of the provisions so long as the employees were free to hold a union ticket (as opposed to having collective bargaining rights), Kenny J had adopted an approach that was too narrow.¹⁴⁰

“...There are strong reasons for giving the meaning of membership a ‘functional’ element...For employees, the act of association is a means rather than an end in itself...Without collective action, union membership was...’devoid of any meaningful benefit to the employees because they would be unable to exercise their rights as members.”

¹³⁹ Sarah Richardson “Freedom of Association and the Meaning of Membership: An Analysis of the BHP Case” (2000) 22 *Sydney Law Review* 435-450. Refer to especially the portion of that note commencing with the heading, “The Meaning of Membership” (at 444-450).

¹⁴⁰ Sarah Richardson “Freedom of Association and the Meaning of Membership: An Analysis of the BHP Case” (2000) 22 *Sydney Law Review* 435-450 at 445.

As discussed at length in chapter two of this thesis, there is again an argument as to whether trade unions exist simply to service the ‘friendly society’ needs of their members, or whether they have (colloquially speaking) the ‘industrial muscle’ to confront management with employee concerns and fight for better conditions of employment and pay. That question is connected to the age-old debate as to whether there is a power imbalance between employer and employee that needs third party intervention to be redressed.

Although writing about the original interlocutory decision of Gray J, Riley¹⁴¹ notes a valid concern that crafty employers might be able to execute an anti-trade union agenda simply by avoiding the *pronounced* anti-union tones that CRA had done in the 1996 Weipa dispute. At this point, it is useful to reflect on the idea of sex discrimination law. How many times (these days) do employers actually put in writing “you are not getting the job because you are a woman”? But does that mean such a thought is not sometimes one covert operative factor in a decision not to employ a female?¹⁴²

Most importantly, though, as noted above and by Professor McCallum and Noakes and Cardell-Ree, the case, if followed, may mean that trade unions could

¹⁴¹ Joellen Riley “Individual Contracting and Collective Bargaining in the Balance” (2000) 13 *Australian Journal of Labour Law* 92-98.

¹⁴² The problems with proving sex discrimination cases have been well documented by eg Barbara Hocking in her article: Barbara Hocking “Is the Reasonable Man the Right Man for the Job?” (1995) 17 *Adelaide Law Review* 77 at 78. See also: Louise Willans Floyd *Lectures on Sex Discrimination* (kept on file with author and in University of Queensland Law Library); and Sarah Richardson “Freedom of Association and the Meaning of Membership: An Analysis of the BHP Case” (2000) 22 *Sydney Law Review* 435-450 at 443-444. It has to be acknowledged, however, that in the case of BHP, there were months of documents and not one was produced that had a clear anti-union intent. This fact was pointed out

simply be ignored if an employer does not want them to be a part of the workplace – even if the workers do want unions involved. That is a stunning position for unions to be in. It is also reminiscent of the Asahi case (although, obviously, the trade union, in that case, was not supported by employees or connected with the work place in any way). The additional problem is, of course, that in the Asahi situation, the Commission still had unlimited powers to make awards – whereas today there is the curtailment of Arbitration powers through the allowable matters, and there is no such thing as trade union preference.

Australian Meat Industry Employee’s Union v Belandra Pty Ltd [2003] FCA 910¹⁴³

In contrast to *BHP*, this case did not involve a refusal to bargain with trade unions in the course of enterprise negotiations. Instead, it involved questions of de-unionisation and corporate restructure. But the case is relevant to *BHP* and, in the view of the present writer, provides a pathway to clarifying the freedom of association laws by offering a durable interpretation thereof.

by eg David Noakes and Andrew Cardell-Ree “Individual Contracts and the Freedom to Associate” (2001) 14 *Australian Journal of Labour Law* 89-96 at 93.

¹⁴³ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J).

Belandra was an action brought by the union under:

- *s.298K(1)(c) and (d)* that the employer altered the position of an employee to the employee's prejudice and refused to employ another person (**element one – action**); as well as
- *s.298L(1)(a) and (h)* – that they did the above action for a prohibited reason – because they were members of an industrial association and were entitled to the benefit of an industrial instrument. That needed to be one reason, although not the sole or dominant reason¹⁴⁴ (**element two – reason**).

Facts:¹⁴⁵

Belandra was a meat slaughtering facility (in the Brooklyn site in the state of Victoria). As at 20 June 2001, it employed 160 people, most of whom belonged to the relevant union (AMIEU), with terms of employment governed by a year 2000 certified agreement. On 20 June, a fire destroyed most of the business premises. Consequently, *Belandra's* employees were dismissed. However, the evidence (namely, statements made to union officials and the withholding of final severance payments) showed that *Belandra* intended to restart the slaughtering operations and reemploy the workforce.

Then the event occurred which was the subject of this application.¹⁴⁶ The director and major shareholder of *Belandra* (Mr Catalfamo) decided *Belandra* would not resume

¹⁴⁴ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 168.

¹⁴⁵ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 169 et seq.

operations and would not re-employ the employees who had worked for Belandra before the fire. Instead, the business was to be restructured.

The manner in which Mr Catalfamo set about restructuring the meat business involved opening a facility at Altona, which had not been used as an abattoir for years. Essentially, the facilities, there, were to be provided by the original Belandra company (TGS). Management was conducted largely by the original Belandra/Brooklyn managers. However, their services were supplied through a management company, Larberg. Larberg then engaged a labour hire company (Web Labour/ESP Tecforce). Most of the workforce were the original workers, but, in connection with ESP, they were working under AWAs, not under the original certified agreement that they had had with the trade union. TGS paid Larberg on a fee per beast basis. Each afternoon, Larberg would notify ESP of the labour requirements for the following day. The rates quoted by ESP to Larberg could not be maintained if ESP had to engage the production workers on the terms of the former certified agreement.¹⁴⁷

As Justice North summed up the situation, many things remained the same for Belandra – the client was still Coles; the workers and management were still the same people; Belandra was still the supplier; the product was still the same; and Mr

¹⁴⁶ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 170.

¹⁴⁷ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 172.

Catalfamo's companies were still the supplier of the slaughter facilities. What changed were the working arrangements on the slaughter floor:¹⁴⁸

“...What changed over that period was that the people who worked on the slaughter floor were employed by another employer. As a result they were no longer employed under the 2000 agreement and, as a further result, the applicant no longer had the role of collectively representing those employees.”

In an affidavit sworn on 4 September 2002,¹⁴⁹ Mr Catalfamo spoke of the reasons for the restructure. He stated that he was in shock after the fire. The more he thought about Belandra when things settled down, the more he thought that he and the other directors of Belandra lacked the production expertise to oversee meat production and that they would do better to focus on marketing or research. Mr Catalfamo also suggested that rising costs meant Belandra faced insolvency if it did not change the way in which it operated. The Commonwealth Bank had frozen \$5 million in insurance payouts and reneged on a loan facility to the company; and there was a large workers' compensation insurance bill that the company had to renegotiate.¹⁵⁰

The applicant's opposing contention was, of course, that an operative reason for Mr Catalfamo's decision was that the Belandra employees were members of the applicant and/or the employees were entitled to the benefit of the 2000 Agreement.

¹⁴⁸ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 172.

¹⁴⁹ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 171, 227 et seq.

¹⁵⁰ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 227-229.

The Decision:**ELEMENT ONE (action):**

Justice North had no difficulty in finding the first element satisfied, that is, the actions of refusing to employ and altering the position of the employees to their detriment had occurred.¹⁵¹

The parties to the dispute were usually employers and employees within the meaning of s.4 of the statute and that was sufficient for the operation of the freedom of association provisions.

Regarding “**refusal to employ**” (under s.298K(1)(d)), it was not necessary for there to be an actual employment vacancy for there to be a refusal to employ.¹⁵² If such was necessary, then employers could simply contrive to ensure there was no vacancy and do so for a prohibited reason. That would defeat the whole purpose of the legislation. One had to differentiate between the actions (of refusing to employ or altering someone’s position to their detriment) and the reasons for those actions (eg because they are a member of a union or because they are entitled to the benefit of an industrial instrument). If there is a refusal to employ, one was then required to look at the reasons. If it is because there is no vacancy, then that might show genuine commercial reasons for

¹⁵¹ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 174 et seq.

¹⁵² *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 181-186. There were no jobs available if the plant had closed down.

refusing to employ rather than union hatred, (that is, it might be enough to rebut the presumption that the refusal was for a prescribed reason).

Finally, the **alteration spoken of in s.298K(1)(c) does not have to be to a legal right**. Rather it could be a reasonable expectation, for example, that you will get work. (The section deals with alteration to position and not injury in employment – therefore it is broadly interpreted).¹⁵³

The Union had proved refusal to employ and prejudicial alteration [and that Belandra was an employer and that the employees were entitled to the benefit of an award]. Therefore, the presumption operated in the union's favour and the employer must prove their conduct was not for a prohibited reason (ie s.298V).

ELEMENT TWO – Prohibited Reason:

The most crucial part of North J's judgment related to the scope of s298L(1)(a). It is in that context that His Honour provides an interesting and, in the view of this writer, a desirable alternative to *BHP* per Justice Kenny.¹⁵⁴ Regarding whether or not a reason for Belandra's conduct was that the employees were **members of a union**, there was disagreement between the parties as to the scope of s.298L(1)(a). **Did it mean simply belonging to a union or did it also include: conduct because a union engaged in**

¹⁵³ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 186 et seq.

activities as an incident of a person being a member of a union; activities as a union member; and a union involved in activities for a member? The distinction was important. If “union membership” was just a union ticket, as Kenny J had suggested, then a case does not come within s298L if the employer’s conduct is because the employee has engaged in activities as a union member or because they want collective bargaining – such interpretation means that a lot of anti-union activity goes unchecked by the law. It also means that so long as an employer lets the employee hold a union ticket, however useless such might be, then the employer acts legally.

North J went to great lengths to distinguish Kenny J (and said her finding on union membership under s.298L(1)(a) was obiter, in any event). In an interesting, insightful and considered judgment, North J examined the very core of freedom of association as it exists in our industrial relations *system*.

First, His Honour found that Kenny J had relied on the maxim: *expressio unius est exclusio alterius* (an express reference to one matter indicates that other matters are excluded). By so doing, she incorrectly interpreted the statute to imply that since s.298L dealt with a number of specific reasons, then each should be narrowly construed. Courts use the “*expressio unius*” principal with caution and the history of the provisions (which North J amply discussed) demonstrates that the other paragraphs in 298L(1) were added with intentional overlap and not to distract from the meaning of s.298L(1)(a).¹⁵⁵

¹⁵⁴ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 195 et seq.

¹⁵⁵ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 204-208.

More importantly, North J found that one had to broadly interpret the freedom of association provisions, having regard to an understanding of the hybrid nature of Australian labour law, today, as well as their basic purpose at international law.¹⁵⁶

His Honour quoted Latham CJ in *Metal Trades Employers Association v Amalgamated Engineering Union*:¹⁵⁷

“...In a forensic sense the organization is the party to the dispute, though it asks for nothing for itself as an organization...”

Noting that traditional role of unions as *parties principal* to a dispute, North J found that the present Australian system, whilst undergoing individualistic change, had not abandoned its arbitration roots. Unions as entities have a role to play within the system and freedom of association provisions should be interpreted so as to reflect this.¹⁵⁸

Likewise, at international law, freedom of association provisions had been interpreted broadly.¹⁵⁹ Australia ratified ILO Convention (No 87) concerning Freedom of Association and Protection of the Right to Organise. Article 11 of that Treaty states: “Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers

¹⁵⁶ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 198-204.

¹⁵⁷ *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 at 403-404 as cited in *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 200.

¹⁵⁸ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 200-208.

¹⁵⁹ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 208-226.

and employers may exercise freely the right to organise.”¹⁶⁰ The judge continued on the above point by quoting from *Minister for Immigration and Ethnic Affairs v Teoh* (per Mason CJ and Deane J):¹⁶¹

If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then the construction should prevail.

These factors grounded a broad interpretation of s.298L, as did other international considerations. The challenges confronting Australian labor law jurisprudence (in terms of flexibility and the like) at present had been before many countries throughout the world. What was important to North J was that the weight of international opinion favoured a *broad* interpretation of the reach of freedom of association provisions and of the meaning of trade union membership. In this context, North J relied on the July 2002 decision of the European Court of Human Rights (European Court). That decision determined that the United Kingdom law (as determined by the House of Lords and narrowly construed union membership) did not conform with article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, Rome, 213 UNTS 221) (European Convention) – it was too narrow a view of trade union membership.¹⁶²

¹⁶⁰ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 209.

¹⁶¹ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 209 quoting from *Minister for Immigration and Ethnic Affairs v Teoh* (1994-1995) 183 *Commonwealth Law Reports* 273 by Mason CJ and Deane J at 287.

¹⁶² *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 208-226. North J looks at the UK cases (at 210 et seq): *Discount Tobacco and Confectionary Ltd v Armitage* [1990] IRLR 15 – some judges held that there was no distinction between membership of a union and making use of its essential services; *Associated British Ports v Palmer and Others and Associated Newspapers Ltd v Wilson* (1993) IRLR 336 – The Court of Appeal had a similar

The factual analysis of North J (the causal link between trade union membership and the conduct of the company):

Having determined the scope of the provisions, North J found in favour of the union applicant when determining whether the evidence showed that the proscribed reasons (of trade union membership and so forth) were an activating reason for the employer's conduct. The major evidence relied upon by His Honour in reaching this decision were the statements of witnesses in evidence (and the *lack* of documentation). It neither negated the prohibited reason nor offered a viable commercial reason for the corporate restructure. As mentioned earlier, Mr Catalfamo had sworn in evidence that the restructure arose because Belandra faced insolvency and also that he had met with another businessman who suggested what he described as the "Westfield Model" – that is, making *other people responsible* for areas of the business as *their own business*.¹⁶³ But, the only evidence of the danger of insolvency for Belandra was the high cost of workers' compensation insurance. Further, Justice North had concerns about the veracity of this so-called Westfield Model. There was no evidence of expert analysis of the proposal. Likewise, Mr Catalfamo did not spend much time explaining the relevance of

view (membership includes the union's relationship with the employer and not just the employee's relationship with the union), but the House of Lords did not. The European Court of Human Rights said that "the right of union representation is inherent in the right of union membership" (cited by North J at 220). North J (at 224) also cites with approval: Keith Ewing "The Implications of *Wilson v Palmer*" (2003) 32 *Industrial Law Journal* 6-7.

¹⁶³ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 227-229.

the difference between the Westfield business and his own. Due to the importance of witness testimony in the case, it is worth quoting Justice North at length on this point:¹⁶⁴

“It is not incumbent on Belandra to establish that there were other reasons for its conduct...However, the existence of a cogent alternative explanation for the conduct might be an indicator that the proscribed reasons did not so actuate the conduct. In any event, Belandra undertook, in this case, to demonstrate alternative reasons for its conduct. The alternative reasons raised by Mr Catalfamo, in his affidavit of 4 September 2002..., were the desire to introduce the Westfield model, and the financial viability of Belandra.

I am not satisfied, however, that either of the proffered reasons actuated Belandra’s decision to refuse to re-employ the workforce. The case put by Belandra, in essence, rested mainly on assertion where it was reasonable to expect that some supporting evidence would have been produced. For instance, to establish the asserted danger of Belandra’s insolvency if the workforce was re-employed, calls for expert analysis of past accounting records and projections as to future trading outcomes based on assumptions of either maintaining or dispensing with the workforce. Instead of taking that course, Belandra relied on the increased costs of workers compensation premiums as the primary basis for establishing the danger of insolvency.

...Mr Catalfamo’s analogy with the Westfield shopping centre business was so vague and inexact as to lack any real significance. In cross-examination he was pressed with the obvious difference between the Belandra business and the Westfield business, namely, that the Belandra business was directed to the supply of goods, whilst Westfield owned and managed shopping centres through which goods were supplied by others...

This lack of formulation of the business model suggests that it was a superficial musing of Mr Catalfamo, which served as a convenient fog to soften the central reality that Belandra would not re-employ its workforce. To avoid calling a spade a spade, Mr Catalfamo called the decision not to re-employ the Belandra employees, the implementation of the Westfield model. It was probably for the same reason that despite a promise made at a meeting on 17 September 2001, to Mr Bird, the secretary of the Victorian Branch of the applicant, Mr Catalfamo did not commit the Westfield model to paper.

The next question is whether Belandra has negated the proscribed reasons.(my emphasis) ..”

¹⁶⁴ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 228-230.

In this latter regard, North J noted the evidence of the trade union representative (Mr Paul Davey) as credible. That evidence viewed Belandra as an “unsettled” workplace where there were many problems *frequently caused by management, for example, late payment of wages and the like*.¹⁶⁵

His Honour then noted apparent inconsistencies in the evidence of Mr Catalfamo. When asked about industrial issues, Catalfamo at various times said that “(we) worked with the union very well...I believe in unions...we’ve got no problem with the enterprise agreement.”¹⁶⁶ But that went to:

- “We don’t have a problem with a responsible active union”.¹⁶⁷
- “But certainly, we want to run our own business. We don’t have a problem if the union is there in the peripherals.”¹⁶⁸
- “we have a philosophical difference with the union in Victoria.” and¹⁶⁹
- “We didn’t have a problem with that. Over the years we have worked very closely with them, very close, and we have a – my problem is one where I want to run my business different in the future...”¹⁷⁰

¹⁶⁵ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 230-232.

¹⁶⁶ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 232.

¹⁶⁷ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 235.

¹⁶⁸ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 233.

¹⁶⁹ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 234.

Perhaps the best example related to Catalfamo's answers to questioning regarding why he had used both management and labour hire companies for the Altona site (which was different from the establishment of his other businesses). Again, it is worth quoting at length:¹⁷¹

"Because we are diametrically opposites at the moment with the union. We are at opposite ends of the spectrum. **Having worked closely with them we just can't seem to be able, ideologically – and I'm no ideologue, your Honour.** You know, I just – having been involved in this industry now for 40 years and having put forward many suggestions and many ideas across the table, I would get – prevent the industry in the state. I would get – the industry could grow – you might as well talk to the wall. You know, I just – we have gone – we have walked the walk, met them, invited them, spoke with them, over many years. We cannot get the smallest change. That is the truth of it. You might as well talk to the wall. Here we are investing millions of dollars in an industry that's defunct in this state. This state, your Honour, used to have 17 000 members. The union had 17 000 members in this state back in the 70s. The industry has left the state, has taken flight. Within a small radius of where we are, within a five kilometre radius, there was 10 abattoirs, large ones. They're all gone, we are the only ones left standing at the moment. We want to grow the business. We want to grow our export business and our domestic business. We want to employ people. We don't want – we want to give them conditions. But every time we've – we don't want – basically they got us to the point now where we don't want to employ people directly any more because of the resistance to change and there's a – going to work every day and running a meat plant is not an easy task. The biggest single problem is the industrial relation issue, because business can be got – there's plenty of business over the water and there's plenty of business domestically, if you do the right job. All we asked for was a bit of cooperation with the union and a bit of – just listening to some changes. 'Let's implement some changes.' Even the smallest of change was answered by, 'But you used to do it like that 30 years ago, 40 years ago and some very smart people thought about that.' But 30, 40 years ago they used to pick up carcasses off the concrete and lift them up and put them on the rail. Now there's a lot of machinery that does all that hard work. We're talking about a lot of things. (Emphasis added by present writer; some original italics removed)"

¹⁷⁰ *Australasian Meat Industry Employees' Union v Beldra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 235.

¹⁷¹ *Australasian Meat Industry Employees' Union v Beldra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 236.

Justice North accepted that: "...there is a high degree of subjectivity in making judgments based on the impression made by a witness in the witness box. However, in a situation like the present, where the mental processes of the witness are in issue, and there is little objective evidence available apart from the evidence of the witness himself, [His Honour was certain that] there is room for the use of such an approach."¹⁷² In His Honour's view, Catalfamo's statements and passion about the meat industry demonstrated that he was only prepared to engage with the applicant if the applicant accepted his views and vision and did not obstruct. The high level of industrial disputation was said to reflect the "growing determination of Belandra to resist the demands of the applicant." The agreements were not only causes for the conduct of the company but they were the reasons for it.¹⁷³

On that latter point,¹⁷⁴ Justice North noted that a distinction had been made in earlier cases between the cause of a situation and the reason for it.¹⁷⁵ The fact that there is some connection between the employer's act and trade union membership does not mean the employer did the act because the employee was a union member. For example,

¹⁷² *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 237.

¹⁷³ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 238.

¹⁷⁴ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 190-195.

¹⁷⁵ Such distinction had been accepted by Merkel and Finkelstein JJ in *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232; and Branson J in *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326; and it seemed to be adopted in *MUA v Geraldton Port Authority* [2001] FCA 236 per R D Nicholson J. Refer *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 194.

if an employer made a decision to make his operation more efficient or to facilitate the provision of services to the service users at a lower cost (and for no other reason), that action is not open to the inference of having been taken for reasons which include that the employees are members of a union or have the benefit of an award.¹⁷⁶ Section 298L(1) is, then, an interpretation section. The section defines what constitutes a prohibited reason for the purposes of s.298K(1). It is a process of characterisation and focuses on the “because” of a situation. On the evidence in this case, trade union membership was surely the “because.”¹⁷⁷

Conclusion – and suggestions for law reform:

Case Law:

The decision in *Belandra* was appealed, but settled out of court when workers voted on a compromise agreement, which reinstated the fundamental terms of the enterprise agreement under which they had previously worked.¹⁷⁸ Discussing the practical settlement of the matter in the newsletter, *Workforce*, the counsel for *Belandra*

¹⁷⁶ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 194.

¹⁷⁷ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 194-195.

¹⁷⁸ *Workforce* (Issue 1433, 20 February, 2004) at 1, citing trade unionist Paul Davey. It is interesting to note that *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) was discussed in Issue 1414 of 45 September 2003 at 2.

said the decision of North J extended the law on freedom of association and that the issues raised in the judgment would “inevitably need to be dealt with.”¹⁷⁹

Not a truer word was spoken. Quite obviously, the law on freedom of association and the role of trade unions in bargaining in this country is the proverbial ‘mine field.’ There are conflicting single judge decisions, some which broadly interpret the area, and others that have a narrowing effect on the law. The latter appear consistent with some aspects of the approach of the Full Federal Court on the matter, yet there is also a highly credible body of academic opinion that the Full Court position (adopted by Kenny J) may be wrong – and out of kilter with international authority.

In the view of the present writer, the preferable position on s.298 K, L and M is that of Justice North in *Belandra* and the leading academic commentators (McCallum, Noakes, Cardell-Ree, Richardson and Riley) in their responses to *BHP*. These all urge a broad interpretation of Australian freedom of association provisions. With due respect to Justice Kenny, Her Honour’s interpretation:

- almost neuters the effect of the freedom of association provisions;
- fails to take into account the breadth and purpose given those provisions at international law;
- fails to acknowledge the systemic importance of trade unions in Australia; and
- does not adequately account for the fact that Part XA is the major protection for trade unions now that preference is gone.

¹⁷⁹ *Workforce* (Issue 1433, 20 February, 2004) at 1, citing Blake Dawson Waldron partner, Mr Stephen Amendola.

In contrast, Justice North's judgment is compelling. His Honour actually conveys the importance of the systemic and international context for the freedom of association provisions. He outlines the history and present life of Australian labour to highlight the role that trade unions still play. He also notes the international genesis of the provisions and the influence that background must surely play in the interpretation of the statute. These provisions are the major protections for trade unions – they must be given the necessary breadth to be effective.

In the view of the present writer, adopting the approach of Justice North and the academic commentators, although perhaps not a strict application of the doctrine of precedent, is not such a Herculean task. Justice North ties his international-style interpretation of the provisions to the High Court decision in *Teoh*.¹⁸⁰ Further, his approach of examining the purpose of the laws as an avenue for understanding its meaning accords with basic principles of statutory interpretation.¹⁸¹ Finally, the academic condemnation of the Justice Kenny view is held by some of the foremost critics in this country.

The result of adopting the broad view of s.298K, L and M (suggested by Justice North and commentators), it is submitted, would be both legally sound, and logical, at a practical level. Such interpretation would mean that no employer could 'turn its back' on a trade union in a bargaining situation. So, it would mean, as McCallum suggested, that

¹⁸⁰ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

¹⁸¹ Don Gifford *How to Understand an Act of Parliament* (Cavendish Publishing Limited, England, 1996) 1-196 at 83 et seq.

the provisions would actually have effect as a remedy, rather than being robbed of their meaning. But the broad interpretation of the freedom of association laws would not remove the option of offering AWAs and non-union agreements to employees. Justice North spent a good deal of time discussing the need for prejudice to be *because* of union membership. The evidence of each case would still be relevant, therefore, and AWAs could still be offered if they were justified on commercial grounds rather than as a tool to deunionise. In essence, the broad interpretation of the provisions would provide a real choice in terms of the types of mechanisms that governed workplace relations (AWAs or bargains) – and that choice is the stated aim of the *Workplace Relations Act 1996*.

One further consideration, which it is submitted is relevant, are the recent laws on trade union regulation. The registration and internal administration of unions has been moved from Parts IX and X of the *Workplace Relations Act 1996* to Schedule 1B of that act by the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002*. The aim of that latter legislation is to make unions more representative of and accountable to their members, and to adopt principles of management for unionists that are broadly similar to those of company directors. That legislation must surely assist in bargaining and help improve on situations, like that of BHP, where the relevance of unions was questioned even by its own members and where trade union intransigence was a factor.¹⁸²

¹⁸² The present writer is publishing a brief comment on those laws in: Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter 32) in Clive Turner *Australian Commercial Law* (Thomson Publishing, Sydney) forthcoming 2005 edition.

Legislative Reform:

As the Part XA provisions are the major safeguard for unions, it is perhaps naïve to wait for a future court to follow the decision of a single judge and a number of academics, however high calibre they might be. Clearly, legislative reform would have a more immediate effect.

In that sense, the position favoured by the present writer is that adopted by Naughton and expressed earlier in this chapter. Section 170QK should be reinstated so as to give the Commission a power to order parties to bargain in good faith. The effect of *Asahi* could be overcome by redefining the word “negotiate,” as Naughton had suggested.

Professor McCallum notes that a similar bid for law reform was commenced by Hon Kim Beazley MHR in 2000.¹⁸³ The Professor does not specifically refer to the views of Naughton, but does generically describe good faith bargaining provisions as a good “first step.” Professor McCallum also suggests a “second step,” such as trade union recognition laws – systems by which workers at a particular work place might actually vote for a union to be their exclusive bargaining agent. The Professor usefully outlines such systems as they exist in the United States, Britain and New Zealand, and notes the inherent problems that Australian unions will always face, namely that they are geared

¹⁸³ Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249 at 242 (in particular footnote 37) – where Professor McCallum refers to then Opposition Leader Hon Kim Beazley MP’s call for the introduction of sections 170MKA-MKC through Bill No. 00121.

towards large scale (national operations) – they are not representative of one workplace alone.¹⁸⁴

With respect to the professor, the present author is less convinced of the virtues (and even necessity) of trade union recognition in Australia, and is more inclined to regard the Naughton approach as enough of a development for the foreseeable future. There have been numerous critiques of trade union recognition published in the countries in which such laws apply. Authors such as Professor Michael Gold;¹⁸⁵ Tonia Novitz and Paul Skidmore;¹⁸⁶ Alan Bogg;¹⁸⁷ and Lord Wedderburn¹⁸⁸ all note the complexity of the voting systems and other structures on which trade union recognition laws depend. For almost all of these authors, trade union recognition is no panacea. Gold even infers that voting can be manipulated by employers to suit their interests.

¹⁸⁴ Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Bargaining Laws” (2002) 57 *Relations Industrielles* 225-249 at 243-244.

¹⁸⁵ Associate Professor Michael Gold – undergraduate lectures in Labor Law, Center for Industrial and Labor Relations Studies, Cornell University, Ithaca, New York, USA (October 2002). The present writer is grateful to Professor Gold for letting her attend his lectures whilst the present writer was a Visiting Fellow at Cornell University. (Lecture notes on file with author).

¹⁸⁶ Tonia Novitz and Paul Skidmore *Fairness at Work: A Critical Analysis of the Employee Relations Act 1999 and its Treatments of Collective Rights* (Hart Publishing, USA, 2001) 1-180, especially Chapter Seven – Conclusion. The present writer is grateful to Dr Novitz for the time she spent discussing this and other British labor issues during this author's short day trip to the University of Bristol in December, 2002.

¹⁸⁷ Alan Bogg “The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness” (2001) 64 *The Modern Law Review* 875-889. Again, the present writer expresses her gratitude to Dr Bogg for his time in discussing British labor law during this author’s short day trip to the University of Birmingham in December, 2002.

¹⁸⁸ Lord Wedderburn “Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition” (2000) 29 *Industrial Law Journal* 1-42.

While so often finding enormous worth in his work, the present writer has one further critique of Professor McCallum. Very little of his commentary on *BHP* speaks of trade union intransigence in the Pilbarra or the economic imperatives presented to BHP by the competition of Hammersley Iron Ore.¹⁸⁹ Likewise, Professor McCallum attributes the resurgence of the industrial torts to competition law.¹⁹⁰ But the present writer is at pains to point out that the catalyst for the rebirth of those torts was the decision of *Dollar Sweets*.¹⁹¹ In that case, *the union defied all orders of the Commission and some unionists acted with such physical violence towards others that one victim required retinal surgery*.¹⁹²

Admittedly, adopting the Naughton approach requires the overruling of the *Asahi* definition of 'negotiate,' and introduces yet another discretion to the jurisdiction of the industrial commission. But, it is submitted, it allows the right degree of choice and freedom to both unions and employers. It would prevent an employer from having to bargain with a union that had nothing to do with the workplace, and it would seriously challenge the rights of unions with which even members were disillusioned. Yet, it would prevent a situation where unions (even wanted and representative unions) could be ignored by an employer whose motivation might be deunionisation. As mentioned earlier

¹⁸⁹ David Noakes and Andrew Cardell-Ree "Individual Contracts and the Freedom to Associate" (2001) 14 *Australian Journal of Labour Law* 89-96 at 96.

¹⁹⁰ Ron McCallum "Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws" (2002) 57 *Relations Industrielles* 225-249 at 233-234.

¹⁹¹ *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia and Others* [1986] *Victorian Reports* 383-391 (per Murphy J).

¹⁹² *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia and Others* [1986] *Victorian Reports* 383-391 (per Murphy J) at 389, 387.

that represents a true choice in workplace relations. Importantly, to the central thesis of this dissertation, it also retains the relevance of the structures that support the no disadvantage test as it exists in the context of enterprise bargaining – that system of negotiating and settling terms of employment cannot simply be ignored.

VIII. CHAPTER EIGHT: Glass Houses: AWAs & Disadvantage...

In discussing the *Weipa* dispute in the previous chapter,¹ attention was paid to the philosophies espoused by some companies that the most mutually beneficial form of employment relationship stems from an *individual* relationship of *trust* between the worker and the company. Such philosophies stem from the teachings of latter day American managerialists, such as Sir Roderick Carnegie,² and are also reminiscent of the theories of Hayek (discussed in Chapter Two of this work), which dispute the existence of a power imbalance between employer and worker, and urge minimal intervention in the employment relationship. *Weipa* occurred under the previous legislation, the *Industrial Relations Act 1988*, through use of an employment vehicle outside the legislative framework - the common law contract of employment. Today, under the *Workplace Relations Act 1996*, individual employment instruments are sanctioned *within* that very statute. They are Australian Workplace Agreements (AWAs).

As discussed in Chapter Five of this dissertation, AWAs do something the common law contract of employment still cannot do – *they supersede relevant awards and enterprise agreements*. This is interesting in itself, but takes on particular significance when two further factors are borne in mind. The opening chapter of this

¹ Refer the discussion of, for example: *Australian Manufacturing Workers' Union and Others v Alcoa of Australia Limited and Others* (1996) 63 *Industrial Reports* 138-193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDVP; Harrison DP; Merriman C); and Terry Ludeke *The Line in the Sand: The Long Road to Staff Employment in Comalco* (Wilkinson Books, Melbourne, 1996) 1-170.

² Terry Ludeke *The Line in the Sand: The Long Road to Staff Employment in Comalco* (Wilkinson Books, Melbourne, 1996) 1-170 at 7-8, 13-14.

work studied the original “Rock Solid Guarantee” speech of our now Prime Minister.³ The present writer observed that, far more important than its limited guarantee of take home pay, was the speech’s allusion to the individualistic nature of future employment law - the ultimate expression of which was the AWA. Further, and as discussed in Chapters Five and Six, the original Workplace Relations Bill only required AWAs to comply with a series of statutory minimum conditions and would take effect once lodged with a new body called the Employment Advocate. The requirement of passing the no disadvantage test and the possible involvement of the Commission (if the Employment Advocate has concerns as to whether the no disadvantage test is passed) was only included in the legislative scheme to appease the holders of the Senate balance of power and ensure the ultimate passage of the whole Workplace Relations Bill.⁴

The confluence of such history, philosophical background and policy significance can only deepen the importance of a consideration of AWAs to this legal analysis of the no disadvantage test. It is the purpose of this chapter to do just that. Some of the factors that tell heavily on such assessment are: the secrecy of the AWA process and the operation of the Office of Employment Advocate; the question of ‘duress;’ and something of a recurrent theme of this study – bargaining power and whether individuals (bargaining without unions or the Commission in a secretive process) can ‘hold their

³ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9 at 4-5. (Copy supplied by Prime Minister’s Office and on file with author).

⁴ The passage of the *Workplace Relations Act 1996* (Cth) through Parliament was discussed in Chapter Five of this thesis at 1 et seq. See also, for example: Louise Willans Floyd “To Thine Own Self Be True – Enterprise Bargaining and the Rise of Individualism in Australian Industrial Law and Trade” (1997) 3 *International Trade and Business Law Annual* 263-276 at 267-271.

own.’ The chapter concludes by returning to the original government policy on statutory minimum conditions and subsequent suggested changes to dilute or remove the no disadvantage test and the Commission’s jurisdiction in the AWA process. It also ponders the related matter of a possible re-emergence of the common law contract of employment. It follows from the discussion in Chapter Three of this thesis that today’s questions are not just central to any consideration of the rock solid guarantee to workers, but are reminiscent of the original Parliamentary debate that spawned Australia’s Constitutionally-enshrined Commission system over 100 years ago. It was then that Sir Alfred Deakin favoured the flexibility of a (protective) Commission (which was like an elephant’s trunk “that could pick up a pin or lift an enormous load”) to rigid legislation that “must necessarily be ineffective in dealing with a living society.”⁵ *Perhaps it is true that the more things change, the more they stay the same...*

⁵ Refer Chapter Three of this thesis and the discussion of Sir Alfred Deakin’s “Second Reading of the Conciliation and Arbitration Bill 1903” (House of Representatives) *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 1903) 2862 et seq.

CRITIQUE OF THE NO DISADVANTAGE TEST AS APPLIED TO AUSTRALIAN WORKPLACE AGREEMENTS:

1. *How can something so secretive be rock solid?*

The Office of Employment Advocate (the OEA - which, in the first place, applies the no disadvantage test to AWAs) operates in conditions of tremendous secrecy. Under s.83BS *Workplace Relations Act 1996*, the parties to an AWA cannot be revealed by anyone employed by the OEA or any researcher, and the penalty for breaching that provision is *6 months imprisonment*. Further, there are strict limits applying to researchers who hope to access actual AWAs stored at the Office of Employment Advocate. Under regulation 8D *Workplace Relations Regulations* the Employment Advocate will only authorise access to AWAs to competent researchers who seek to analyse *trends* in agreement making. *Documents showing the reasoning behind the Employment Advocate's assessment of an AWA are not accessible*, nor are researchers allowed to contact the parties to an AWA. The decision to grant or withhold access to researchers is at the *sole discretion* of the Employment Advocate and researchers granted access must sign a research protocol contract, which contains a confidentiality agreement. Copies of the confidentiality agreement are not on the OEA web site. However, a copy supplied to the present writer by the Office demonstrates how strict the obligations are. The Commonwealth may take legal proceedings against researchers even in the event of merely suspected breach. There can be inspection of the researcher's premises without warning by the Commonwealth and a review of the researcher's performance. And the researcher must indemnify the Commonwealth against all loss.⁶

⁶ Refer Clauses 6, 7 and 10 *Deed of Agreement* (copy on file with author).

One of the reasons the OEA gives for this secrecy is to prevent AWA access being used to generate commercial advantage to particular businesses.⁷ Obviously there is some credence to that argument, at least in the case of top level employees. It must also be acknowledged that, despite the limitations, there is some excellent socio-legal research that has been done on AWA trends by such noted scholars as Professor Richard Mitchell.⁸ Some of Mitchell's findings are discussed in greater detail later in this chapter, but it is important to acknowledge, for present purposes, that Mitchell received *hundreds* of de-identified sample AWAs from the OEA for his research, and his conclusions on AWA bargaining were hardly those of an OEA puppet.⁹ However, clearly this secrecy does limit research into the legislative and other safeguards of workers' rights in making an AWA. Some may be deterred from undertaking such examinations due to the onerous nature of the confidentiality agreements and because it is the OEA who selects the sample

⁷ Refer web site of the Office of Employment Advocate for details: <http://www.oea.gov.au> (last visited 24 March 2004). See especially the page: "How to Apply for Access to AWAs for Research" http://www.oea.gov.au/printer.asp?showdoc=/home/research-how_to_apply.asp&Page=5 It is interesting to note that the Office of Employment Advocate will deposit an internet cookie on the hard drive of any person who visits their website – this is said to be so the OEA can better understand the manner in which its web site is used.

⁸ See particularly: Richard Mitchell and Joel Fetter "Human Resource Management and Individualisation in Australian Labour Law" (2003) 45 *Journal of Industrial Relations* 292-325. Further (related) research includes: Paul Gollan and Jonathan Hamberger "Australian Workplace Agreements and High Performance Workplaces: A Critique of Mitchell and Fetter" (2003) 45 *Journal of Industrial Relations* 521-527; Richard Mitchell and Joel Fetter "Australian Workplace Agreements and High Performance Workplaces: A Reply" (2003) 45 *Journal of Industrial Relations* 528-529; and Richard Mitchell "Australian Industrial Instruments and the Capacity to Manage" *IPA Conference Papers* <http://www.ipa.org.au/Units?Workreform/capmanseminar/mitchell.htm> (last accessed 19 February 2004). The OEA also provides some material about trends on its web site: refer "Sample of 100 AWAs" http://www.oea.gov.au/printer.asp?showdoc=/home/sample_awas.asp&Page=5 last accessed 24 March 2004. See also: Richard Mitchell *Final Report: Protecting the Worker's Interest in Enterprise Bargaining - The 'No Disadvantage' Test in the Australian Federal Jurisdiction* (Prepared for the Workplace Innovation Unit, Industrial Relations Victoria by The Centre for Employment and Labour Relations Law, Law School, The University of Melbourne, 2004) 1-77.

⁹ Richard Mitchell and Joel Fetter "Human Resource Management and Individualisation in Australian Labour Law" (2003) 45 *Journal of Industrial Relations* 292-325 at 311.

of agreements that the researcher examines, in any event.¹⁰ More disturbingly, the secretive nature of the OEA also raises a serious question as to whether the no disadvantage test may be considered anything like a ‘rock solid guarantee’ for such agreements or whether the office, itself, may be operating in favour of employers. These claims are considered presently.

2. *Possible Employer Bias of OEA?*

It will be recalled from Chapter Five of this thesis that the Office of Employment Advocate advises *both* employers *and* employees on AWAs.¹¹ The OEA was created by the *Workplace Relations Act 1996*, which also created AWAs and arguably promotes such instruments through its principal objects. Furthermore, the OEA is staffed by public servants. Westminster traditions aside, such public servants might be regarded as serving the government of the day and that government has favoured the making of AWAs (*over collective agreements*) since the making of the ‘rock solid guarantee’ speech, itself.

The potential this situation has to cause conflicts of interest has not been lost on scholars in the area. It was noted by McCallum, as early as the Senate enquiry into the Workplace Relations Bill, in 1996.¹² And the work of recent commentators has hardly

¹⁰ The Office of Employment Advocate states that it receives 5 requests for AWA research access per year – refer email from Kerrie Webb of the Office of Employment Advocate (dated 20 July 2004.) (Copy on file with author).

¹¹ Refer Chapter Five of this thesis.

¹² (Chapter Four) “Changes to the System and Its Institutions” (Part C) *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* Senate, Parliament of Australia (http://www/aph.gov.au/Senate/committee/economics_ctte/workplace/report/c06.htm 1-11 at 3. See also Louise Willans Floyd “To Thine Own Self Be True – Enterprise Bargaining and the Rise of Individualism

assuaged those fears. Mitchell noted that the OEA website, in dealing with template AWAs, devotes much time to employer cost-saving issues, but relatively little to any obligations on employers to provide multi-skilling and worker empowerment. Moreover, in developing some template agreements, the OEA collaborated with certain employer organisations, but neither with trade unions nor independent human resource consultants.¹³ In his article, “Flexibility and Stretching Rights: The No Disadvantage Test In Enterprise Bargaining,”¹⁴ Omar Merlo considered the situation where the OEA had a choice of possible benchmark awards for the purposes of applying the no disadvantage test to AWAs. Merlo went so far as to suggest that the OEA might select the award that had terms that were easier to satisfy *for employers, for example, it may require lesser pay.*¹⁵ The case symptomatic of the problem for Merlo was one he labels the *GTS Case*.¹⁶ Such decision is considered in some detail by the present writer, below. It will become clear that there are some problems with Merlo’s own analysis of the dispute; nonetheless, the litigation does expose real problems with the no disadvantage test as it applies to AWAs and raise further doubts as to its effectiveness.¹⁷

in Australian Industrial Law and Trade” (1997) 3 *International Trade and Business Law Annual* 263-276 at 271-273. And refer Chapter Five of this thesis.

¹³ Richard Mitchell and Joel Fetter “Human Resource Management and Individualisation in Australian Labour Law” (2003) 45 *Journal of Industrial Relations* 292-325 at 310-311. More on the precise nature of Mitchell’s work is considered *infra*.

¹⁴ Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labor Law* 207 – 235 at 224 et seq.

¹⁵ As alluded to in Chapters Five and Six of this thesis, Merlo is also highly critical of the application of the test in situations where unions are not present. This criticism obviously also applies to the application of the no disadvantage test to individualistic AWAs.

¹⁶ Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labor Law* 207 – 235 at 224 et seq.

¹⁷ Omar Merlo “Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining” (2000) 13 *Australian Journal of Labor Law* 207 – 235 at 224 et seq.

*The GTS Case – Australian Municipal, Administrative, Clerical and Services Union and Global Telesales Pty Ltd*¹⁸

Lufthansa German Airlines had established a call centre in Victoria, in the form of its wholly owned subsidiary, Global Telesales Pty Ltd (GTS). GTS was the initial point of contact for callers to the airline and its staff took reservations for Lufthansa and its partner airlines. There was some hope of extending the work to be done by call centre staff (to, for example, taking calls relating to other businesses), but that potential was yet to be developed.¹⁹

GTS was a ‘green fields’ site and employment was offered on the basis of Australian Workplace Agreements.²⁰ Under section 170XE *Workplace Relations Act* 1996, the Employment Advocate designated the *Commercial Sales (Victoria) Award 1996*²¹ as the designated award for the purposes of applying the no disadvantage test to the AWAs in question.²² It was at this point that the ASU involved itself.²³ The ASU

¹⁸ Where possible, this analysis is taken from reported judgments: *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Commissioner Whelan, M Print Q 9177, 27 November 1998) 1-18; *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (stay application Australian Industrial Relations Commission per Watson SDP, M Print R 0333, 23 December 1998) 1-3; and *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Full Bench, Australian Industrial Relations Commission, PR927484, 10 February 2003 per Giudice J; Acton SDP and Smith C) 1-13.

¹⁹ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 4-5.

²⁰ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 6.

²¹ *Commercial Sales (Victoria) Award 1996* (Print N7268).

²² S.170XE(3) *Workplace Relations Act* 1996 (Cth): “...the Employment Advocate must determine...an award or awards under this Act regulating terms or conditions of employment of employees engaged in the same kind of work as that of the person under the AWA...” (emphasis added).

was not respondent to the *Commercial Sales Award*,²⁴ but nonetheless represented to the Employment Advocate that the relevant award was really the *Overseas Airline Award 1994*.²⁵ That latter award covered employment that was essentially in the airline industry and it paid more than the salary contained in the *Commercial Sales Award*.²⁶

The Employment Advocate designated the *Commercial Sales Award* as the appropriate benchmark for the no disadvantage test. No reasons were published, nor were they required under the *Workplace Relations Act 1996*.²⁷ At that point, the ASU sought an interim award to bind the employer and employees which was in similar terms to the *Commercial Sales Award*. The union applied on the basis that strong minimum

²³ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 6-7.

²⁴ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 9.

²⁵ *Overseas Airline Award 1994* (Print L5762). For confirmation that the union had made representations to the Employment Advocate regarding the designation of the award see: *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 6.

²⁶ This is implicit from the judgment in *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 3 et seq. See also: Leigh Hubbard (Victorian Trades Hall Council) *Submission to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Submission Number 413; 22 September 1999) 1-112 at 22-29 (copy gratefully received from Mr Jarrod Moran, Workcover Liaison Officer, Victorian Trades Hall Council and on file with author); and Omar Merlo "Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining" (2000) 13 *Australian Journal of Labour Law* 207-235.

²⁷ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 9, where the Commissioner states: "Whatever the Employment Advocate may or may not have done in designating that award under section 170XE..." (emphasis added); and 12: "...It can only be presumed that this was done in accordance with section 170XE(3) on the basis that this award regulates terms or conditions of employment of employees engaged in the same kind of work as that of the employees under the AWAs. There is no evidence before the Commission concerning the basis upon which this decision was made or the reasoning of the Employment Advocate which leads to this conclusion..."

award entitlements were the basis for bargaining and that the core function performed by GTS employees were international airline bookings.²⁸ GTS appealed, arguing, for example, that the core work performed was telephone sales; that changing the designated award (after some AWAs had already been signed) was unfair and confusing to employees; and that those people accepted employment of their own free will.²⁹

At first instance, Commissioner Whelan granted the interim award. She found that the applicable award was the *Overseas Airline Award 1994*. In the view of the Commissioner, the alternative award, the *Commercial Sales (Victoria) Award 1996*, applied to those who, for example, were engaged in cold calling (ie soliciting orders by telephoning potential customers). The employees in the instant case were involved in taking airline bookings and the Commissioner was unaware of any other case in which such employees had been engaged under the *Commercial Sales (Victoria) Award 1996*.³⁰

In coming to her conclusion, Commissioner Whelan distinguished the function of the

²⁸ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 1 et seq. In advancing this argument, the union relied on, for example, sections 3(d) and 88B *Workplace Relations Act 1996* (Cth). They also relied on *ALHMWU v Garner Merchant* (Australian Industrial Relations Commission, Print Q 1953) where the Commission stated: "The Act, however, does not in any way suggest that the fact that a employer wishes to offer AWAs or, indeed, that employees agree to enter into them, makes the existence of an award binding on the parties irrelevant. The existence of an award does not prevent the making of AWAs. It does, however, clearly act as a safety net prior to the signing of an AWA, after the expiry of an AWA, during the negotiation of an AWA or until an AWA takes effect. It also provides the safety net for new employees and those who may choose not to enter into an AWA. While the provisions of the award will be overridden by an AWA during the life of an agreement, the AWA does not invalidate the award. Indeed, the existence of an underpinning award is totally consistent with the objects of the Act and, in particular, section 3(d) which sets out clearly the relationship between the award safety net and the facility for employers and employees to enter into the type of agreements which meet their needs."

²⁹ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 5 et seq.

³⁰ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 13-14.

Employment Advocate in designating an award under s.170XE, and the function of the Commission in determining whether or not to make an interim award. The Commissioner said that the public interest was served by the making of an interim award to further the objects of the act in preserving a strong award safety net.³¹ Finally, Commissioner Whelan questioned the assertion of the company that the AWAs in question had been freely entered into. During argument, statements had been made on behalf of the employer that employment was offered on the basis of an AWA or a contract of employment with similar terms. Commissioner Whelan referred to the *Macquarie Dictionary* definition of “agreement” as something involving mutuality; and to the judgment in *Toys ‘R’ Us (Australia) Pty Ltd Enterprise Flexibility Agreement 1994 (Print L9066)*, where Vice President Ross discussed the need for consent and an absence of coercion. Commissioner Whelan relied on these authorities to find that the union, in seeking an interim award, was seeking to further the choice of employees and to enhance their safety net.³²

The interim award was subsequently staid by Senior Deputy President Watson.³³ A Full Bench then quashed the award “on jurisdictional grounds.” That decision does *not* seem to be reported, but rather is only referred to in the reports of subsequent applications

³¹ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 12-13.

³² *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, 27 November 1998) 1-18 at 7, 13-14.

³³ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales Pty Ltd* (Australian Industrial Relations Commission per Watson SDP, M Print R0333, 23 December 1998) 1-3.

in the matter.³⁴ Ultimately, the applicability of awards became less important as the dispute drew on, the parties and the government negotiating modified terms of employment.³⁵

Commentary on the GTS Case:

What is interesting from a reading of Merlo's footnotes is that *his analysis does not appear to come from a reading of the actual decisions of any tribunal* – either the Industrial Relations Commission or the Office of Employment Advocate.³⁶ *Rather, Merlo cites, as his authority for his analysis, the submission of the Victorian Trades Hall Council (VTHC) to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee*³⁷ (reviewing the Federal Government's Workplace

³⁴ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales Pty Ltd* (Australian Industrial Relations Commission per Giudice J, Acton SDP and Smith C, PR927484, 10 February 2003) 1-13 at 2. It is interesting to note that this report only alludes to the decision to quash the award – it is not that actual report of that latter order. In fact, such does not seem to have been reported; no citation is given in the Full Bench judgment, nor is one provided in: Leigh Hubbard (Victorian Trades Hall Council) *Submission to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Submission Number 413; 22 September 1999) 1-112; and Omar Merlo "Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining" (2000) 13 *Australian Journal of Labour Law* 207-235.

³⁵ *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales Pty Ltd* (Australian Industrial Relations Commission per Giudice J, Acton SDP and Smith C, Print PR 927484, 10 February 2003) 1-13; Leigh Hubbard (Victorian Trades Hall Council) *Submission to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Submission Number 413; 22 September 1999) 1-112 at 23 et seq; and Omar Merlo "Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining" (2000) 13 *Australian Journal of Labour Law* 207-235 at 225.

³⁶ Omar Merlo "Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining" (2000) 13 *Australian Journal of Labor Law* 207 – 235 at 224 et seq, for example, footnotes 123 (*GTS Case*) and 181 (*Melbourne Cricket Ground Case*).

³⁷ Leigh Hubbard (Victorian Trades Hall Council) *Submission to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Submission Number 413; 22 September 1999) 1-112.

Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999). Interestingly, that VTHC submission also does not contain citations of these cases which it “analyses.”³⁸

To be fair to Merlo and the Victorian Trades Hall, and as noted throughout the above commentary, *not all the GTS applications seem to have been reported*. But, in the view of the present writer, Merlo does appear to rely largely on union research for his condemnation of the OEA – and on that latter issue, unions are hardly unprejudiced, themselves! In fact, there are portions of the union submission that the present writer challenges as matters of fact. For example, they claim that the employer in this case actually implied workers would start on the airline award. However, there is absolutely no implication as to the name of awards at all in the documents of offer.³⁹

Allowing for circumspection, though, there is still, it is submitted, cause for concern over the way in which the OEA dealt with the no disadvantage test in the *GTS* workplace agreement. In researching the decision, the present writer emailed the OEA legal people on the Advocate’s choice of benchmark award in light of Merlo’s claim. Whilst that group was polite and prompt in answering the questions of this writer, their only response to the OEA’s selection of one award over another as designated award was: “*The EA is not under a statutory duty under section 170XE of the Workplace Relations*

³⁸ Leigh Hubbard (Victorian Trades Hall Council) *Submission to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Submission Number 413; 22 September 1999) 1-112 at 22-29.

³⁹ Leigh Hubbard (Victorian Trades Hall Council) *Submission to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Submission Number 413; 22 September 1999) 1-112 at 22.

Act 1996 to publish reasons for his determination of the relevant Award for the purposes of the no disadvantage test."⁴⁰ With respect, this is insufficient response. Keeping in mind the OEA's stated justification for secrecy (namely, competitive business conditions may require secrecy as to terms of employment), it is hard to see how any commercial disadvantage could come from divulging reasons in a case of this prominence. Clearly, the matter had already come to the attention of the general public, given the ultimate application to the Commission for an interim award and, finally, the involvement of the Victorian Government in negotiating some form of compromise.

What the GTS dispute shows unequivocally, therefore, is the problem caused by the secrecy of the OEA. At the very least, no one can be *absolutely* sure there is a rock solid guarantee pertaining to the no disadvantage test as applied to AWAs because nobody *actually* knows what is going on. The worst case scenario is that the OEA is biased in favour of employers. The VTHC uses the *GTS Case* to argue that the Employment Advocate could be pro-employer and that AWAs should be vetted by the Australian Industrial Relations Commission. Noting that common law contracts of employment have always been available to employers, the VTHC argues that the advent of AWAs, which go further than contracts by allowing employers to avoid awards, may be an inherently pro-employer device, irrespective of how they are approved.⁴¹ Merlo

⁴⁰ This statement was made in an email from Ms Suzanne Badge, Office of Employment Advocate, to the present writer, Louise Willans Floyd (17 March 2004). (Copy on file with author).

⁴¹ Leigh Hubbard (Victorian Trades Hall Council) *Submission to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Submission Number 413; 22 September 1999) 1-112 at 25.

makes a similar point and, in the submission of the present writer, there is worth to this critique, as will be seen in the remainder of this chapter.⁴²

3. *Duress and AWAs*

In his judgment in *Belandra*, Justice North spent considerable time emphasising that the crux of Australian industrial law is still the collective agreement sanctioned by the Industrial Relations Commission. Despite their topical, controversial nature, AWAs are only a small part of the system, which remains a hybrid between the newly embraced individualism and the traditional arbitration model.⁴³ Yet despite that statistical limitation, AWAs have a high level of importance because they represent a systemic change to Australian labour law. They are the antithesis of the traditional arbitration model and, as noted in the introduction to this chapter, they even go beyond the effect of common law contracts of employment as they alone can override an award. AWAs are part of an array of instruments that can and do govern employment relationships. Yet as McCallum noted in the context of the *BHP dispute*,⁴⁴ the levers of choice over that array may well rest in the hands of the employer. The *BHP dispute* involved an employer who sought to entice employees onto AWAs through use of terms that were more favourable than those in the pre-existing enterprise bargain. The different yet related issue involves

⁴² Omar Merlo 'Flexibility and Stretching Rights: The No Disadvantage Test in Enterprise Bargaining' (2000) 13 *Australian Journal of Labor Law* 207 – 235 at 224.

⁴³ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J) at 200-208: AWAs were estimated to cover less than 5% of the Australian workforce.

⁴⁴ The expression "the levers of choice" was coined by Ron McCallum in his article, "Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws" (2002) 57 *Relations Industrielles* 225-249 at 236.

possible employer *duress* – that an employee *simply must have* an AWA. Whether that can be done is both dependent on the no disadvantage test and impacts the effectiveness of the test – as illustrated below.

The Law on Duress:

The *Workplace Relations Act 1996* specifically outlaws duress in section 170WG(1), which provides that “a person must not apply duress to an employer or employee in connection with an AWA or ancillary document.” Yet, the Explanatory Memorandum to that legislation is equally clear that such prohibition “...would not prevent an employer from offering employment on the basis that the employee enter into an AWA.”

Referring to the latter explanation as simply a ‘gloss,’ Justice Marshall, in *Australian Services Union v Electrix Pty Ltd*,⁴⁵ granted an injunction against an employer who sought to employ highly specialised employees only if they would accept AWAs. The employer concerned was a successor business to what had been a Victorian (government) power supplier. As such, the employer was really dealing with highly skilled workers who were essentially applying for the same job they had done for the earlier power supplier. The terms and conditions of employment of those workers had previously been covered by an enterprise bargain, which contained better entitlements

⁴⁵ *Australian Services Union v Electrix Pty Ltd* (per Marshall J) (1999) 93 *Industrial Reports* 43-47.

than were being offered in the AWA. In granting the injunction, His Honour went so far as to describe the conduct of the employer as:⁴⁶

“...unconscionable conduct which no employee in a humane, tolerant and egalitarian society should have to suffer...The meter readers would be confronted with...a situation where (the employer was) able to unilaterally vary their entitlements on a ‘take it or leave it’ basis. Without injunctive relief (the employees) would essentially be left with the choice between reduced entitlements or the economic scrap heap of unemployment (They) have specialised skills which are incapable of being utilised in other gainful employment.”

Despite Justice Marshall’s certainty on the issue, commentators of the day, such as Joo Cheong Tham in the article “Take It Or Leave It AWAs: A Question of Duress?”⁴⁷ questioned whether a general principle could be extrapolated from the interlocutory decision as to the meaning of ‘duress.’ As Tham noted, ‘duress’ is a concept known to the common law. As such it has particular features. It is a vitiating factor that may *render a contract voidable once that contract has been entered into. Likewise, ‘duress’ has grown up as a concept in a commercial context of contract law, not labour law.* There is a real question, therefore, whether any exploitation by an employer of an employee’s bargaining imbalance would qualify as the illegitimate pressure needed to constitute duress at common law.⁴⁸

⁴⁶ *Australian Services Union v Electrix Pty Ltd* (per Marshall J) (1999) 93 *Industrial Reports* 43-47 at 45-46.

⁴⁷ Joo Cheong Tham “Take It Or Leave it AWAs: A Question of Duress?” (1999) 12 *Australian Journal of Labour Law* 142-148.

⁴⁸ Joo Cheong Tham “Take It Or Leave it AWAs: A Question of Duress?” (1999) 12 *Australian Journal of Labour Law* 142-148 at 146.

The authoritative case on the meaning of duress came in the form of the decision of Justice Moore in *Schanka v Employment National (Administration) Pty Ltd*.⁴⁹ That decision set beyond doubt the notion that offering employment on the basis of an AWA is not duress. It confirmed the common law definition of ‘duress,’ then, as something requiring *illegitimate* pressure, not simply pressure, alone. But the case also acknowledged that the duress concept, as dealt with in s.170WG of the *Workplace Relations Act 1996*, applied even when no AWA was concluded. It, therefore, raised questions as to whether duress, in the labour context, considers primarily the conduct of the person pressured (as does the common law) or whether it is broad enough to focus on the conduct of the party applying the pressure.

*Schanka v Employment National (Administration) Pty Ltd*⁵⁰

Justice Moore began one of his main judgments in the Schanka litigation with the acknowledgment that “(these) proceedings now have a lengthy history.”⁵¹ Indeed, His Honour goes on to outline the myriad court applications, procedural applications and substantive hearings.⁵² Such an elaborate history is not necessary for present purposes.

⁴⁹ *Schanka v Employment National (Administration) Pty Ltd* (per Moore J) (2001) 105 *Industrial Reports* 271-315. (Earlier decision: (1999) 92 *Industrial Reports* 464-484).

⁵⁰ *Schanka v Employment National (Administration) Pty Ltd* (per Moore J) (2001) 105 *Industrial Reports* 271-315. (Earlier decision: (1999) 92 *Industrial Reports* 464-484).

⁵¹ *Schanka v Employment National (Administration) Pty Ltd* (per Moore J) (2001) 105 *Industrial Reports* 271-315 at 271.

⁵² *Schanka v Employment National (Administration) Pty Ltd* (per Moore J) (2001) 105 *Industrial Reports* 271-315 at 271 et seq. See, generally: Shae McCrystal and Renata Grossi “Duress and Australian Workplace Agreements – The Schanka Litigation and Other Developments” (2002) 15 *Australian Journal of Labour Law* 184-197.

The facts and judgment necessary to analyse 'duress' as a concept relevant to AWAs are considered presently.

Facts:

Schanka and his fellow litigants had been employed by the old Commonwealth Employment Service (CES), a government entity which had dealt with job placement to public service and other positions for the unemployed and other job seekers. When the Federal Government essentially privatised/corporatised that function, those who had been employed with the CES were offered a number of options, ranging from redundancy through to being employed by the only remaining government entity dealing with old CES matters, Employment National (EN). Originally, those who were to be employed by EN could elect to be covered by either an AWA or a direction made under s.81 *Public Service Act*, which provided for the exact same terms as the AWA. The understanding was that eventually the AWAs and s.81 orders would be replaced by an enterprise bargain. However, there was a question as to whether such would take the form of a union or non-union agreement. The possibility of there being an ultimate enterprise bargain crystallized the difference between the AWA and s.81 option. Those who had signed an AWA might be limited in their capacity to strike whilst bargaining for a certified agreement, given that AWAs bind parties absolutely during their period of operation. After intervention by the relevant union, the s.81 option was withdrawn and employment was offered on the basis of an AWA, only. It was at that time that Schanka and his fellow litigants were offered work with EN on an AWA-only basis. They had all

previously announced their preference to work under a collective agreement. Further, they faced their new choice (to work only under an AWA) at a time when the Australian Public Service was going through a massive downsizing.

Decision:

Justice Moore held that duress had been applied in connection with the AWAs – section 170WG had been breached. However, it is crucial that His Honour found that *the offer of employment exclusively on the basis of an AWA did not, of itself, cause the breach*. Such amounted to the placing of pressure on job applicants. But *to ground a finding of duress, there had to be illegitimate pressure*. To this end, Justice Moore relied on the judgment of McHugh JA (as he then was) in *Crescendo Management Pty Ltd v Westpac Banking Corporation* as cited by R D Nicholson J in *Maritime Union of Australia v Geraldton Port Authority*.⁵³

“While ‘duress’ is not defined in the WR Act, it is a concept well understood in the law. The rationale of the doctrine of economic duress “is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party when the law regards that pressure as illegitimate...(citations omitted)”

In the instant case, the “singularly most important ...(matter)...evidencing illegitimate pressure” was the fact that Schanka and his fellow applicants had already

⁵³ *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40 at 45 cited by RD Nicholson J in *Maritime Union of Australia v Geraldton Port Authority* [1999] FCA 899. Moore J cites these decisions in *Schanka v Employment National (Administration) Pty Ltd* (1999) 92 *Industrial Reports* 464-484 at 482.

been employed by the CES and were, effectively, applying for their former position.⁵⁴ But there was another factor. By removing the s.81 option and offering employment only on the basis of an AWA (which would necessarily prohibit industrial action), EN was removing the rights of parties to bargain further at a later stage. Such removal was taking place even though EN was aware the employees wanted to so bargain (particularly for a certified *union* agreement) and improve on the conditions of employment offered in the AWA.⁵⁵ There was even another factor, namely, that prior to casting the AWAs, EN had concluded a non-union agreement with a small number of employees which would serve as the benchmark award for the application of the no disadvantage test. That agreement contained terms of employment that were not as favourable to employees as those contained in the previous union award under which Schanka and others had worked. Justice Moore found this conduct of EN illegitimate and something that was clearly against the spirit of the *Workplace Relations Act* 1996 (for example, the principal object in section 3) which affirmed the need for parties to *freely bargain* for their conditions of employment. His Honour also mentioned the shrinking nature of public service employment, but did not actually state the extent to which that was an operative consideration in his reasoning.

⁵⁴ *Schanka v Employment National (Administration) Pty Ltd* (per Moore J) (2001) 105 *Industrial Reports* 271-315 at 307.

⁵⁵ *Schanka v Employment National (Administration) Pty Ltd* (per Moore J) (2001) 105 *Industrial Reports* 271-315 at 307 et seq.

While much of the analysis of 'duress' in the case is drawn from the common law, there is one aspect on which *Schanka*⁵⁶ distinguishes 'duress' as it exists under the *Workplace Relations Act 1996* from 'duress' as it is known for the avoidance of a common law contract. According to Justice Moore, an AWA does not need to be concluded for a finding of duress to be made under s.170WG. His Honour, therefore, distinguished cases such as *Westpac Banking Corporation v Cockerill*,⁵⁷ where Justice Keifel had concentrated on the quality of the consent. Instead, Moore J relied again on McHugh JA in *Crescendo Management v Westpac* to find that 'duress' refers to the conduct of one party upon another. The person subject to the duress may actually know what they are doing, but submit to demands or threats or pressure.⁵⁸

The interesting point of analysis for this case is the degree of protection it provides employees against being forced to accept employment only through an AWA. It was noted at the beginning of the discussion of this case, that the decision affirms the right of employers to offer employment only on the basis of an AWA. The reason why such approach does not amount to duress was discussed in the subsequent decision of *Maritime Union of Australia v Burnie Port Corp Pty Ltd*.⁵⁹ Justice Ryan placed

⁵⁶ *Schanka v Employment National (Administration) Pty Ltd* (per Moore J) (2001) 105 *Industrial Reports* 271-315. (Earlier decision: (1999) 92 *Industrial Reports* 464-484).

⁵⁷ As cited by Moore J in: *Schanka v Employment National (Administration) Pty Ltd* (1999) 92 *Industrial Reports* 464-484 at 482-483.

⁵⁸ As cited by Moore J in: *Schanka v Employment National (Administration) Pty Ltd* (1999) 92 *Industrial Reports* 464-484 at 482-483.

⁵⁹ *Maritime Union of Australia v Burnie Port Corp Pty Ltd* (2000) 101 *Industrial Reports* 435-454.

importance on the fact that the operation of AWAs was dependent on their first having passed the no disadvantage test:

“I cannot agree that Parliament in enacting s.170WG intended that the concept of duress should be capable of an application as wide as that. The WR Act expressly limits the advantage to an employer which might be gained by requiring an AWA as a condition of entry into an employment contract. That limitation somewhat diminishes the force of the Union’s submission so far as it is directed to showing that the Corporation’s object was to increase productivity whatever the cost to its employees. *The WR Act conditions the operation of each AWA on its passing the “no disadvantage” test prescribed by s.170XA. The result is to narrow considerably the detriment that can be imposed on an employee and the advantage that can accrue to the employer when the latter successfully insists that their relationship be regulated in future by an AWA.*

It may be that, in future, if the designated award that provides the criteria for application of the “no disadvantage” test is not adjusted to reflect market trends evidenced by relevant certified agreements and AWAs, the utility of the “no disadvantage” test in ensuring minimum standards will gradually diminish. However, that circumstance is not said to have arisen here and it is unnecessary therefore to consider its impact in bringing the conduct of the Corporation in relation to its AWAs within the concept of duress. (Emphasis added).⁶⁰

As to the precedential value of the *Schanka* decisions, Shae McCrystal and Renata Grossi, in “Duress and Australian Workplace Agreements – The *Schanka* Litigation and Other Developments,”⁶¹ note that a finding of AWA ‘duress’ will be rare and will depend on the conduct of the parties in each case. The commentators assert that duress may only be particularly relevant where employees are being re-employed by a successor business. To this end, they draw attention to the fact that there was no finding of duress in the

⁶⁰ *Maritime Union of Australia v Burnie Port Corp Pty Ltd* (2000) 101 *Industrial Reports* 435-454 at 451. See also: Shae McCrystal and Renata Grossi “Duress and Australian Workplace Agreements – The *Schanka* Litigation and Other Developments” (2002) 15 *Australian Journal of Labour Law* 184-197 at 193-194.

⁶¹ Shae McCrystal and Renata Grossi “Duress and Australian Workplace Agreements – The *Schanka* Litigation and Other Developments” (2002) 15 *Australian Journal of Labour Law* 184-197 at 193-194 et seq.

Burnie decision⁶² where the job applicants were effectively strangers to the employer. In that case, Justice Ryan rejected the union's argument that offers of employment only on the basis of an AWA amounted to duress because it exploited the employer's unfair bargaining advantage at a time where conditions in the regional labour market were poor.⁶³ Unfortunately, McCrystal and Grossi do not delve into the relevance of EN's conduct in limiting bargaining options for Schanka. Surely, in the view of the present writer, such conduct is reprehensible and contrary to the scheme of the act that paints the type of conduct that amounts to duress as rare, indeed.

Further Significance of Schanka and Related Decisions:

No Disadvantage Test – Insufficient Protection From Duress?

The above passage of the judgment of Justice Ryan in *MUA v Burnie Port Corp*⁶⁴ observed the importance of the no disadvantage test to the question of whether 'take it or leave it AWAs' amount to duress. The test was said to "narrow considerably" the difference between any detriment to employees and advantage to employers in the bargaining process; as such test was the benchmark for AWAs, it prevented the 'take it or leave it AWA' option from amounting to illegitimate pressure. The caveat on that reasoning focussed on the test's reliance on awards (as opposed to bargains). As time

⁶² *Maritime Union of Australia v Burnie Port Corp Pty Ltd* (2000) 101 *Industrial Reports* 435-454.

⁶³ Shae McCrystal and Renata Grossi "Duress and Australian Workplace Agreements – The *Schanka* Litigation and Other Developments" (2002) 15 *Australian Journal of Labour Law* 184-197 at 193-194 et seq.

⁶⁴ *Maritime Union of Australia v Burnie Port Corp Pty Ltd* (2000) 101 *Industrial Reports* 435-454 at 451.

passes, awards are less likely to reflect market trends and, hence, the utility of the no disadvantage test diminishes. That latter weakness in the no disadvantage test was discussed by the present writer in Chapter Six of this thesis. Likewise, the further problems for the test as applied to AWAs were studied in the opening to this chapter – that is, the secrecy of the OEA (which initially applies the test) and the fact that the OEA may choose the benchmark award without giving reasons. Due to the relatively recent nature of the AWA duress proceedings (*Schanka* was decided in 2001), there is little, if any, commentary on whether the no disadvantage test is sufficiently old to warrant a review of the “take it or leave it AWA” position as relevant to duress. But, it is the view of the present writer, for the reasons already given, that the no disadvantage test is no longer adequate protection against duress in the context of “take it or leave it AWAs.” In this connection, there is one further residual issue, which is considered presently and demonstrates a possible way to deal with the problem.

The Need for Genuine Bargaining by Employers and a Role for the Commission?

As early as 1999, Justice Marshall, in *Australian Services Union v Electrix*,⁶⁵ dwelt upon an argument pertaining to the explanatory memorandum of the Workplace Relations Bill 1996 and its insistence that s.170WG does not preclude an offer of employment on the basis that “the employee enter into *an* AWA.”⁶⁶ The argument raised by the union in that case was whether there was a distinction between offering

⁶⁵ *Australian Services Union v Electrix Pty Ltd* (per Marshall J) (1999) 93 *Industrial Reports* 43-47.

⁶⁶ *Australian Services Union v Electrix Pty Ltd* (per Marshall J) (1999) 93 *Industrial Reports* 43-47 at 45-46.

employment on the basis of *an* AWA, which the parties will negotiate, and offering employment on the basis of one, and only one, AWA – namely, *the one* that was unilaterally drawn up by the employer.⁶⁷

Earlier in this chapter, it was acknowledged that those trumpeting the virtues of AWAs are really advocating a change in the very essence of our labour *system*. Such advocates usually reject the idea of there being a power imbalance between worker and employer. Consequently, the original blueprint for AWAs saw no need for the no disadvantage test, which is, obviously, the very *entrée for the Commission and unions to continue acting as protective devices for the rights of workers*.⁶⁸ In their stead, the champions of AWAs see workers as being protected in a different way – namely, through competent managerial staff who value their employees as individual assets of the business and have a relationship of trust. In fact, *such individuality, managerial competence and trust are crucial to the successful operation of the new type of system*.⁶⁹

Yet, black letter law emphatically shows that there are significant cases where, at the very least, there is *no* individual bargaining for AWAs or individual

⁶⁷ *Australian Services Union v Electrix Pty Ltd* (per Marshall J) (1999) 93 *Industrial Reports* 43-47 at 45-46. It is interesting to recall that such case involved a successor business.

⁶⁸ It will be recalled from Chapter Five of this thesis that the original Workplace Relations Bill contained minimum conditions for AWAs. The no disadvantage test was only included in the final legislation after a compromise deal with then holders of the balance of power in the Senate, The Australian Democrats, to ensure passage of the legislation through Parliament.

⁶⁹ Sir Roderick Carnegie as quoted in: Terry Ludeke *The Line in the Sand: The Long Road to Staff Employment in Comalco* (Wilkinson Books, Melbourne, 1996) 1-170 at 13-14 – quoted at length in Chapter Seven of this thesis. See also: Jonathan Hamburger “Individual Contracts: Beyond Enterprise Bargaining?” (ACIRRT Working Paper Number 39, Australian Centre for Industrial Relations Research and Teaching, University of Sydney, December 1995) 1-49 at 5-6, 42, 44.

contracts. Rather, these supposed tools of *individualisation* were unilaterally determined at the behest of the employer, with little or no input from any employee. Such was the situation in *Electrix*, as considered by Justice Marshall;⁷⁰ Commissioner Whelan raised the question in *GTS*;⁷¹ little individual bargaining took place for the agreements in *BHP*;⁷² and the individual contracts in *Comalco* were determined largely on a uniform basis.⁷³

Whilst this is not a socio-legal thesis, it is at least interesting to note that some socio-legal research also supports this view. In *Human Resource Management and Individualisation in Australian Labour Law*,⁷⁴ Mitchell and Fetter consider the extent to which the content of AWAs reflect and further the managerial culture they purport to pursue.⁷⁵ From studying hundreds of AWAs, Mitchell and Fetter come to the view that very few AWAs in fact reflect this culture. Rather, they largely concentrate on employer

⁷⁰ *Australian Services Union v Electrix Pty Ltd* (per Marshall J) (1999) 93 *Industrial Reports* 43-47 at 45-46.

⁷¹ Refer *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales* (Australian Industrial Relations Commission per Whelan C, M Print Q 9177, Melbourne, 27 November 1998) 1-18 at 7, 13-14.

⁷² See, for example, *Australian Workers' Union v BHP Iron Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J).

⁷³ *AMWU and Others v Alcoa Australia Limited and Others* (1996) 63 *Industrial Reports* 138 – 193 (Full Bench, Australian Industrial Relations Commission per O'Connor P; MacBean and Polites SDPP; Harrison DP; Merriman C).

⁷⁴ Richard Mitchell and Joel Fetter "Human Resource Management and Individualisation in Australian Labour Law" (2003) 45 *Journal of Industrial Relations* 292-325. See also: Richard Mitchell *Final Report: Protecting the Worker's Interest in Enterprise Bargaining - The 'No Disadvantage' Test in the Australian Federal Jurisdiction* (Prepared for the Workplace Innovation Unit, Industrial Relations Victoria by The Centre for Employment and Labour Relations Law, Law School, The University of Melbourne, 2004) 1-77.

⁷⁵ Richard Mitchell and Joel Fetter "Human Resource Management and Individualisation in Australian Labour Law" (2003) 45 *Journal of Industrial Relations* 292-325 at 295.

cost-cutting measures and sometimes contain clauses that, for example, allow for pay increases at the absolute discretion of the employer.⁷⁶ Mitchell and Fetter, themselves, note that the reality of whether a workplace is cooperative and beneficial for workers may not be reflected in the raw terms recorded in an AWA.⁷⁷ It is also important to note that all socio-legal research results depend on such things as the definitions used of particular concepts. Further, there have been a number of socio-legal studies in the area and many come to a variety of different conclusions as to the effect of the AWAs on employee rights.⁷⁸ However, this is a *legal* analysis of the no disadvantage test – concerned with the legal strength of this structural device embedded in the legislation to protect workers’ rights. So, such conflicting statistical research surely only underlines the urgency of the question that the black letter law resoundingly begs:

In circumstances where the safeguards of exemplary management; recognition of employees’ individual talents; and unfailing corporate trustworthiness do not actually ‘leap out at one,’ what becomes of the employee who signs the (take it or leave it) AWA in the absence of an effective no disadvantage test and the third party protections it ushers in?

The importance of that question is highlighted when one reflects upon the commentaries of authors such as Bennett that were discussed in Chapter Four of this

⁷⁶ Richard Mitchell and Joel Fetter “Human Resource Management and Individualisation in Australian Labour Law” (2003) 45 *Journal of Industrial Relations* 292-325 at 311 et seq.

⁷⁷ Richard Mitchell and Joel Fetter “Human Resource Management and Individualisation in Australian Labour Law” (2003) 45 *Journal of Industrial Relations* 292-325.

⁷⁸ Richard Mitchell and Joel Fetter “Human Resource Management and Individualisation in Australian Labour Law” (2003) 45 *Journal of Industrial Relations* 292-325 at 297-298 et seq; and 319-320. See also Jonathon Hamburger “Individual Contracts: Beyond Enterprise Bargaining?” (ACIRRT Working Paper No 39, Australian Centre for Industrial Relations Research and Teaching, University of Sydney, December 1995) 1-49 at 35, 44-46.

thesis.⁷⁹ In analysing the old non-union Enterprise Flexibility Agreements, Bennett found unfathomable how workers (unaided by third parties, like unions) could adequately understand all the laws governing bargaining, and appreciate what are their rights and how such things as calculation of cashed-in leave loadings actually work. The cases considered in Chapters Four through to Six of this thesis demonstrate that her fears were not without merit. In *Tweed Valley*, for example, the exercise of determining cashed in entitlements was surely difficult.⁸⁰ It is submitted that Bennett's critique is particularly relevant to the position of workers with AWAs due to the secrecy of the provisions and the limits placed on the role of unions and the Commission.

Another factor that demonstrates the importance of the question is the notion of "pattern bargaining" (ie the serving of near-identical demands by a union on numerous employers in an attempt to establish award-style uniformity in enterprise bargaining.) When one considers the "pattern agreements"⁸¹ discussed above (ie those individual agreements largely replicated across a workforce), one may well say that there is a place for such replication – after all why laboriously negotiate with individuals who are doing the same job? But that is the same argument unions have used for pursuing pattern bargaining, only to see the Federal Government pursue legislative change that seeks to

⁷⁹ Laura Bennett "Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction" (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Sydney, 1995) 129-154.

⁸⁰ *AFMEPKIU v Tweed Valley Fruit Processors* (1995) 61 *Industrial Reports* 212-235 (Australian Industrial Relations Commission per Ross VP; Duncan DP; Mahon C.)

⁸¹ Mark Wooden *The Transformation of Australian Industrial Relations* (The Federation Press, Australia, 2000) 1-238 at 94. In particular, Wooden refers to these as reducing negotiation costs for larger firms.

curb pattern bargaining by unions.⁸² The problem is, of course, whether such attempts at legislative change show an ideological bias inherent in the legislation that undercuts award-style bargaining by unions, but allows employers to individualise a workplace (ie de-unionise it) while not being substantively individualistic at all.

The Proposed Solution Spelt Out:

Throughout Chapters Four through to Six of this thesis, the present writer supported the operation of the no disadvantage test to those agreements certified by the Commission, with the rider that the standard against which the agreement is adjudged is the previous agreement, rather than an out of date award. *Contrastingly, the present writer advocates major changes to the law on AWAs. The no disadvantage test is ineffective as applied by the Office of Employment Advocate and the supposed safeguards that are meant to be inherent in AWAs (trust and individual bargaining) do not work.*

Most importantly, this author suggests limiting AWAs in their availability to high income earners and those who occupy a unique or managerial position within a

⁸² The Federal Government has underlined the importance of s.170MW *Workplace Relations Act 1996* (Cth) on genuine-bargaining through its amending legislation, the *Workplace Relations Amendment (Genuine Bargaining) Act 2002* (Cth). The current law embeds as a notation to the *Workplace Relations Act 1996* (Cth) the principles of *Australian Industry Group v AFMEPKIU* (Australian Industrial Relations Commission Print, T1982). Under that latter decision it was held that similar demands can be served on numerous employers within an industry provided that bargaining thereafter takes into account differences at particular workplaces and is not sought on an all or nothing basis. The issue of pattern bargaining existed even under the original bargaining provisions of the *Industrial Relations Act 1988* (Cth), see: Louise Willans Floyd "Termination of the Bargaining Period (Commentary on s.170MW)" in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2001) 3189 – 3196.5 at paragraph

*workplace.*⁸³ For such individuals, the idea of actually bargaining for individual terms of employment that suits their unique skill is more than a fiction; it is inherent in the nature of their work. Were that limit to be enacted, non-union bargaining would still be available for other workers in the form of s.170LK agreements, which are presently available under the auspices of the Commission. Limiting the availability of AWAs to specialised employees should have the collateral advantage of stopping pattern agreements. Were it to be retained as the enforcer of AWAs, the secrecy of the OEA would be curtailed, especially in circumstances like those that existed in the *GTS* dispute. However, the present writer fails to see why AWAs cannot fall within the jurisdiction of the Commission. To be complete and to answer the questions of the *VTHC* and *Merlo*,⁸⁴ the present writer does see some worth in the retention of AWAs in addition to common law contracts of employment. AWAs are useful for those who have already been within the award system. Further, sometimes there are real problems with the application of, for example, State laws to highly individualistic common law contracts. By retaining AWAs as an option for highly skilled managers, a truly individual agreement can be struck without the intrusion of state legislation to parties who may not have even considered their application.

170MW.85. In particular, refer to its consideration of the decision in *Shell Company of Australia; Mobil Oil; Ampol Ltd and Linfox Australia v Transport Workers Union of Australia* (1995) AILR ¶ 3-030 at 1125.

⁸³ Such view was foreshadowed by the present writer in her 1996 work: Louise Willans Floyd "Workplace Relations: Employment and Industrial Law" (Chapter 32) in Clive Turner *Australian Commercial Law* (formerly Yorston & Fortescue: 21st ed, Law Book Company, Australia, 1997) 978 – 1016.

⁸⁴ Discussed earlier in this chapter.

It is interesting to note that other well-respected commentators have canvassed further options for AWA law reform. Mitchell has spoken of the possibility of having reforms embedded in the relevant legislation that address changing workplace culture.⁸⁵ In this context, he has highlighted the problem with the present *Workplace Relations Act* 1996 in that it neither obliges employers to bargain nor to act in good faith.⁸⁶ Alternately, Hamburger, in his 1995 study, supported individual bargaining as beneficial for employers and employees, yet acknowledged there might be a need for some form of protection for workers in case some employers did try to exploit them. While not committing himself to any particular model, Hamburger raised the no disadvantage test as a possibility, but also warned against over reliance on legislation or the Commission.⁸⁷ But for this commentator, what lies at the core of law reform on this issue is acknowledging the importance of the Australian Industrial Relations Commission.

ARGUMENTS FOR THE NO DISADVANTAGE TEST, THE COMMISSION AND THE CONSTITUTIONAL BASE OF LABOR LAW

AWAs beget systemic change, whereas the no disadvantage test includes a role for the Commission and unions (even when the role of the latter may be slightly reduced).

⁸⁵ Richard Mitchell and Joel Fetter "Human Resource Management and Individualisation in Australian Labour Law" (2003) 45 *Journal of Industrial Relations* 292-325 at 294, where Mitchell outlines the English notion of "partnership at work."

⁸⁶ Richard Mitchell and Joel Fetter "Human Resource Management and Individualisation in Australian Labour Law" (2003) 45 *Journal of Industrial Relations* 292-325 at 297.

⁸⁷ Jonathon Hamburger "Individual Contracts: Beyond Enterprise Bargaining?" (ACIRRT Working Paper No 39 - Australian Centre for Industrial Relations Research and Teaching, University of Sydney - December 1995) 1-49 at 45-46.

As this chapter draws to a close, the present writer amplifies her support for the Commission system.

The Commission's Raison D'etre (The more things change, the more they stay the same):

It will be recalled from Chapter Three of this thesis that when the Founding Fathers were preparing to draw up the Australian Constitution in the late 1800s, no one compelled them to adopt conciliation and arbitration.⁸⁸ They were painting on a blank canvass, writing on a fresh script. They chose the *Australian system of establishing a Commission to prevent and settle industrial disputes* over American style collective bargaining and in preference to statutory minimum conditions as a device to protect workers.⁸⁹ The Commission was chosen partly to stop the crippling strikes that had gripped the young nation at that time, and so allow it to take its place and trade in the world.⁹⁰ In tandem with that reason was a more noble, lofty pursuit. It went to the core of the young nation's character in the Deakin Settlement – that this country was to be fair and just for all. "Might should not equal right," it will be recalled, and the Commission was to mete out its decisions fairly, in accordance with what it viewed as right and

⁸⁸ See, for instance: Sir Alfred Deakin "Second Reading of the Conciliation and Arbitration Bill 1903" *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) 2864 et seq.

⁸⁹ Sir Alfred Deakin "Second Reading of the Conciliation and Arbitration Bill 1903" *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) 2868.

⁹⁰ Sir Alfred Deakin "Second Reading of the Conciliation and Arbitration Bill 1903" *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) 2870.

showing regard to the public interest.⁹¹ Yet another reason for the adoption of the Commission system was, ironically, the very reason that some question the worth of the Commission today – it was the need for flexibility. It was noted in Chapter Three and again in the opening to this Chapter, that the Commission system (of hearing disputes then handing down decisions) was seen as being as flexible as an “elephant’s trunk.” It was something that could adapt to the exigencies of life and the many colours of the human rainbow.⁹² For all those reasons, the Australian labour system was embedded in the *Australian Constitution*. As such, it was a part of the foundation stone of this country.⁹³ And it was harder to change than any other piece of legislation.⁹⁴

Jettisoning the Commission – a labor system not reliant on 51(xxxv)?

Chapter Three amply demonstrated both the arguments in favour of and the criticisms that have been made against the Commission system. What is apposite for the present analysis of AWAs is an understanding of the collateral argument for simply

⁹¹ It will be recalled from chapter three that the Commission was charged with considering the public interest generally in discharging its functions – that is public interest over and above that listed in the no disadvantage test, which is specific to a particular agreement.

⁹² Sir Alfred Deakin “Second Reading of the Conciliation and Arbitration Bill 1903” *Commonwealth of Australia Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) 2866 – see also 2865.

⁹³ Ron McCallum “Collective Labour Law, Citizenship and the Future” [1998] *Melbourne University Law Review* 42-61.

⁹⁴ Patrick Parkinson *Tradition and Change in Australian Law* (The Law Book Company, Sydney, 1994) 1-303 at 155 et seq.

ignoring the Commission or abolishing it by relying on a different head of Constitutional power from 51(xxxv).⁹⁵

In May 1977, Professor Jim O'Donovan pioneered the question: *Can the Contract of Employment be Regulated Through the Corporations Power?*⁹⁶ The professor concluded that the Commonwealth *could* regulate the employment relationship through use of placitum 51(xx) of the *Constitution*.⁹⁷ Such could be done by broadly defining the expression “trading corporations” and their associated trading activities, or by denying a corporation the right to trade unless it satisfies certain requirements regarding its employees.⁹⁸ Such finding meant that “‘bread and butter issues’ such as wages, hours and leave entitlements could be regulated *without resort to the dispute machinery provided by the arbitration system*.”⁹⁹ Likewise, national health and safety;

⁹⁵ While it goes beyond the scope of this thesis, which concentrates on collective Australian problems, it is interesting to note the issue of international conflicts of labor laws: see for example, Ron McCallum “Conflicts of Laws and Labour Law in the New Economy” (2003) 16 *Australian Journal of Labour Law* 50-68.

⁹⁶ Jim O'Donovan “Can the Contract of Employment be Regulated Through the Corporations Power?” (1977) 51 *Australian Law Journal* 234 – 246, for example 234, 246.

⁹⁷ “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.”

⁹⁸ Jim O'Donovan “Can the Contract of Employment be Regulated Through the Corporations Power?” (1977) 51 *Australian Law Journal* 234 – 246 at 246, 239 et seq.

⁹⁹ Jim O'Donovan “Can the Contract of Employment be Regulated Through the Corporations Power?” (1977) 51 *Australian Law Journal* 234 – 246 at 239 et seq. [Emphasis added] Contrast O'Donovan's circumspection (regarding the implications of the corporations power for the arbitration system) with what may well prove the naivete of then Attorney-General Mr R J Ellicott QC, who said: “The corporations power could probably be used to back up the Arbitration Commission and its awards...” (as cited in O'Donovan at 246 - footnote 44.) The analysis in the following pages of this thesis demonstrates that O'Donovan's circumspection was well founded.

superannuation; and redundancy schemes could be established.¹⁰⁰ O'Donovan's reflections on the potential for government to use non-specifically industrial powers to regulate industrial relations were ominous:

"The burden of this article has been to show that the corporations power does have a latent potential in the field of industrial law. *Whether it would be prudent to tap this potential and abandon the traditional method of regulating the employment relationship in the corporations described is a much broader, more controversial issue. A number of features of legislation passed in reliance upon s.51, pl (xx) might well be undesirable and politically unpalatable.* One of course is the indirect, almost coercive, method of regulation which could be adopted under pl. (xx). Another is the fact that any legislation passed in reliance on the corporations power would be restricted in its operation to certain types of corporate employers leaving other employers beyond the reach of the federal laws enacted in pursuance of the corporations power. These are serious objections but they do not deprive the Commonwealth of the power to play a more active part in the development of industrial law if, and when, it considers such a role necessary or even useful. *Yet, far from being a panacea in the field of industrial relations, the corporations power might well prove to be a Pandora's box.*"¹⁰¹ [emphasis added]

In 2004, it is clear that the "Pandora's box" is well and truly open. The AWA provisions of the *Workplace Relations Act 1996* depend on the corporations power. Likewise, cases such as *Victoria and Ors v Commonwealth*,¹⁰² leave beyond doubt that further powers (such as foreign affairs) can also be used to ground industrial legislation. **At the moment, those further powers exist parallel with the conciliation and arbitration model. But the question raised by some (and exemplified by AWAs) is whether 51(xxxv) and its attendant Commission and no disadvantage test should be jettisoned, and these other constitutional powers should be relied on exclusively.**

¹⁰⁰ Jim O'Donovan "Can the Contract of Employment be Regulated Through the Corporations Power?" (1977) 51 *Australian Law Journal* 234 – 246 at 239 et seq.

¹⁰¹ Jim O'Donovan "Can the Contract of Employment be Regulated Through the Corporations Power?" (1977) 51 *Australian Law Journal* 234 – 246 at 246.

¹⁰² *Victoria v Commonwealth* (1996) 187 *Commonwealth Law Reports* 416.

The Alternatives:

The original Rock Solid Guarantee speech outlined AWAs as the new tomorrow and the original Workplace Relations Bill saw no purpose for the Commission and the no disadvantage test associated with AWAs.¹⁰³ Indeed, a reading of subsequent Coalition policy reform documents, such as: *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay*;¹⁰⁴ *Getting the Outsiders Inside – Towards a Rational Workplace Relations System in Australia*,¹⁰⁵ and the most recent offering from the 2004 election, *Flexibility and Productivity in the Workplace: The Key to Jobs*¹⁰⁶ confirm that the government's ongoing concern is to achieve a system based on the corporations power. In that world, industrial relations would be based on individual agreements, underpinned (likely) by statutory minimum conditions, regarding which the commission would have a limited and mainly conciliatory function. Likewise, unions would be peripheral and the relevance of the broader public interest or good in the settlement of disputes would be marginal. As regards the minutiae of such changes,

¹⁰³ Hon. John Howard MP *Address to 28th Young Liberal Movement Convention* (Australian National University, Canberra, 8 January 1996) 1-9. (Copy supplied by Prime Minister's Office and on file with author) Refer also Chapter Five of this thesis for details of the passage of the *Workplace Relations Act* 1996 (Cth).

¹⁰⁴ Hon Peter Reith MP, Minister for Employment, Workplace Relations and Small Business *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay* (Australian Government Printing Service, Canberra, May 1999) 1-44.

¹⁰⁵ Hon Peter Reith MP, *Getting Towards a Rational Workplace Relations System in Australia* (Ministerial Address to the National Press Club, Canberra, 24 March 1999) 1-50. (Copy supplied by the former Minister's office and on file with author.)

¹⁰⁶ Liberal Party of Australia *Flexibility and Productivity in the Workplace: The Key to Jobs* (www.liberal.org.au last accessed 21 October 2004) 1-19. Such inference about continuing structural reform may also be drawn from: Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, "Where To From Here?" An address to the Australian Industrial Relations Commission Centenary Conference *The Centenary Convention: the Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9. (Copy on file with author).

private mediators are often suggested as an option for dispute resolution (in contrast with the Commission's traditional role as conciliator),¹⁰⁷ and flexible appointment arrangements (in the form of changes to tenure for Commissioners) have been suggested at various stages.¹⁰⁸ There was to be further simplification of awards as a safety net for the low paid and the Commission was to be re-oriented towards the maintenance of that basic safety net, with a lesser role in arbitration.¹⁰⁹ Importantly, so far as this thesis is concerned, the 1999 policy advocated the Commission was to relinquish its role in the application of the no disadvantage test to Australian Workplace Agreements and curtail its role regarding Certified Agreements by assuming such met the test unless specific concerns were raised.¹¹⁰ There were to be controls on coercion and industrial action, but these appeared to be more geared against trade unions than manipulative employers.¹¹¹

¹⁰⁷ Hon Peter Reith MP, Minister for Employment, Workplace Relations and Small Business *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay* (Australian Government Printing Service, Canberra, May 1999) 1-44 at 2, 3, 19-20. See also Liberal Party of Australia *Flexibility and Productivity in the Workplace: The Key to Jobs* (www.liberal.org.au last accessed 21 October 2004) 1-19 at 6.

¹⁰⁸ Hon Peter Reith MP, Minister for Employment, Workplace Relations and Small Business *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay* (Australian Government Printing Service, Canberra, May 1999) 1-44 at 16.

¹⁰⁹ Liberal Party of Australia *Flexibility and Productivity in the Workplace: The Key to Jobs* (www.liberal.org.au last accessed 21 October 2004) 1-19 at 7.

¹¹⁰ Hon Peter Reith, Minister for Employment, Workplace Relations and Small Business *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay* (Australian Government Printing Service, May 1999) 1-44 at 15 et seq as well as: 2, 7, 8 and 11.

¹¹¹ Hon Peter Reith MP, Minister for Employment, Workplace Relations and Small Business *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay* (Australian Government Printing Service, Canberra, May 1999) 1-44 at 3, 25 et seq. Liberal Party of Australia *Flexibility and Productivity in the Workplace: The Key to Jobs* (www.liberal.org.au last accessed 21 October 2004) 1-19 at 7 et seq.

The government's drive for a contractualist model is supported by non-government think-tanks such as the Institute of Public Affairs (IPA). The 2003 IPA conference, encouraging the use of the *Trade Practices Act 1974* in industrial relations, featured papers that regarded trade unions as anti-competitive oligopolies.¹¹² In his paper, "Trade Practices Limitations", Graham Smith, for example, referred to unions (and by implication The Commission which gives them a hearing) in the following terms:

"One always needs to begin an analysis of the interaction between trade practices law and industrial relations law with the observation that most industrial relations laws are basically anti-competitive. Unions... inherently operate in restraint of trade... They seek to create monopolies of labour and aim to prevent competition in labour markets..."

"Labour laws which protect unions from the common law restraint of trade doctrines (such as the...registration provisions of the *Workplace Relations Act*) are inherently anti-competitive. This is because they give unions the springboard to achieve, by lawful exertion of collective pressure, industrial settlements such as industrial awards which provide a level playing field in labour markets and between competing firms.

"The principal labour laws which go the other way and which promote a degree of competition in labour markets are the *Trade Practices Act* itself and of course enterprise bargaining laws. I have always been an advocate of the use of enterprise bargaining by firms to gain competitive advantage over other firms... *Companies that are not using enterprise bargaining to maximise competitive advantage are, I believe, selling their shareholders short.*

"However,...even the enterprise bargaining laws contain some elements which enhance anti-competitiveness. At least in terms of conferring protection from some of the provisions of the *Trade Practices Act*. (Emphasis added)"¹¹³

¹¹² See, for example, John Trew QC "Existing Opportunities" delivered at *Institute of Public Affairs Conference, The Last Frontier: Making Industrial Relations Subject to the Trade Practices Act* (22 May 2003). (Paper on file with author and kindly supplied by her colleague Associate Professor Donald Gifford, University of Queensland).

¹¹³ Graham Smith "Trade Practices Limitations" 1-8 at 1, 2 delivered at *Institute of Public Affairs Conference The Last Frontier: Making Industrial Relations Subject to the Trade Practices Act* (22 May 2003). (Paper on file with author and kindly supplied by her colleague Associate Professor Donald Gifford, University of Queensland).

Although present day Labor espouses the virtues of the Commission¹¹⁴ such has hardly been a uniform stand. It will be recalled from the consideration of the speech of former Labor Prime Minister Paul Keating to the National Institute of Company Directors that Labor,¹¹⁵ at one stage, championed something like minimum conditions, itself. It must also be recalled that the original move towards enterprise bargaining was facilitated by Labor legislation.¹¹⁶ In fact, in reflecting on the alternatives offered by Australia's major political parties in the early 1990s,¹¹⁷ Stewart previewed what a modified Australian system might resemble under a then Labor Government:

“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 be 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 bargaining, rather than the potentially one-sided individual employment arrangements given overriding affect under

¹¹⁴ Refer, for example, speech of Hon Bob Hawke, former Prime Minister, addressing the AIRC Centenary Conference. Although clearly Mr Hawke is no longer Labor leader, his views are a fair reflection of the Labor Party’s position on this issue.

¹¹⁵ Former Prime Minister Keating’s speech to the National Institute of Company Directors was acknowledged in Terry Ludeke “The Evolving Industrial Relations Regime: The Federal System – 1992-1998” (1998) 72 *Australian Law Journal* 863-870. The speech was set out in Chapter Seven of this thesis and also referred to in Chapter Five.

¹¹⁶ Refer to the history of the no disadvantage test, which was discussed in more detail in chapter four of this thesis.

¹¹⁷ Liberal Party of Australia *Fightback! It’s Your Australia* (Online Offset Printers, Canberra, 1992) 1-67 compared to the policies embodied ultimately in the Labor Party’s Industrial Relations Reform Bill 1993.

New Zealand's *Employment Contracts Act 1991* or the *Employee Relations Act 1992* in Victoria."¹¹⁸

As discussed in Chapter Three and also Chapter Seven of this thesis, the reasons for such a stance usually relate to the need to be flexible in a world of globalisation and technological change. The complex nature of the Commission system (particularly the notion of 'paper disputes,' which allow unions to create a problem with a reasonable non-union employer in order to embrace a particular workplace) is also a factor.

In Defence of the Commission and No Disadvantage Test:

It is true, the world is a different place today than it was in the late 1800s and early 1900s. But simply because there have been developments in a society does not make the problems of a bygone era irrelevant. After all, were not our Founding Fathers concerned about the young Australian nation's capacity to trade with other nations? Likewise, was it not the case that those who drafted the Constitution wanted a system flexible enough to deal with the many nuances of life? Surely these questions have a resonance with any era. And despite the specificity of any age's problems, many of the basic elements will remain the same. As Justice Kirby said: life is a "constant *rediscovery* of things that are fundamental."¹¹⁹

¹¹⁸ Andrew Stewart "Federal Regulation and the Use of Powers Other than the Industrial Power" (Chapter Eight) in (Paul Ronfeldt and Ron McCallum eds) *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (ACIRRT Monograph No 6, Australian Centre for Industrial Relations Research and Teaching, Sydney, 1993) 86-100 at 92.

¹¹⁹ This passage of Justice Kirby's speech was discussed in greater detail in Chapter Three of this thesis.

In a speech presented to the University of Sydney in 1996, Professor McCallum warned of the dangers of making workers bargain for themselves – without a safety net.¹²⁰ Yet the Professor also counseled against simply “re-enacting” the original conciliation and arbitration model.¹²¹ As the Professor observed and as noted in chapter three, the time when conciliation and arbitration triumphed over contractualism pre-dated Gallipoli by almost a quarter of a century. It is the view of the present writer that the current hybrid Australian system of labour law is the correct balance between protecting workers and facilitating flexibility in business – it is the correct blend of Australia’s rich labour tradition and the need to change. The crux of that balance is the no disadvantage test and the role it offers the Commission (and possibly unions).

The Flexibility of the Commission:

The many cases considered in Chapters Four through to Six of this thesis demonstrate the chameleon-like quality and flexibility that the Commission has shown over the years. It has dealt with everything from the cashing in of leave entitlements through to the conflicting objects of the Workplace Relations Act 1996. Its Commissioners have noted defects in evidence in cases and undertaken difficult calculations as to what changes in conditions of employment translate to in effect. One can only wonder exactly how fitting any solution would be if it were purely the creature

¹²⁰ Ron McCallum, “Australian Workplaces, The Rise of Contractualism and Industrial Citizenship” paper presented at *Employment Contracts: Their Role in Industrial Relations?* (Fourth Annual Labor Law Conference, University of Sydney, 1996) 1-4 at 1-2.

¹²¹ Ron McCallum, “Australian Workplaces, The Rise of Contractualism and Industrial Citizenship” paper presented at *Employment Contracts: Their Role in Industrial Relations?* (Fourth Annual Labor Law Conference, University of Sydney, 1996) 1-4 at 1-2.

of statute and lacked the knowledge, experience and inherent flexibility of a tribunal staffed by persons who had actually represented the very employers, unions and employees whom it governed.

In the foreword to the collection of papers, *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations*,¹²² Justice PRA Gray reflected upon the early constitutional debates of the Founding Fathers and the fact that the worth of the contractual system as opposed to one involving arbitration was the point at issue even then. Noting that a contractual system would involve the fixing of terms of employment by the Government of the day, Justice Gray spoke of the flexibility of the arbitration system and its reliance on consensus between the parties to the employment relationship:

“Conciliation and arbitration did, however, prove itself to be remarkably flexible in producing a range of outcomes over the past 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 the 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..

¹²² (Paul Ronfeldt and Ron McCallum eds) *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (ACCIRT Monograph No. 9; Australian Centre for Industrial Relations Research and Teaching, Sydney, 1993) 1-153 at iii-v.

“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 procedures by which they are achieved must be fair. (Emphasis added)”¹²³

Importance of The Commission in Preference to the Common Law Courts:

Justice Gray’s allusion to the common law contract of employment hints at another reason for supporting a Commission system. Chapter Two of this thesis studied the notion of power imbalance. It also discussed the difficulties of applying typical common law notions in the context of labour law.

In recent times, numerous scholars have been apt to highlight positive common law developments in terms of protection of weaker parties. The embracing of the implied duty of trust and confidence by the House of Lords in *Malik v Bank of Credit and Commerce International SA (in liq)*¹²⁴ was met with enthusiasm by Riley as paving the way for greater rights for employees at common law.¹²⁵ McCarry¹²⁶ and Naughton¹²⁷

¹²³ (Paul Ronfeldt and Ron McCallum eds) *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (ACCIRT Monograph No. 9; Australian Centre for Industrial Relations Research and Teaching, Sydney, 1993) 1-153 at iii-v, iv, v.

¹²⁴ *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] *Appeal Cases* 20-53.

¹²⁵ Joellen Riley “Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?” (2003) 16 *Australian Journal of Labour Law* 28-49.

were more circumspect as to the extent of the protection it will provide, at this stage, due to the unusual facts of the case. Further the doyen, Dr Douglas Brodie, (whose analysis the House of Lords accepted)¹²⁸ welcomed *Malik*,¹²⁹ but only as a step on the way to fully compensate employees for loss.¹³⁰

In his 1997 article, “Exhuming the Individual Contract: A Case of Labour Law Exceptionalism,”¹³¹ Chin considered the increasing protection offered to what might be dubbed ‘weaker parties’ under the common law of contract, particularly in the context of consumer protection laws. According to Chin:

“The legal developments in the field of contract in the last 20 years have been impelled by a recognition that the laissez-faire views of the law of contract are inadequate for the complexities of the latter part of the twentieth century. Instead, rules and frameworks need to be developed which ensure just and fair outcomes in consumer and commercial transactions whilst *taking proper account of the inevitable inequality of bargaining power between major institutions and individuals on the one hand and, on the other, the need to maintain a proper balance between reasonable notions of justice and fairness and the adoption of principles which transcend the particular individual case*. Hence it has been claimed that ‘we have witnessed what it does not seem too fanciful to describe as a socialisation of our theory of

¹²⁶ Greg McCarry “Damages for Breach of the Employer’s Implied Duty of Trust and Confidence” (1998) 26 *Australian Business Law Review* 141-146

¹²⁷ Richard Naughton “The Implied Obligation of Mutual Trust and Confidence – A New Cause of Action for Employees?” (1997) 10 *Australian Journal of Labour Law* 287-291.

¹²⁸ For such implicit praise see: Greg McCarry “Damages for Breach of the Employer’s Implied Duty of Trust and Confidence” (1998) 26 *Australian Business Law Review* 141-146 at 142; and Joellen Riley “Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?” (2003) 16 *Australian Journal of Labour Law* 28-49.

¹²⁹ Douglas Brodie “A Fair Deal At Work” (1999) 19 *Oxford Journal of Legal Studies* 83-98 at 88. See also: Douglas Brodie “Beyond Exchange: The New Contract of Employment” (1998) 27 *Industrial Law Journal* 79-102; and Douglas Brodie “The Heart of the Matter: Mutual Trust and Confidence” (1996) 25 *Industrial Law Journal* 121-139.

¹³⁰ Douglas Brodie “A Fair Deal At Work” (1999) 19 *Oxford Journal of Legal Studies* 83-98 at 88.

¹³¹ David Chin “Exhuming the Individual Contract of Employment Contract: A Case of Labour Law Exceptionalism” (1997) 10 *Australian Journal of Labour Law* 257-279.

contract.’ In other words, the law has endeavoured to ameliorate the harsher outcomes from the equivalent ‘higgling in the market’ for goods and services generally [footnotes omitted; emphasis added.]¹³²

Yet Chin noted that labour law was the exception – in which contract was being used to disenfranchise weaker parties. Likewise, the discussion at the start of this chapter of the law on duress demonstrates that some common law concepts give little weight to the problems of workers and are an obstacle to their progress.

The further problem with relying on common law remedies is their means of enforcement. As North¹³³ noted in his discussion of the *Dollar Sweets* decision,¹³⁴ the moment recourse is made to the common law courts, questions arise as to whether parties have the money to afford good counsel; and whether a rich litigant (likely an employer) could deliberately stall proceedings so that a poorer (yet meritorious) litigant can no longer continue the fight. As discussed in Chapter Three of this thesis, these were the very problems that the Australian Industrial Relations Commission was designed to avoid. Finally, recourse to the common law courts, and for that matter reliance on minimum conditions as a means of protection, requires that individual workers know their rights and feel comfortable attempting to enforce them. Clearly, that is not always the case.

¹³² David Chin “Exhuming the Individual Contract of Employment Contract: A Case of Labour Law Exceptionalism” (1997) 10 *Australian Journal of Labour Law* 257-279 at 270 et seq. Chin’s work goes on to discuss cases such as: *Commercial Bank of Australia Ltd v Amadio* (1983) 151 *Commonwealth Law Reports* 447; and *Walton’s Stores (Interstate) Ltd v Maher* (1988) 164 *Commonwealth Law Reports* 387.

¹³³ David North QC “Industrial Action – The Need for Change in the Law” (1991) 65 *Law Institute Journal* 608-610.

¹³⁴ *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia and Others* [1986] *Victorian Reports* 383-391 (per Murphy J).

CONCLUSION:

In his celebrated 1998 Foenander lecture, "Collective Labour Law, Citizenship and the Future," Professor Ron McCallum eloquently reflected upon the interpretive history of placitum 51(xxxv), in particular the High Court's reluctance to construe the notion of an "interstate industrial dispute" as grounding a jurisdiction for the Commission to deal with individual rights, such as reinstatement.¹³⁵ Compounding that obstacle were such problems as the inability to obtain injunctions to prevent a foreshadowed breach of an award.¹³⁶ These difficulties, combined with globalisation, technological change and a basic downturn in unionism, according to the professor, caused the *significance of the Australian Industrial Relations Commission to be blurred. That, so says Professor McCallum, is the real crisis in Australian labor law. It is also central to the writing of this thesis.* The purpose behind Professor McCallum's speech, then, was to remind Australians that their system of labour laws is a separate statutory mechanism through which workers may seek to have their terms and conditions of employment impartially countenanced; as such, that system has enriched the overall society.¹³⁷

"...Throughout most of this century, conciliation and arbitration has participated in welding this continental nation together. It has bestowed benefits upon workers, and the equality of this bestowing has played an important part in the creation of a national economic structure and a largely egalitarian society where social, rights are protected."

¹³⁵ Ron McCallum "Collective Labour Law, Citizenship and the Future" [1998] *Melbourne University Law Review* 42-61 at 51 et seq. Other substantial aspects of this luminous work were considered earlier in this thesis in Chapter Three.

¹³⁶ Ron McCallum "Collective Labour Law, Citizenship and the Future" [1998] *Melbourne University Law Review* 42-61 at 53 et seq.

¹³⁷ Ron McCallum "Collective Labour Law, Citizenship and the Future" [1998] *Melbourne University Law Review* 42-61 at 57 et seq, especially 59.

To Professor McCallum, that meant placing more emphasis on the power of the Commission to conciliate disputes and, in so doing, deal with the problems of individual workers.¹³⁸ Whether that view is accepted goes beyond the scope of this thesis, that deals with collective protection. However, what is directly on point is the Professor's plea:¹³⁹

“If the proponents of independent labour tribunals remain silent, conservative governments will continue with their strategy of downgrading these bodies. We do not want to find ourselves in the position of...having to rebuild collective labour law virtually from scratch...”

¹³⁸ Ron McCallum “Collective Labour Law, Citizenship and the Future” [1998] *Melbourne University Law Review* 42-61 at 58 et seq.

¹³⁹ Ron McCallum “Collective Labour Law, Citizenship and the Future” [1998] *Melbourne University Law Review* 42-61 at 57 et seq, especially 59.

IX. CHAPTER NINE - CONCLUSION:

Reinvigorating Collective Labour Law

“Sometimes I even want to tap with my long snout on those divers’ goggles and say: You want to know what this country will become? Ask me – after all, if you can’t trust a liar and a forger, a whore and an informer, a convicted murderer and a thief, you’ll never understand this country. Because we all make our accommodations with power, and the mass of us would sell our brother or sister for a bit of peace and quiet. We’ve been trained to live a life of moral cowardice while all the time comforting ourselves that we are nature’s rebels. But in truth we’ve never got upset and excited about anything; we’re like the sheep we shot the Aborigines to make way for, docile until slaughter.”¹

Richard Flanagan used these words at the end of his novel, *Gould’s Book of Fish*.²

That work explored many themes – that development provides change, yet also predictability; that history may be corrupted; and that dreams of grandeur may be fruitless or may lie in a yearning for something we have cherished in the past.³ Yet that particular passage may seem almost a ‘call to arms’ – a wish to stand for something that goes to the heart of life...

¹ Richard Flanagan *Gould’s Book of Fish – A Novel in Twelve Fish* (Picador – Pan MacMillan, Australia, 2001) 1-404 at 400-401.

² Richard Flanagan *Gould’s Book of Fish – A Novel in Twelve Fish* (Picador – Pan MacMillan Australia 2001) 1-404.

³ See for example: Brian Matthews “The Ministry of Fish” (2001) 235 *Australian Book Review* 41-42; and Jesse Shipway “Wishing for Modernity: Temporality and Desire in Gould’s Book of Fish”(2003) 21 *Australian Literary Studies* 43-53 at 45, 47 and 52.

The Argument of the Thesis:

Essentially, this thesis is an argument in support of the no disadvantage test. Such is a fair balance between the need to protect the position of workers, as well as the need to facilitate business flexibility and terms of employment that are relevant to actual workplaces, rather than rigidly applied across an industry. Importantly, the test is the means by which the Australian Industrial Relations Commission retains a vibrant, active role in this country's industrial life (particularly in the context of collective agreements). This is a real strength of the present system and a necessary support for the effectiveness of the no disadvantage test, itself. The prospect of responsible union representation is also applauded. To the extent that the no disadvantage test is applied by the alternate body, the Office of Employment Advocate (in the context of AWAs), the test is viewed as wanting. In fact, the advent of the Employment Advocate and AWAs (in their present incarnation) is seen as taking Australia down the road of individualisation largely at the expense of workers' rights. Being a discretion, the 'no disadvantage test' is not an iron-clad guarantee that every one of its aims will be fulfilled on every application, even when applied by the Commission. So, some fortification of the test is necessary – although not at the expense of the flexibility of the test, which is, itself, a strength. Being the conduit for both individual bargaining and centralised protection for the weak, the no disadvantage test goes to the heart of Australia's hybrid labor system. As legislative changes to address those possibly contrasting goals have been made by governments of both political colours and as the Federal Government has already foreshadowed changes to the Workplace Relations Act 1996 right at the very start of its fourth term in office, it is

a fair observation that *ours is a system in transition* and will remain so for the foreseeable future. Consequently, *this thesis makes a timely and original scholarly contribution to the ongoing debate on the laws that govern this country's working life and the form they should take. It has, as its quest, the retention of a fortified no disadvantage test and strengthened role for the Commission and unions (as opposed to the Office of Employment Advocate and individualistic AWAs).*

The Argument in Depth:

The above argument was inspired by the 'Rock Solid Guarantee' speech, made by the now Prime Minister, in foreshadowing proposed changes to our labour system. Much of the commentary on that speech concentrated on its guaranteeing no reduction in award level take-home pay for workers in the proposed decentralised system. More important, though, were the omissions from that guarantee. There were no assurances as to the protection of any other terms of employment for workers. Likewise, systemic change was advocated through which unions and the Commission were seen as anathema. The dilution of these proposed legislative changes only occurred due to amendments forced upon the Government in the Australian Senate. That 'eleventh-hour' retention of the no disadvantage test and its supporting structures underlines the importance of defending their very worth. Such argument, which lies at the heart of this thesis, is made out in the following manner...

The early chapters of this thesis (in Part A), Chapters Two and Three, establish some of the basic concepts on which its central argument is built. *In Chapter Two, it is accepted that there is a power imbalance between workers and employers.* The present writer rejects arguments by Hayek,⁴ Schwab⁵ and Epstein⁶ that buoyant free enterprise enables the creation of jobs and that the free market ensures pay rates will always be viable. Instead, she relies on the Webbs;⁷ Wedderburn,⁸ Kahn-Freund;⁹ Higgins;¹⁰ and Stewart¹¹ to argue that the power of an employer to deny work to the potential employee (who has bills to pay and food to buy) provides that employer with a superior bargaining position in most cases. That being the case, *the present writer argues in favour of government intervention in labour law to ensure workers are protected.*

⁴ Friedrich Hayek *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569; and *Law, Legislation and Liberty* (The University of Chicago Press, USA, 1973) (Volumes 1-3).

⁵ Stewart Schwab "Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?" (2001) 76 *Indiana Law Journal* 29 – 48. See, also, the text by the same author, *Employment Law Cases and Materials* (Lexis Law Publishing, USA, 2002) 1-1293 at 7-8.

⁶ Richard Epstein "In Defense of the Contract at Will" (1984) 51 *University of Chicago Law Review* 947-982.

⁷ Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927; and *The History of Trade Unionism* (Longmans, Green and Co., 1920) 1-784.

⁸ Lord Wedderburn, *The Worker and the Law* (3rd ed, Pelican Books, England, 1986) 1-1026; "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38; and "Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition" (2000) 29 *Industrial Law Journal* 1-42.

⁹ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296.

¹⁰ See, for example, *Ex parte H v McKay (The Harvester Judgment)* (1907) 2 *Commonwealth Arbitration Reports* 1-33 (per Higgins J).

¹¹ Andrew Stewart "Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation" (1982) 5 *Australian Journal of Labour Law* 101 – 134

In Chapter Three, it is argued that the most appropriate form of legislative intervention is the means on which we have relied since the writing of the Australian Constitution, namely the Australian Industrial Relations Commission. Certainly, academics, like Niland,¹² are correct in saying that the tribunal is somewhat unusual. It both settles disputes between parties and establishes the terms of employment that will govern their relationship in years to come. Likewise, there may well have been times when the Commission acted too rigidly in laying down conditions that applied across an industry – perhaps it even became like a club. But any such phases of development should never belie its inherent worth. The Commission was not established by a simple Act of Parliament that could be altered on a change of government. Rather, it was a mechanism for hearing and determining particular disputes that was enshrined in our Constitution. As such, it acted flexibly in hearing the disputes of particular parties. And it aspired for industrial peace through fairness and the protection of the public good. These aspirations stemmed from the Deakin settlement and are enhanced by recent legislative reform.¹³

¹² John Niland "Process and Strategy in Industrial Relations Reform" (Chapter Fifteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen and Unwin Publishers; Sydney; 1986); "The Light on the Horizon" (Chapter Fifteen) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press; Australia 1990) 182 – 207; and *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, Sydney, 1978) 1-174. See also: Kenneth Walker "Compulsory Arbitration in Australia" in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books, USA, 1976) 1-44.

¹³ Joe Isaac "The Arbitration Commission: Prime Mover or Facilitator" (1989) 31 *Journal of Industrial Relations* 407-427; Edward Davis and Russell Lansbury "Employment Relations in Australia" (Chapter Five) in (Greg Bamber and Russell Lansbury eds) *International and Comparative Employment Relations: A Study of Industrialised Market Economies* (Allen & Unwin, Sydney, 1998) 110-143; Don Rawson "Industrial Relations and the Art of the Possible" (Chapter Sixteen) in (Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen & Unwin; Sydney; 1986) 273-297; Richard Mitchell and Malcolm Rimmer "Labour Law, Deregulation, and Flexibility in Australian Industrial Relations" (1990-91) 12 *Comparative Labor Law Journal* 1-34.

Chapters Four through to Six of this thesis (Part B) deal with that legislative reform, which ushered in the no disadvantage test and the hybrid system we have today.

Chapter Four develops the analysis of the advent (in the 1980s and 1990s) of globalisation and instantaneous communication, and the premium they place on flexibility that allows particular businesses to respond quickly and efficiently to the challenges they face. At that point in time, the Commission and the traditional conciliation and arbitration system may well have become somewhat rigid, sometimes applying principles across an entire industry. *So, the present writer supports moves towards individualisation and decentralisation in principle.* The early steps in this direction occurred most notably through the *Industrial Relations Reform Act 1994*. That system allowed bargaining for terms of employment at *particular* workplaces. But, importantly, it contained '*the no disadvantage test*' whereby all new agreements were adjudged by the Australian Industrial Relations Commission against the relevant award on a line-by-line basis before the agreement could take effect at law. The public interest was also relevant to the operation of the test – if there was an alteration to award conditions, then the agreement could still pass the test if it was in the public interest. An analysis of the cases in which the Commission applied the no disadvantage test to agreements demonstrated the fundamental role the Commission played in ensuring the new system afforded flexibility for businesses, yet not at the expense of the security of workers. In cases such as: *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility*

Agreement;¹⁴ and *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994*¹⁵ the Commission undertook complex exercises of determining whether proposed rates of pay compensated for forgoing penalty rates; it also examined the social implications of the cashing in of various leave entitlements – rejecting or modifying agreements, as the justice of the case demanded it. Under this system, workplace agreements could be made either between a union and an employer or a group of employees and an employer. This led Bennett¹⁶ to question whether workers would be protected in the latter type of agreement – if they had to inform themselves of the machinations of the new system. Indeed, many of the leading cases in which the Commission intervened and modified proposed agreements were those of the non-union variety. However, as Coulthard¹⁷ notes, such agreements were few in number; and there were numerous opportunities for unions to intercede. Besides, the Commission was required to certify the agreement before it became law, hence that was an ultimate protection.

Chapter Five goes on to discuss the present system under the *Workplace Relations Act 1996*. That regime retains a no disadvantage test, but it is broader and easier to pass than its predecessor. There is a role for the Commission in administering the test, but the jurisdiction of the Commission is limited to twenty allowable matters.

¹⁴ *Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement* (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22.

¹⁵ *Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994* (Australian Industrial Relations Commission per Ross VP, Print L4744, 16 January 1995) 1-18.

¹⁶ Laura Bennett "Bargaining Away the Rights of the Weak: Non-Union Agreements in the Federal Jurisdiction" (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Sydney, 1995) 154-184 at, for example, 174 et seq.

Finally, there is some scope for trade unions to form agreements but their enshrined place within the system is gone. While these features of the current system at least resemble the earlier bargaining model and some features of the arbitration system, of equal importance is the fact that these features were retained in the legislation only due to amendments forced upon the government by the Senate. Even more importantly, the *Workplace Relations Act 1996* introduces AWAs – contracts which are negotiated between the employer and the individual employee and override awards. The no disadvantage test does apply to these agreements, but it is administered, in the first instance, by the Employment Advocate. The Industrial Relations Commission only becomes involved in the process if the OEA has concerns about the AWA and refers it to the Commission. AWAs are obviously groundbreaking. What resonates, in perhaps a haunting way, is the Government's original intention to abolish the no disadvantage test in favour of minimum conditions as the employee safeguard and focus on AWAs as the centrepiece of Australian industrial law...

While those latter matters are considered in more detail at the end of this work, *Chapter Six* studies the innate strengths and weaknesses of the current no disadvantage test, as well as its application, particularly to collective agreements. The current no disadvantage test is not like the original test, whereby the agreement was compared specifically to the award on a line-by-line basis before the public interest was taken into account. Rather, the present no disadvantage test is a global discretion to see if, on balance, the agreement is less favourable than the award. Further, the public interest is a

¹⁷ Amanda Coulthard "Non-Union Bargaining: Enterprise Flexibility Agreements" (1996) 38 *Journal of Industrial Relations* 339-358.

second means by which the agreement can pass. The breadth of the present test has led critics, such as Merlo,¹⁸ to condemn it as being a nebulous discretion that is too vague to protect workers. In particular, Merlo has charged that the no disadvantage test has been utilised to cash in leave entitlements to too great an extent and hence threaten community standards. Such a claim is rejected by the present writer as an inaccurate reading of the case law.¹⁹ Certainly, there are complexities with applying the no disadvantage test, such as determining the worth of non-monetary conditions and dealing with the conflicting objects of the *Workplace Relations Act* 1996, itself. Likewise, the test is broad. *But the present writer accepts the analysis of Justice Munro,²⁰ which concentrates on the positive ways in which the discretion has been applied by the Commission to deal with innovative situations.* Examples include the *Wallara Industries Enterprise Agreement 2000.*²¹ In this case, the Commission used the public interest discretion to pass an agreement that was in the interests of the disabled in circumstances where the agreement would otherwise have failed due to the absence of a benchmark award. *To the present writer, therefore, the breadth of the no disadvantage test is its strength, especially in terms of the role it affords the Commission in Australian labour law. The main criticism of the test is more specific, namely, that the no disadvantage test – now over a decade old – is still*

¹⁸ Omar Merlo "Flexibility and Stretching Right: The No Disadvantage Test in Enterprise Bargaining" (2000) 13 *Australian Journal of Labour Law* 207-235.

¹⁹ See, for example, *Textile Clothing and Footware Union of Australia & Mountcastle Pty Ltd (Mountcastle Pty Ltd Enterprise Agreement 1998)* (Australian Industrial Relations Commission per Hoffman C, Print M2260, 22 December 1998) 1-9.

²⁰ Justice Munro "Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test" – lecture presented to the members of the Australian Industrial Relations Commission (2001) 1-24. (Copy given to present writer by her friend and mentor, Hon David Hall, President, Industrial Court of Queensland – on file with author).

²¹ *Wallara Industries Enterprise Agreement 2000* (Australian Industrial Relations Commission per Boulton J, Print S7568, 27 June 2000).

using the original award as its benchmark. In the view of the present writer, support should be given to the argument of Marles²² - that awards (especially now that they are simplified) are no longer an adequate benchmark for the application of the no disadvantage test and that the standard should be the previous agreement. Such a point of reference would better protect the position of workers. And the co-existence of the public interest discretion would mean that awards, rather than the previous agreement, could be taken into account to pass new agreements where an employer was in financial difficulties; where there was no previous agreement; or where innovative agreements were sought for non-monetary conditions.

The remainder of the thesis (Part C) goes on to deal with the issues that the present writer construes as the fundamental problems associated with the no disadvantage test, namely, the structural changes that the Workplace Relations Act 1996 has introduced hand-in-glove with the new bargaining system. They are the changing objects of the act and changing role for trade unions; as well as the introduction of AWAs and the application of the no disadvantage test by the Office of Employment Advocate.

Chapter Seven opens with the acknowledgement that the principal objects of the *Workplace Relations Act 1996*²³ aim to provide a “framework for *co-operative* workplace

²² Richard Marles “Predictions and Premonitions – Individual Contracts...A View to their Future” speech delivered at the Queensland Bar Association (Industrial Law Section) Industrial Law Conference 2001 (22 April 2001, Gold Coast, Australia) 1-12. (Copy supplied by Mr Marles and on file with author).

²³ s.3 *Workplace Relations Act 1996* (Cth).

relations” rather than “prevention and settlement of disputes,” as has been the case in the past. As Ludeke notes, this “change is not merely a gesture”, it heralds systemic change in our labour laws from concentrating on conciliation and arbitration (through the Commission) to focusing on individual agreements.²⁴ This diminished concentration on the AIRC’s central role as conciliator and arbitrator is made more conspicuous by the way in which unions and freedom of association are treated under the act. The *Workplace Relations Act 1996* removes the trade union security device of preference; there is less emphasis on trade unions being parties principal to a dispute and subsequent agreement; and the legislation concentrates on the freedom *not* to belong to a union. There is a conflict in the cases as to what this means for bargaining. The important series of decisions in the *Australian Workers Union v BHP Iron Ore*²⁵ seemed to accept that employers could simply refuse to bargain with unionists without breaching the freedom of association laws. As Professor McCallum observed,²⁶ the *BHP decisions* placed the “levers of choice” (in terms of selecting the type of agreement to govern the employment relationship) in the hands of the employer, and this lay open the prospect of using AWAs to de-unionise a workplace.

²⁴ Terry Ludeke “The Evolving Industrial Relations Regime: The Federal System – 1992-1998” (1998) 72 *The Australian Law Journal* 863-870.

²⁵ *Australian Workers’ Union v BHP Iron-Ore Pty Ltd* (2001) 102 *Industrial Reports* 410-480 (per Kenny J).

²⁶ Ron McCallum “Trade Union Recognition and Australia’s Neo-Liberal Voluntary Laws” (2002) 57 *Relations Industrielles* 225-249 at 236.

In the more recent decision of *Belandra*,²⁷ however, Justice North rejects the BHP line of reasoning. The present writer supports that latter reasoning of *Belandra*. But as such is case law and reliant on further litigation to foster change and certainty in the law, the present writer also urges legislative reform. To this end, she recalls s.170QK, which existed under the previous statute, the *Industrial Relations Act* 1988, and gave the Commission a good faith bargaining jurisdiction. The present writer supports the reintroduction of that provision. She acknowledges the difficult decision of *Asahi*²⁸ that was decided in relation to the old provision. In that case at first instance, a single Commissioner ordered an employer to negotiate with a union that had no members at a workplace and in circumstances where employees were happy with the employer's actions. A subsequent full bench hearing of the Commission ruled that there was no power to compel negotiation, only to meet and confer. Importantly, the full bench, in handing down its reasoning, stated that its refusal to compel negotiation rested on the fact that the award system still comprehensively governed conditions of employment and that the word 'negotiate' implied the making of concessions.²⁹ The present writer applauds the full bench's decision not to force negotiation with a union *on the facts of the particular case*. But she also notes that the award system is no longer the protection it was at the time of *Asahi* and she accepts the analysis of Naughton, that the word

²⁷ *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 *Industrial Reports* 165-239 (per North J).

²⁸ *Asahi Test Case, March 1995 - Asahi Diamond Industrial Australia Pty Ltd v Automotive Food Metals and Engineering Union* (1995) 59 *Industrial Reports* 385-429 (Full Bench, Australian Industrial Relations Commission per O'Connor P; Ross and McIntyre VPP; McBean SDP; and McDonald C). (For the earlier single judge decision of Hodder C see: *Automotive Food Metals and Engineering Union v Asahi Diamond Industrial Australia Pty Ltd* (Print L7818 (decision) and Print 7819 (order) – 19 December 1994.)

'negotiate' does not necessarily mean the making of concessions. The present writer, therefore, argues in favour of Naughton's view that there should be a good faith bargaining discretion vested in the Commission once more. It would be inappropriate to exercise such a discretion in the circumstances that existed in *Asahi*, but it might be appropriate to use the discretion in circumstances where the union was representative of employees and it was the employer who was being unreasonable. Certainly, such approach gives the Commission yet another discretion, but the Commission, dealing directly with the parties at the hearing, is best situated to judge the parties' conduct and standing.

In closing the chapter, the present writer acknowledges the interesting international study of Professor McCallum³⁰ on trade union recognition. Obviously, the present writer has found great worth in the views of Professor McCallum throughout this thesis, but, with respect, the present writer argues that trade union recognition devices are not necessary if s.170QK is re-introduced. From an outline of the American collective bargaining system, it is suggested that recognition devices are complex, and can be manipulated by employers, as well as being counter-productive of union goals. The present writer also notes that attempts to avoid bargaining with unions are not always an indicator of employer intransigence and perhaps could be a sign of the union, itself, being unreasonable.

²⁹ *Asahi Test Case, March 1995 - Asahi Diamond Industrial Australia Pty Ltd v Automotive Food Metals and Engineering Union* (1995) 59 *Industrial Reports* 385-429 (Full Bench, Australian Industrial Relations Commission per O'Connor P; Ross and McIntyre VPP; McBean SDP; and McDonald C) at 422.

In the penultimate chapter, **Chapter Eight**, the thesis examines the second great area of structural change – the application of the no disadvantage test to AWAs and the fact the test is administered by the Office of Employment Advocate, without any necessary involvement of the Australia Industrial Relations Commission. It is argued that this is a grave area of inadequacy in the operation of the test and one that is crying out for reform. The OEA operates in circumstances of such secrecy that it is impossible to say the test is applied fairly. That concern is developed by examining the OEA's handling of the *GTS case*.³¹ There was a serious question as to whether the OEA adopted, as the yardstick for the application of the test, an award that was easier for an employer to satisfy. The fact that the OEA will not supply any reasons for its decision in this matter and the fact that the OEA advises both employers and employees demonstrates the ineptitude of the no disadvantage test in the context of AWAs.

Further compounding that problem is the legal position on AWA duress. Currently, the common law definition of duress is applied to AWAs – there must be *illegitimate* pressure on an employee to sign such an agreement before it can be set aside at law. Consequently, any pressure stemming from the employee's need for a pay cheque is not to the point and employers can literally offer jobs on the basis of a 'take it or leave it' AWA. There are many cases where there is no actual individual bargaining for AWAs at all – despite the mantra of employers that AWAs foster unique relationships with workers that are inherently more productive than those governed by collective

³⁰ Ron McCallum "Trade Union Recognition and Australia's Neo-Liberal Voluntary Laws" (2002) 57 *Relations Industrielles* 225-249 at 243-244.

agreements. The legal justification for this stance is said to be that the no disadvantage test, as applied to AWAs, is protection enough for workers. Clearly, having disparaged the no disadvantage test as applied to AWAs, the present writer finds the law on AWA duress untenable and the absence of individual bargaining (despite the frenetic arguments in favor for individualism) invidious.

Chapter Eight, therefore, argues for extensive change to the AWA regime. The OEA should be abolished and its work taken over by the Australian Industrial Relations Commission. AWAs should be restricted in their availability to only high income earners or those who demonstrate specific skills and duties in their work. These parties actually are in a position where individual bargaining has immediate practical benefits and worth. Such a stance still leaves to employers the prospect of having non-union agreements under s.170LK.

Conclusion:

This thesis has argued in favour of the present hybrid system of Australian labour law. The centrepiece of that system is the no disadvantage test. That test opens up the flexibility to establish terms of employment applicable to a particular workplace. Yet it also retains the ultimate protection for workers – the jurisdiction of the Australian Industrial Relations Commission. That test is broad. Yet this is a strength – it allows for innovation and, under the auspices of the Commission, establishes a meaningful safety

³¹ *Schanka v Employment National (Administration) Pty Ltd* [1999] *Federal Court Cases* 1334 (per Moore J). See also: *Australian Municipal, Administrative, Clerical and Services Union and Global Telesales*

net. The main problem with the actual no disadvantage test is specific – it is the use of awards as the benchmark for passing agreements. As awards are simplified and largely 10 years old, the benchmark should be changed to the previous agreement, taking into account awards under the public interest if employers are financially troubled or to foster innovation for non-monetary terms of employment.

The real problem with the current system is not the no disadvantage test per se, but the systemic changes that accompany it under the *Workplace Relations Act 1996*. The weakened position of trade unions under the act and the possibility that unions can simply be ignored by employers may mean that AWAs can be used as a tool to deunionise even against the wishes of workers and even in cases where unions are responsible to their members. Consequently, the act should be amended to reintroduce s170QK, with an amended definition of the word “negotiate”. Such would give the Commission a good faith bargaining jurisdiction in the event representative unions were being ignored. Even more importantly, there should be major statutory reform in relation to AWAs. This would see their availability limited to high income workers and those in specialist positions for whom individual bargaining has real meaning. Further, the Office of Employment Advocate should be abolished and the Australian Industrial Relations Commission substituted in its place.

This thesis has not been written on the flight of fancy of its author. The Australian system has been the subject of legislative change from both major political parties over the last 15 years, particularly. It is, therefore, a system in transition and the

nature it should ultimately take is a scholarly priority. The 'rock solid guarantee' that inspired both the writing of this thesis and the present regime was centred on the issue of structural reform in the system. It is to that question that this work is particularly aimed. This thesis supports a system in which the Australian Industrial Relations Commission retains a vibrant role through the no disadvantage test (and where trade unions are not an irrelevancy). Ultimately, this doctorate embraces calls to cherish an institution that lay at the heart of the foundation of this country before it is changed beyond recognition. Such is flexible and, importantly, it is also fair. This call must be heeded if we are to be more than just people living "a life of moral cowardice while all the time comforting ourselves that we are nature's rebels" – if we are to avoid becoming the sheep who are "docile until slaughter..."

BIBLIOGRAPHY:

Scholarly Articles:

Alan Bogg "The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness" (2001) 64 *The Modern Law Review* 875-889.

Douglas Brodie "A Fair Deal At Work" (1999) 19 *Oxford Journal of Legal Studies* 83-98.

Douglas Brodie "Beyond Exchange: The New Contract of Employment" (1998) 27 *Industrial Law Journal* 79-102.

Douglas Brodie "The Heart of the Matter: Mutual Trust and Confidence" (1996) 25 *Industrial Law Journal* 121-139.

David Campling "International Economic Restructuring" (1994) 10 *International Journal of Comparative Labour Law and Industrial Relations* 36.

David Chin "Exhuming the Individual Contract of Employment Contract: A Case of Labour Law Exceptionalism" (1997) 10 *Australian Journal of Labour Law* 257-279.

Hugh Collins "Labour Law as a Vocation" (1989) 105 *The Law Quarterly Review* 468-484.

Amanda Coulthard "Non-Union Bargaining: Enterprise Flexibility Agreements" (1996) 38 *Journal of Industrial Relations* 339-358.

Richard Epstein "In Defense of the Contract at Will" (1984) 51 *University of Chicago Law Review* 947-987.

Keith Ewing "The Death of Labour Law?" (1988) 8 *Oxford Journal of Legal Studies* 293-300,

Keith Ewing "The Implications of *Wilson v Palmer*" (2003) 32 *Industrial Law Journal* 6.

Louise Willans Floyd "Enron and One.tel: Employee Rights on Employer Insolvency in the United States and Australia. (Australian Renegades Championing the American Dream?" (2003) 56 *SMU Law Review* 975-1043.

Louise Willans Floyd "To Thine Own Self Be True: Enterprise Bargaining and the Rise of Individualism in Australian Industrial Law and Trade" (1997) 3 *International Trade and Business Law Annual* 263-276.

Louise Willans Floyd "Weipa and the Wharves: Australian Strike Law and its Effects on Trade Union Power" (1999) 18 *University of Tasmania Law Review* 65-125

Paul Gollan and Jonathan Hamberger "Australian Workplace Agreements and High Performance Workplaces: A Critique of Mitchell and Fetter" (2003) 45 *Journal of Industrial Relations* 521-527;

David Hall "Deregulating the Labour Market in the Pioneer State" (Legislative Comment) in (1988) 1 *Australian Journal of Labour Law* 59 – 69.

Jonathan Hamberger "Individual Contracts: Beyond Enterprise Bargaining?" (Australian Centre for Industrial Relations Research and Teaching, University of Sydney, ACIRRT Working Paper Number 39, December 1995) 1-49.

Gerard Henderson "The Industrial Relations Club" in (1983) 27 *Quadrant* 21-29.

Justice Henry Higgins "A New Province for Law and Order" (Government Printer, Melbourne, 1915) 1-24 (Reprinted from the *Harvard Law Review* 1915).

Barbara Hocking "Is the Reasonable Man the Right Man for the Job?" (1995) 17 *Adelaide Law Review* 77.

Joe Isaac "The Australian Arbitration Commission: Prime Mover or Facilitator" (1989) 31 *Journal of Industrial Relations* 407-427.

James Judge "Australian Workplace Agreements" Volume 23 *Alternative Law Journal* 75-77.

Terry Ludeke "The Evolving Industrial Relations Regime: The Federal System – 1992-1998" (1998) 72 *Australian Law Journal* 863-870.

Brian Matthews "The Ministry of Fish" (2001) 235 *Australian Book Review* 41-42.

Ron McCallum "Collective Bargaining Australian Style: The Making of Section 115 Agreements under the Industrial Relations Act 1988 (Cth)" (1990) 3 *Australian Journal of Labour Law* 211-226.

Ron McCallum "Enhancing Federal Enterprise Bargaining: the Industrial Relations (Legislation Amendment) Act 1992 (Cth)" (1993) 6 *Australian Journal of Labour Law* 63-68.

Ron McCallum "Australian Workplace Agreements – An Analysis" (1997) 10 *Australian Journal of Labour Law* 50-61.

Ron McCallum "Collective Labour Law, Citizenship and the Future" (1998) 22 *Melbourne University Law Review* 42-61.

Ron McCallum "Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws" (2002) 57 *Relations Industrielles* 225-249.

Ron McCallum "The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993" (1994) 16 *Sydney Law Review* 122.

Ron McCallum "Conflicts of Laws and Labour Law in the New Economy" (2003) 16 *Australian Journal of Labour Law* 50-68.

Greg McCarry "Damages for Breach of the Employer's Implied Duty of Trust and Confidence" (1998) 26 *Australian Business Law Review* 141-146

Shae McCrystal and Renata Grossi "Duress and Australian Workplace Agreements – The *Schanka* Litigation and Other Developments" (2002) 15 *Australian Journal of Labor Law* 184-197.

Richard Mitchell and Malcolm Rimmer "Labour Law, Deregulation, and Flexibility in Australian Industrial Relations" in (1990-91) 12 *Comparative Labor Law Journal* 1-34.

Richard Mitchell and Joel Fetter "Human Resource Management and Individualisation in Australian Labour Law" (2003) 45 *Journal of Industrial Relations* 292-325.

Richard Mitchell and Joel Fetter "Australian Workplace Agreements and High Performance Workplaces: A Reply" (2003) 45 *Journal of Industrial Relations* 528-529;

Richard Mitchell "Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia" (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 113- 135.

Richard Mitchell "The Rise and Fall of the Preference Power: The Practice of the Federal Commission 1970-1987" (1988) 1 *Australian Journal of Labour Law* 224.

Omar Merlo "Flexibility and Stretching Right: The No Disadvantage Test in Enterprise Bargaining"(2000) 13 *Australian Journal of Labour Law* 207-235.

Matt Moir "Individual and Collective Bargaining in Australian Labour Law: The CRA Weipa case" (Comment) [1996] *Sydney Law Review* 350-371.

Brian Napier, "Compulsory Arbitration – The Australian Way?" (Book Review) (1989) 18 *The Industrial Law Journal* 67-68.

Richard Naughton, "Bargaining in Good Faith – The Asahi Decision" ((1995) 8 *Australian Journal of Labour Law* 166 – 168.

Richard Naughton "The Implied Obligation of Mutual Trust and Confidence – A New Cause of Action for Employees?" (1997) 10 *Australian Journal of Labour Law* 287-291.

Richard Naughton "The New Bargaining Regime Under the Industrial Relations Reform Act" (1994) 7 *Australian Journal of Labour Law* 147-169.

David Noakes and Andrew Cardell-Ree "Individual Contracts and the Freedom to Associate" (2001) 14 *Australian Journal of Labour Law* 89-96.

David North "Industrial Action – The Need For Change in the Law" (1991) 65 *Law Institute Journal* 608-610.

Jim O'Donovan "Can the Contract of Employment be Regulated Through the Corporations Power?" (1977) 51 *Australian Law Journal* 234 – 246.

David Plowman "An Uneasy Conjunction: Opting Out and the Arbitration System" (1992) *Journal of Industrial Relations* 284-306.

Sarah Richardson "Freedom of Association and the Meaning of Membership: An Analysis of the BHP Case" [2000] 22 *Sydney Law Review* 435-450.

Joellen Riley "Individual Contracting and Collective Bargaining in the Balance" (2000) 13 *Australian Journal of Labour Law* 92-98.

Joellen Riley "Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?" (2003) 16 *Australian Journal of Labour Law* 28-49.

Stewart Schwab "Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?" (2001) 76 *Indiana Law Journal* 29 – 48.

Jesse Shipway "Wishing for Modernity: Temporality and Desire in Gould's Book of Fish" (2003) 21 *Australian Literary Studies* 43-53.

Andrew Stewart "Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation (19982) 5 *Australian Journal of Labour Law* 101 – 133.

Joo Cheong Tham "Take It Or Leave it AWAs: A Question of Duress?" (1999) 12 *Australian Journal of Labour Law* 142-148.

Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 18 *Industrial Law Journal* 1-38.

Lord Wedderburn "Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition" (2000) 29 *Industrial Law Journal* 1-42.

Books:

Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer, USA, 1988) 1-133.

Laura Bennett *Making Labour Law in Australia: Industrial Relations, Politics and Law* (The Law Book Company Limited, Sydney, 1994) 1-253.

Tony Blair *New Britain: My Vision of a Young Country* (Fourth Estate, London, 1996) 1-338.

(Richard Blandy and John Niland eds) *Alternatives to Arbitration* (Allen and Unwin Publishers, Sydney, 1986).

Breen Creighton and Andrew Stewart *Labour Law: An Introduction* (3rd ed, The Federation Press Sydney, 2000) 1-500.

Paul Davies and Mark Freedland *Labour Law: Text and Materials* (2nd ed, Weidenfeld & Nicolson, London, 1984) 1-964.

Richard Flanagan *Gould's Book of Fish – A Novel in Twelve Fish* (Picador – Pan MacMillan, Australia, 2001) at 400-401.

Anthony Giddens *The Third Way* (Polity Press, London, 1998) 1-166.

Anthony Giddens *The Third Way and its Critics* (Polity Press, 2000, UK) 1-189

Don Gifford *How to Understand an Act of Parliament* (Cavendish Publishing Limited, England, 1996) 1-196.

Patrick Gorman *Weipa: Where Australian Unions Drew their 'Line in the Sand' with CRA* (Published by the Weipa Industrial Site Committee and distributed on their behalf by the national office of the Construction, Forestry Mining and Energy Union (CFMEU) Mining and Energy Division, Sydney, 1996) 1-57.

(Patrick Hardin and John Higgins eds) *The Developing Labour Law* (4th ed, Bureau of National Affairs, Washington, 2001)(Volume One).

Friedrich Hayek *The Constitution of Liberty* (The University of Chicago Press, USA, 1960) 1-569.

Friedrich Hayek *Law, Legislation and Liberty* (The University of Chicago Press, USA, 1973) (Volumes 1-3).

Justice Henry Higgins *The New Province for Law and Order* (Dawsons of Pall Mall, London, 1968) 1-181.

Ronald Howatson *They'll Always Be Back – A Chronicle of Events Relating to Industrial Relations Tribunals in Queensland to 1960* (Industrial Registrar, Industrial Court of Queensland, Brisbane, 1998) 1-435.

Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens and Maxwell, London, 1977) 1-296.

Terry Ludeke *The Line in the Sand: The Long Road to Staff Employment in Comalco* (Wilkinson Books, Melbourne, 1996) 1-170.

(Stuart MacIntyre and Richard Mitchell eds) *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890-1914* (Oxford University Press, Melbourne, 1989) .

Matthew *The Holy Bible* (King James Version) (Thomas Nelson Publishers, Nashville, 1976).

John Niland *Transforming Industrial Relations in New South Wales (The Niland Green Paper)* (NSW Government Printer, Sydney, 1989).

Tonia Novitz and Paul Skidmore *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights* (Hart Publishing, Oxford, 2001) 1-195.

Patrick Parkinson *Tradition and Change in Australian Law* (The Law Book Company, Sydney, 1994) 1-303.

Jane Romeyn *The Law Arbitration and Bargaining* (Industrial Relations Research Monograph Number 5, Department of Industrial Relations, Canberra, 1994) 1-49.

(Paul Ronfeldt and Ron McCallum eds) *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (Monograph No. 9; Australian Centre for Industrial Relations Research and Teaching (ACIRRT) 1993).

Stewart Schwab *Employment Law: Cases and Materials* (Lexis Law Publishing, USA, 2002) 1-1293.

Nicolas Valticos, *International Labour Standards* (Kluwer, The Netherlands, 1979) 1-267.

Sidney and Beatrice Webb *Industrial Democracy* (Longmans, Green and Co., London, 1902) 1-927.

Sidney and Beatrice Webb *The History of Trade Unionism* (Longmans, Green and Co., 1920) 1-784.

Lord Wedderburn, *The Worker and the Law* (Third edition, Pelican Books, England, 1986);

Phillipa Weeks *Trade Union Security Law – A Study of Preference and Compulsory Unionism* (The Federation Press, Sydney, 1995) 1-282.

Mark Wooden *The Transformation of Australian Industrial Relations* (The Federation Press, Sydney, 2000) 1-238.

Book Chapters:

Laura Bennett “Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction.” (Chapter Six) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Sydney, 1995) 129-154.

Edward Davis and Russell Lansbury “Employment Relations in Australia” (Chapter Five) in (Greg Bamber and Russell Lansbury eds) *International and Comparative Employment Relations: A Study of Industrialised Market Economies* (Allen & Unwin, Sydney, 1998) 110-143.

Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter Thirty Two) in Yorston Fortescue and Turner (as it was then known) *Australian Commercial Law* (21st ed, Law Book Company, Sydney, 1997) 978-1016.

Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter Thirty Two) in Clive Turner *Australian Commercial Law* (24th ed, Thomson Legal Publishing, Sydney, 2003) 973-1011.

Louise Willans Floyd “Workplace Relations: Employment and Industrial Law” (Chapter Thirty Two) in Clive Turner *Australian Commercial Law* (25th ed, Thomson Legal Publishing, Sydney, 2005 forthcoming).

Wayne Gilbert “The Queensland Power Dispute” (Chapter Two) in HR Nicholls Society 31-52. *Arbitration in Contempt (The proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 31-52.

Joseph Loewenberg “Compulsory Arbitration in the United States” (Chapter Five) in (Joseph Loewenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books, USA, 1976) 141-172.

Ron McCallum and Paul Ronfeldt "Our Changing Labour Law" in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Sydney, 1995) 1-30.

Ian McLachlan "Farmers, Australia's Cost Structures, and Union Power" (Chapter Three) in HR Nicholls Society *Arbitration in Contempt (The proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 53 – 63.

Hugh Morgan "The Nature of Trade Union Power" (Chapter One) in HR Nicholls Society *Arbitration in Contempt (The proceedings of the Inaugural Seminar of the HR Nicholls Society)* (Melbourne, 28 February – 2 March 1986) 24 – 30.

John Niland "The Idea of Public Interest" (Chapter Three) in *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University, Sydney, 1978) 29 – 34.

John Niland "The Light on the Horizon" (Chapter Fifteen) in *Transforming Industrial Relations* (Pluto Press, Australia, 1990) 182 – 207.

Jim Nolan and Kylie Nomchong "Enterprise Flexibility Agreements and Threats to Unions Under the New Federal Act" (Chapter Seven) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Sydney, 1995) 154-184.

Don Rawson "Industrial Relations and the Art of the Possible" (Chapter Sixteen) in Richard Blandy and John Niland *Alternatives to Arbitration* (Allen & Unwin, Sydney, 1986) 273-297.

Malcolm Rimmer "The Niland Green Paper – A Critical Review" (Chapter One) in (Michael Easson and Jeff Shaw eds) *Transforming Industrial Relations* (Pluto Press, Sydney, 1990) 6-17.

Iain Ross "Bargaining in the Federal System" (Chapter Two) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Sydney, 1995) 330-358.

Graham Smith "A Practitioner's View: A Brief Commentary on Working with the New System" (Chapter Nine) in (Paul Ronfeldt and Ron McCallum eds) *Enterprise Bargaining: Trade Unions and the Law* (The Federation Press, Sydney, 1995) 202-207.

Andrew Stewart "Federal Regulation and the Use of Powers Other than the Industrial Power" (Chapter Eight) in (Paul Ronfeldt and Ron McCallum eds) *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (ACIRRT Monograph No 6, Sydney, 1993) 86-100.

Kenneth Walker "Compulsory Arbitration in Australia" (Chapter One) in (Joseph Lowenberg ed) *Compulsory Arbitration: An International Comparison* (Lexington Books, USA, 1976) 1 – 43.

Speeches:

Hon. Kevin Andrews MP, Minister for Employment and Workplace Relations *Where To From Here? An address to the Australian Industrial Relations Commission Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-9.

Hon. Ben Chifley, Prime Minister *The Light on the Hill* (14 November 1949).

Richard Epstein *In Defense of the Corporation* (Keynote Address, University of Queensland CLESI Dinner, 9 August 2004, Stamford Plaza, Brisbane).

Louise Willans Floyd and Thomas Bradley *The Federal Government's Proposed Industrial Relations Law: an Overview* at the conference *Asia-Pacific Trade & Commerce: Developments in Policy and Law* (TC Beirne School of Law, University of Queensland, Fourth International Trade and Business Law Forum 1996 at Customs House, Brisbane, 11 October 1996).

Hon. John Howard MP *Address to 28th Young Liberal Movement Convention*, (Australian National University, Canberra, 8 January 1996) 1-9.

Hon John Howard, Prime Minister *Speech to the Bennelong FEC* (Sydney, 23 August 1996) 1-7.

Hon Justice Michael Kirby *Industrial Conciliation and Arbitration in Australia – A Centenary Reflection* An address to the Australian Industrial Relations Commission *Centenary Convention: The Conciliation and Arbitration Journey* (Melbourne, 22 October 2004) 1-35.

Richard Marles "Predictions and Premonitions – Individual Contracts...A View of their Future" speech delivered to the Queensland Bar Association (Industrial Law Section) Industrial Law Conference (22 April 2001, Gold Coast, Australia) 1-12.

Ron McCallum "Australian Workplace, The Rise of Contractualism and Industrial Citizenship" *Employment Contracts: Their Role in industrial Relations?* (University of Sydney, Fourth Annual Labor Law Conference, 1996) 1-3.

Ron McCallum *Address to the Christian Lawyers Convention 2002* (Bond University, Gold Coast).

Sir Robert Menzies *Forgotten People* (reprinted in full in *Forgotten People* Macmillan Australia 1992).

Justice Paul Munro “Section 170LK Agreements, Australian Workplace Agreements and the No-Disadvantage Test” – lecture presented to members of the Australian Industrial Relations Commission (2001) 1-24.

Judith Sloan *An Economist’s Perspective of the Workplace Relations Act 1996* speech presented at the conference *Asia-Pacific Trade & Commerce: Developments in Policy and Law* (TC Beirne School of Law, University of Queensland, Fourth International Trade and Business Law Forum 1996 at Customs House, Brisbane, 11 October 1996).

Graham Smith “Trade Practices Limitations” Papers delivered at the IPA Conference *The Last Frontier: Making Industrial Relations Subject to the Trade Practices Act* (22 May 2003) 1-8.

John Trew QC “Existing Opportunities” Papers delivered at the IPA Conference *The Last Frontier: Making Industrial Relations Subject to the Trade Practices Act* (22 May 2003).

Parliamentary Debates:

Hon. Laurie Brereton “Second Reading of the Industrial Relations Reform Bill 1993” *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 28 October 1993) 2778 et seq.

Sir Alfred Deakin “Second Reading of the Conciliation and Arbitration Bill” *Commonwealth Parliamentary Debates – Volume XV* (House of Representatives, Parliament of Australia, 1903) 2858-2883.

“Debate of the Conciliation and Arbitration Bill 1903” *Commonwealth of Australia Parliamentary Debates* (House of Representatives, Parliament of Australia, 1903) 2868 et seq (Deakin); 3185 (Reid); 3210 (Watson).

Hon. Peter Reith MP “Second Reading of the Workplace Relations and Other Legislation Amendment Bill 1996” (Parliament House, Canberra <http://www.nla.gov.au/dir/reforms/speech.htm> – accessed on 23 May 1996) 1-13.

Government Reviews and Parliamentary Reports:

Agreement Between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill (The October Agreement) (AGPS, Canberra, 1996).

Business Council of Australia *Enterprise-based Bargaining Units – A Better Way of Working* (Volume One) (Business Council of Australia, 1989) 1-134.

Keith Hancock *Australian Industrial Law and Systems (Report of the Committee of Review)* (Canberra Publishing and Printing Co., Fyshwick, 1985) (Volume One) 1-44.

Keith Hancock *Australian Industrial Law and Systems (Report of the Committee of Review)* (Canberra Publishing and Printing Co., Fyshwick, 1985) (Volume Two) 1-694.

Henry Bourne Higgins, MLA (representative of Victoria) *Official Records of the Debates of the Australasian Federal Convention – Third Session* (Melbourne, 1898) (Volume One).

Leigh Hubbard, (Victorian Trades Hall Council) *Submission to Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Submission Number 413, 22 September 1999)1-112.

“Terms of Reference” *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* Parliament of Australia, Senate. (http://www.aph.gov.au/Senate/committee/economics_ctte/workplace/report/a.htm accessed 27 October 2003).

“Changes to the System and Its Institutions” (Chapter Four, Parts A, B and C) *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* (Senate, Parliament of Australia, Canberra) (http://www.aph.gov.au/Senate/committee/economics_ctte/workplace/report/c05.htm last accessed 27 October 2003.)

“Executive Summary” *Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* (Senate, Australian Parliament, Canberra) (http://www.aph.gov.au?Senate/committee/economics_ctte/workplace/report/b03.htm last accessed 27 October 2003) 1-18.

Richard Mitchell *Final Report: Protecting the Worker’s Interest in Enterprise Bargaining – The ‘No Disadvantage’ Test in the Australian Federal Jurisdiction* (Prepared for the Workplace Innovation Unit, Industrial Relations Victoria by The Centre for Employment and Labour Relations Law, Law School, University of Melbourne, 2004) 1-77.

Policy Documents:

Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, *Flexibility and Productivity in the Workplace: The Key to Jobs* (www.liberal.org.au last accessed 21 October 2004) 1-19.

Liberal Party of Australia *Fightback: It's Your Australia* (Online Offset Printers, Canberra, 1992) 1-67.

Hon Peter Reith MP *Getting Towards a Rational Workplace Relations System in Australia* (April 1999 – published from a Ministerial Address to the National Press Club, Canberra, 24 March 1999) 1-50.

Hon Peter Reith MP, Minister for Employment, Workplace Relations and Small Business *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay* (Australian Government Printing Service, Canberra, May 1999) 1-44

Hon Peter Reith MP, Minister for Workplace Relations, “Cashing Out Leave Entitlements” (Press Release, Canberra, 11 November 1997).

Treatises:

“Enterprise Bargaining” (Volume Four) in CCH Australia *Australian Labour Law Reporter* ¶ 56-104 et seq.

Louise Willans Floyd “No Disadvantage Test (Introduction to Part VIE and s.170XA)” in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2002) 3275-3281.

Louise Willans Floyd “The Principal Object of the Act (Commentary on s.3 *Workplace Relations Act 1996*)” in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2000) 2132 – 2146.

Louise Willans Floyd “Termination of the Bargaining Period (Commentary on s.170MW)” in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2001) 3189 – 3196.5.

Louise Willans Floyd : “Freedom of Association (Introduction to Part XA *Workplace Relations Act 1996*)” in (Trew, McCallum and Ross eds) *Federal Industrial Law* (Butterworths Publishing, Sydney, 2000) 3809 – 3810.3.

Cases:

Arrowcrest Group Pty Ltd (Australian Industrial Relations Commission per Watson DP, Print L44310, 12 July 1994) 1-13.

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Tweed Valley Fruit Processors (1995) 61 *Industrial Reports* 212-235 (per Ross VP; Duncan DP; Mahon C).

Ahrens Engineering Pty Ltd (Construction) Certified Agreement 2003 (Australian Industrial Relations Commission per O’Callaghan SDP, Print PR 943578, 12 February 2004) 1-5.

Australian Construction Pty Ltd Certified Agreement 2003 (Australian Industrial Relations Commission per Harrison DP, Print PR941051).

Australian Industry Group v Automotive, Food, Metals, Engineers, Printing and kindred Industries Union (Australian Industrial Relations Commission, Print T 1982, 16 October 2000).

Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited [2002] FCAFC 199.

Australian Services Union v Electrix Pty Ltd (1999) 93 *Industrial Reports* 211 (per Marshall J).

AWU v BHP Iron Ore Pty Ltd (2001) 102 *Industrial Reports* 410-480 (per Kenny J).

AWU v BHP Iron Ore Pty Ltd (2000) 96 *Industrial Reports* 422-448 (per Grey J).

AMWU and Others v Alcoa Australia Limited and Others (1996) 63 *Industrial Reports* 138 – 193 (Australian Industrial Relations Commission per O’Connor P; MacBean and Polites SDPP; Harrison DP; and Merriman C).

Australian Meat Industry Employee’s Union v Belandra Pty Ltd (2003) 126 *Industrial Reports* 165-239 (per North J).

Arrowcrest Group Pty Ltd (Australian Industrial Relations Commission per Watson DP, Print L4310, 12 July 1994) 1-13.

Asahi Diamond Industrial Australia Pty Ltd v Automotive Food Metals Engineering Union (1995) 59 *Industrial Reports* 385-429.

Re Australian Workplace Agreements (Reference 1997 1-3) (1997) 76 *Industrial Reports* 357-363 (per Duncan DP).

Australian Municipal, Administrative, Clerical and Services Union and Global Telesales (Australian Industrial Relations Commission per Whelan C, M Print 9177, 27 November 1998) 1-18.

Appeal by the Public Sector, Professional, Scientific, Research, Technical, Communications, Aviation and Broadcasting Union (Australian Broadcasting Corporation Case) (Full Bench, Australian Industrial Relations Commission per O'Connor P, Ross VP, Acton DP, Merriman C, and Harrison C, Print L4605, 31 August 1994).

Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth (1986) 161 *Commonwealth Law Reports* 88.

Associated British Ports v Palmer and Others and Associated Newspapers Ltd v Wilson [1994] *ICR* 97.

Australian Municipal, Administrative, Clerical and Services Union and Global Telesales (stay application per Senior Deputy President Watson, AIRC, M Print R 0333, 23 December 1998) 1-3.

Australian Municipal, Administrative, Clerical and Services Union and Global Telesales (Full Bench, Australian Industrial Relations Commission per Justice Guidice as President; Acton SDP and Smith C, PR927484, 10 February 2003) 1-13.

Bermkuks Pty Ltd Certified Agreement (Australian Industrial Relations Commission per Deegan C, Print PR 43124, 28 January 2004) 1-41.

The Burwood Cinemas Case (1925) 35 *Commonwealth Law Reports* 528.

Coal and Allied v Australian Industrial Relations Commission (2000) 174 *Australian Law Reports* 585.

Coles Myer Pty Ltd (Australian Industrial Relations Commission per Whelan C, Print R3504, 31 March 1999) 1-22.

Commercial Bank of Australia Ltd v Amadio (1983) 151 *Commonwealth Law Reports* 447.

Commercial Surveillance Pty Ltd (Australian Industrial Relations Commission, Print S2571)

Concut Pty Ltd v Worrell (2000) 176 *Australian Law Reports* 693.

Crescendo Management Pty Ltd v Westpac Banking Corp (1988) 19 *New South Wales Law Reports* 40.

Daviesway Pty Ltd Enterprise Agreement 1999 (Australian Industrial Relations Commission per Simmonds C, Print R9030, 14 September 1999) 1-4.

Diab Services (Pizza Hut Stores) Agreement 2003 (Australian Industrial Relations Commission per Duncan SDP, Print PR948852, 2 July 2004) 1-5.

Discount Tobacco and Confectionary Ltd v Armitage [1990] *Industrial Relations Law Reports* 15

EFA Test Case, May 1995 (1995) 59 *Industrial Reports* 430-477.

Ex parte H v Kay (The Harvester Judgment) (1907) 2 *Commonwealth Arbitration Reports* 1-33.

Finance Sector Union v Commonwealth Bank of Australia (2000) 106 *Industrial Reports* 139.

General Motors Holden Pty Ltd v Bowling (1976) 12 *Australian Law Reports* 605.

Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union (2001) 112 *FCR* 232.

Greyhound Pioneer Pty Ltd (Australian Industrial Relations Commission per Gay C, Print P8624, 5 February 1998) 1-18.

Group Four Securitas Pty Ltd v Transport Workers Union of Australia (1997) 43 *AILR* 3-718.

Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995 (Australian Industrial Relations Commission per Giudice J; Ross and McIntyre DP; MacBean SDP; McDonald C, M Print P7500).

In re Debs 158 *US* 564 (1895).

R v Cohen and Others; Ex parte The Attorney General for the State of Queensland and Others (1985) *Commonwealth Law Reports* 331.

Re Lillianfels Blue Mountains Enterprise Flexibility Agreement 1994 (Australian Industrial Relations Commission, Print 4744, 16 January 1995) 1-18.

Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) [1998] *Appeal Cases* 20-53.

Maritime Union of Australia v CSL Australia Pty Ltd (2002) 113 *Industrial Reports* 326.

Maritime Union of Australia v Burnie Port Corp Pty Ltd [2000] FCA 1189.

The Metal Trades Case (1935) 54 *Commonwealth Law Reports* 387.

Minister for Immigration and Ethnic Affairs v Teoh (1994-1995) 183 *Commonwealth Law Reports* 273.

National Wage Case March 1987 (1987) 17 *Industrial Reports* 65.

National Wage Case August 1988 (1988) 25 *Industrial Reports* 170.

O'Sullivan v Farrer (1989) 168 *Commonwealth Law Reports* 210.

Patricks Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) (1998) 195 *Commonwealth Law Reports* 1.

R v Coldham ex parte Australian Social Welfare Union 47 *Australian Law Reports* 225

Re Pacific Coal Pty Limited; Ex parte Construction, Forestry, Mining and Energy Union (2000) 172 *Australian Law Reports* 257.

Schanka v Employment National (Administration) Pty Ltd (2001) 105 *Industrial Reports* 271.

Shell Company of Australia; Mobil Oil; Ampol Ltd and Linfox Australia v Transport Workers Union of Australia (1995) AILR ¶ 3-030.

Silver Chain Registered Nurses Agreement 1997 (Australian Industrial Relations Commission per Dight C, Print S1403, 27 May 1997) 1-24.

Textile, Clothing and Footwear Union of Australia and Mountcastle Pty Ltd (Mountcastle Pty Ltd Enterprise Pty Ltd Enterprise Agreement 1998) (Australian Industrial Relations Commission per Hoffman C, Print M2260, 22 December 1998) 1-9.

Toys 'R' Us (Australia) Pty Limited Enterprise Flexibility Agreement (Australian Industrial Relations Commission per Ross VP, Print L9066, 3 February 1995) 1-22.

Transport Workers' Union of Australia v DHL International (Australia) Pty Limited (1997) 73 *Industrial Reports* 356.

Victoria v Commonwealth (1996) 187 *Commonwealth Law Reports* 416.

Wallara Industries Enterprise Agreement 2000 (Australian Industrial Relations Commission, Print S7568, 27 June 2000).

Walton's Stores (Interstate) Ltd v Maher (1988) 164 *Commonwealth Law Reports* 387.

Ward v James [1966] 1 *Queens Bench* 273.

Warren v Coombes [1978-1979] 142 *Commonwealth Law Reports* 531.

Young James and Webster (A/44) [1981] IRLR 408.

Lectures:

Louise Willans Floyd *Lectures on Sex Discrimination* (University of Queensland Law Library, 1993-2004).

Michael Gold *Undergraduate Lectures in Labor Law* (Center for Industrial and Labor Relations Studies, Cornell University, USA, October 2002).

Newspapers & Newsletters:

Syd Marris, "Coalition Reaffirms Rock Solid IR Pledge," *The Australian* (21 May 1996).

Brian Noakes, Australian Chamber of Commerce and Industry *Employment and Labour Relations Forum* (Number 3, October 1995) 112, 133.

Graham Smith "Reforms are just the beginning" *The Australian* (28 October 1996) 4.

Lenore Taylor "Bullets removed from IR gun" *The Australian* (9 January 1996) 1.

Lenore Taylor "Howard's Guarantee: No Pay Cut" *The Australian* (9 January 1996) 1.

Workforce (Issue 1433, 20 February, 2004) 1.

Workforce (Issue 1414, 5 September 2003) 2.

Workplace Express “Subway Ruling highlights AIRC’s scrutiny of non-union deals”
(5 February 2004
http://www.workplaceexpress.com.au/workp...2825&in_version=&in_type=PrinterFriendly – accessed 19 February 2004).

Workplace Express “Commission Details Employer’s 170LK requirements”
Workplace Express - 17 February, 2004
<http://www.workplaceexpress.com.au/workplace/nav?id=64243&no=6909454341133>
3 (last accessed 19 February 2004).

Film & Video:

“No Job for a Woman” *Four Corners* (ABC Television, 1984).

“At the End of the Day” *Four Corners* (ABC Television 1996).

Michael Moore *Fahrenheit 9/11*.

“Hard Bargaining” *Lateline* (ABC Television, 1995).

Legislation:

Industrial Relations Act 1988 (Cth)

Industrial Relations Legislation Amendment Act (No 2) 1992 (Cth).

Industrial Relations Reform Act 1994 (Cth).

Taft-Hartley Act 29 USC 141-144.

Trade Practices Act 1974 (Cth).

ILO Treaty *Convention Concerning Termination of Employment at the Initiative of the Employer* (which was Schedule Ten of the *Industrial Relations Act* 1988.)

Wagner Act 29 USC 151

Workplace Relations Act 1996 (Cth).

Further References:

Web site of the OEA for details: <http://www.oea.gov.au> (last visited 24 March 2004). See especially the pages:

- “How to Apply for Access to AWAs for Research”
http://www.oea.gov.au/printer.asp?showdoc=/home/research-how_to_apply.asp&Page=5
- “Sample of 100 AWAs”
http://www.oea.gov.au/printer.asp?showdoc=/home/sample_awas.asp&Page=5

29 SEP 2005

UNIVERSITY OF SYDNEY LIBRARY



0000000610225698

RARE BOOKS LIB