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# WORKER VOICE IN AUSTRALIA AND NEW ZEALAND: THE ROLE OF THE STATE RECONFIGURED?


## Abstract

In our introduction to this symposium, we consider the significance of the role played by the State in offering opportunities for workers' voice and ensuring (or preventing) its efficacy. We examine how this role is currently being reconfigured, tracking ideological shifts, the development of institutional apparatus, the function of the state as the 'model employer' and the potential opportunities (or otherwise) offered by 'constitutionalisation' of labour norms.


## I Introduction

The idea of 'voice' and its relevance to employees inside and outside the workplace is the subject of a Leverhulme Trust funded study. Since 2011, we have been investigating potential legal mechanisms for the promotion of voice in a variety of common law countries: Australia, Canada, New Zealand, the United Kingdom and the United States. Our intention has been to identify common concerns arising in UK, North American and Australasian labour markets and to capture the justifications for worker voice offered therein. In each context, we have considered the adequacy of current legal mechanisms, as well as their reform (or even replacement), with reference to the potential objectives of 'voice'.

The papers contained in this symposium were selected from an abundant offering presented at the third of our international and comparative workshops on 'Voices at Work'. This event was held at RMIT University, Melbourne in July 2012. Earlier workshops took place in Oxford (July 2011) and Toronto (March 2012). All three sought to tease out the diverse contexts and ways in which 'voice' can be claimed. A further edited book, *Voices at Work: Continuity and Change* (Oxford University Press) to be published in 2014, will bring together the distinctive contributions from each jurisdiction, providing further comparative engagement.

Through these events, it has emerged that what began solely as an instrumental use of 'voice' — on the worker side as a means by which to secure certain economic entitlements in terms of pay and conditions[1] and on the employer side as a strategy


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1 Sidney Webb and Beatrice Webb, *A History of Trade Unionism* (1898) cited in Alan Bogg and Tonia Novitz, 'Investigating "Voice" at Work' (2011–12) 33 *Comparative Labor Law and Policy Journal* 323, 327.

to improve the efficiency and productivity of business — has shifted to gain larger significance.[2] We do not deny the ongoing relevance of the economic objectives underlying political facilitation of legal mechanisms for voice; indeed, tensions of this kind emerge strongly in the papers set out in this special issue and we consider these further in the context of 'third way' attempts at their reconciliation. We further acknowledge that to employers' and workers' economic interests can be added those of each nation state, which may be seeking to attract greater investment, generate ever higher gross domestic product and produce more extensive tax revenue, particularly in a time of recession and financial insecurity.[3]

Yet, there is also a kind of 'legitimacy' claimed through voice which goes beyond economic objectives. This legitimacy can be linked to both the human right to free speech and the value of democratic engagement within public and private spheres. It can also be linked to the desire for an egalitarian society in which the most vulnerable are protected. The idea that unions can act as workers' collective representatives in exercising voice thus has the potential to give their role a further status, arguably beyond that which is offered by their role in the mere maintenance of balance of economic bargaining power. It may provide a new platform from which to speak and be heard.[4]

Australian and New Zealand trade union engagement with the language of voice is perhaps not as extensive as that in the UK, where this alternative framing of union functions has acquired considerably currency.[5] Yet we observe that the Electrical Trades Union ('ETU') describes the role of the Australian Council of Trade Unions ('ACTU') as providing 'a strong voice for working people and their families in politics, the economy and the community';[6] while the NZ Council for Trade Unions describes itself as 'the united voice for working people and their families in New Zealand'.[7] Moreover, the adoption (in 2011) of the name 'United Voice' by what was formerly known as the Liquor, Hospitality and Miscellaneous Union ('LHMU') may indicate a trend in this direction.[8]

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2 Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970); Richard B Freeman, 'Individual Mobility and Union Voice in the Labour Markets' (1976) 66 *American Economy Association* 361; Richard B Freeman, 'The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits and Separations' (1980) 94 *Qualitative Journal of Economics* 643, cited in Bogg and Novitz, above n 1.

3 Eric Tucker, 'Labor's Many Constitutions (and Capital's Too)' (2011–12) 33 *Comparative Labor Law and Policy Journal* 355, 360 ff.

4 Although there may also be costs in phrasing workers' entitlements in solely 'democratic' terms. See Shae McCrystal and Tonia Novitz, '"Democratic" Preconditions for Strike Action — A Comparative Study of Australian and UK Labour Legislation' (2012) 28(2) *International Journal of Comparative Labour Law and Industrial Relations* 115, 121–30.

5 Bogg and Novitz, above n 1, 338–9.

6 Electrical Trades Union, *Links* (2011) <http://www.etunational.asn.au/Links/Links.html>.

7 New Zealand Council of Trade Unions, *About Us* (2010) <http://union.org.nz/about>.

8 See the Fair Work Australia decision: *Re Liquor, Hospitality and Miscellaneous Union* [2011] FWA 766 (15 February 2011). From 1 January 2013, Fair Work Australia became the Fair Work Commission.

In what kind of shape do we now find the prevalent forms of employee voice in Australia and New Zealand? As in most industrialised countries, trade union membership has been falling for some time (although in Australia, the rate of membership decline has slowed in the last few years).[9] The latest figures show union density in Australia at 18.4 per cent of workforce,[10] and 17.4 per cent in New Zealand.[11] This compares with 26 per cent in the UK.[12] Yet only approximately 33 per cent of British workers are covered by a collective agreement;[13] while in Australia, there is 42 per cent coverage by collective agreements and a further 16.1 per cent covered by awards.[14] In other words, it is not the attractiveness of trade union membership which determines efficacy of worker voice, but the legal and institutional context in which voice is exercised.

Even at the height of 'voluntarism' under the British tradition of 'collective laissez-faire', there is now widespread retrospective acknowledgement that strong State support was critical to the emergence of enduring collective bargaining structures in the postwar period.[15] Given the Australasian historical tradition of conciliation and arbitration, the importance of State presence in steering and supporting structures of worker voice is surely less revelatory as an insight to many readers of the *Adelaide Law Review*. Nor is it a surprise to those familiar with the International Labour Organisation ('ILO') Conventions Nos 87 and 98, which stress the significance of the role of the State in promoting freedom of association, the right to organise and collective bargaining.[16]

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9 See Rae Cooper and Bradon Ellem, 'Trade Unions and Collective Bargaining' in Marian Baird, Keith Hancock and Joe Isaac (eds), *Work and Employment Relations: An Era of Change* (Federation Press, 2011) 34; Stephen Blumenfeld, 'Collective Bargaining' in Erling Rasmussen (ed), *Employment Relationships: Workers, Unions and Employers in New Zealand* (Auckland University Press, 2010) 40.

10 Australian Bureau of Statistics, 'Employee Earnings, Benefits and Trade Union Membership, Australia' (Statistical Report, Catalogue No 6310.0, August 2011).

11 Ministry of Business, Innovation and Employment, *Union Membership Return Report 2011* <http://www.dol.govt.nz/er/starting/unions/registration/membership2011.asp>.

12 Department of Business Innovation and Skills, *Trade Union Membership 2011* (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/16381/12-p77-trade-union-membership-2011.pdf>.

13 In 2008 estimated at 36 per cent and now in 2012 estimated widely at 33 per cent. See European Industrial Relations Observatory On-line, *United Kingdom: Industrial Relations Profile* (15 April, 2013) <http://www.eurofound.europa.eu/eiro/country/united.kingdom_4.htm>; Niels-Erik Wergin-Cheek, 'Collective Bargaining Has Been Decentralised in the UK and Germany Over the Past Three Decades. But in Germany, Unions Have Retained Much More Power' on London School of Economics and Political Science, *European Politics and Policy* (12 April 2012) <http://blogs.lse.ac.uk/europpblog/2012/04/12/germany-uk-unions/>.

14 Australian Bureau of Statistics, 'Employee Earnings and Hours, Australia' (Statistical Report, Catalogue No 6306.0, May 2012).

15 Keith D Ewing, 'The State and Industrial Relations: "Collective Laissez-Faire" Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1.

16 See, respectively, International Labour Organisation, *Freedom of Association and Protection of the Right to Organise Convention 1948*, opened for signature 1948, 68 UNTS 17 (entered into force generally 4 July 1950; entered into force for Australia

Nevertheless, the papers in this special issue disclose a potentially radical reconfiguration of the State's role in Australia and New Zealand in respect of the regulation of worker voice in recent decades. This reconfiguration is likely to have significant effects on the character and shape of worker voice in the Australian and New Zealand systems. We detect four distinct dimensions to this process of reconfiguration: the role of ideology, the changing institutional context of the State's regulatory involvement, the State as employer, and the interface between industrial relations systems and wider democratic structures of public governance.

## II Ideology

The recognition of a relation between labour law and political ideology is hardly a novel insight.[17] In turn, the parameters of worker voice are structured and delineated in important ways by the forces of ideological contestation in the public sphere. The papers suggest that political ideology is increasingly fluid and contested in the Australasian context, with shifts in ideology leading sometimes to quite radical normative ruptures in the institutional and regulatory context of Australian and New Zealand labour law.

The natural reaction of a British labour lawyer viewing the history of Australasian labour law is to be captured by the institutional differences. The general system of compulsory conciliation and arbitration that characterised the Australasian approach is, through British eyes, an alien thing. It can be contrasted with the British theory of 'collective laissez-faire' which emphasised the role of *indirect* legal and administrative supports to a system of *voluntary* collective bargaining.[18] Yet these institutional differences reflect a deeper ideological divergence. This emerges very strongly from Naughton and Pittard's paper where they trace the intricate web of institutional connections between the compulsory conciliation and arbitration structure, the system of 'awards' based on the 'test case' method, the privileged role of 'registered' trade unions in that system, and the normative concern to define and enforce a safety net of minimum labour standards shaped by the human needs associated with leading a fulfilling life in a civilised community.[19]

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28 February 1973) art 11 ('*ILO Convention No 87*'); International Labour Organisation, *Right to Organise and Collective Bargaining Convention 1949*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force generally 18 July 1951; entered into force for Australia 28 February 1973) arts 3–4 ('*ILO Convention No 98*').

17 See, eg, Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 24.

18 For a general discussion of this preference for indirect supports, see Alan L Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing, 2009) ch 1. Compulsory arbitration was not unknown to the British system: see Lord Wedderburn, *Labour Law and Freedom* (Lawrence and Wishart, 1995) 11.

19 Richard Naughton and Marilyn J Pittard, 'The Voices of the Low Paid and Workers Reliant on Minimum Employment Standards' (2013) 34 *Adelaide Law Review* 119.

This was an ideology of strong egalitarianism, based upon a political norm of protecting the vulnerable from the exploitation that would otherwise result from unimpeded free markets in the sphere of work.[20] Modern theories of egalitarian liberalism would seem to provide a strong philosophical validation of the Australian ideological tradition. For example, John Rawls famously articulated both the principle of 'fair equality of opportunity' and the 'difference' principle in his theory of justice.[21] Fair equality of opportunity demands that social disadvantages be corrected through education and the limiting of undue concentrations of wealth, so that citizens can participate in the political community under conditions of fairness. The difference principle holds that inequalities are permitted only to the extent that this benefits the least advantaged group in society.

This ideology of egalitarianism, deeply embedded in the historical Australian and New Zealand tradition, contrasts in three important ways with the British ideology of 'collective laissez-faire'. First, it is animated by the value of equality, whereas collective laissez-faire was animated by the value of liberty (and specifically the liberty of groups to pursue their own purposes through collective bargaining free from State interference).[22] Secondly, it countenanced a much more interventionist role for State institutions to support a universal floor of entitlements to protect the most vulnerable workers. Thirdly, it led to an extensive set of institutional arrangements, especially the system of compulsory arbitration, which left a deep imprint on civil society. The papers in this symposium demonstrate that this ideology of egalitarianism has been intensely contested in recent decades. However, the papers also demonstrate that the ideology of egalitarianism has been more resilient in the face of those contestatory pressures than the British ideology of collective laissez-faire.[23] For example, and as Naughton and Pittard observe, it is notable that the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') contains a multi-employer bargaining stream mechanism for 'low paid workers', although its lack of efficacy is clearly troubling.[24]

There are at least three ideological shifts, more or less nascent, that can be traced in the papers. First, we detect the strong emergence of a neoliberal 'deregulatory' ideology in both Australia and New Zealand. One striking example can be seen in Walker and Tipple's analysis of events surrounding the Hobbit dispute over the employment

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20 For a philosophical discussion of such a political norm, see Robert E Goodin, *Protecting the Vulnerable* (University of Chicago Press, 1985).

21 John Rawls, *A Theory of Justice* (Oxford University Press, revised ed, 1999). See also Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000).

22 Bogg, above n 18, 9–15.

23 See Paul L Davies and Mark R Freedland, *Labour Legislation and Public Policy* (Oxford University Press, 1993) ch 1.

24 See Richard Naughton, 'The Low Paid Bargaining Scheme — An Interesting Idea, But Can it Work?' (2011) 22 *Australian Journal of Labour Law* 214; Rae Cooper and Bradon Ellem, 'Getting to the Table? Fair Work, Unions and Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 152–4; Naughton and Pittard, above n 19.

status of contractors in the New Zealand film industry. The stark reality of threatened capital flight as a lever for the enactment of legislation designed to impede collective organisation is laid bare in their account of the dispute.[25] What is interesting here is the government's public narration of events through a neoliberal ideological prism, conflating the common good with the attraction of inward investment through deregulation.[26] Neoliberal ideology was also used as public justification of the Howard government's promotion of contractual flexibility through individualised 'Australian Workplace Agreements'. Bray and Stewart's paper demonstrates how 'voice' can be a powerful analytical device in drawing attention to 'process'. Agreement-making, whether individual or collective, is not the same as agreement-negotiating. The British experience demonstrates a paradox that is confirmed also in Bray and Stewart's paper: individualisation of contracting leads to a highly standardised and formalised contractual form that entrenches managerial authority in defining that contractual form, which is the very antithesis of individual 'flexibility' and thus individual voice.[27]

More recently, we detect two ideologies emerging in the 'Fair Work' era. One might be described as a 'third way' competitiveness ideology. Labour market regulation is justified by its contribution to competitive firms based upon high quality and productive employment practices.[28] Workers should be treated fairly because workers treated fairly will tend to be more productive. In the British context, this has tended to be associated with new regulatory techniques such as 'light regulation', with regulatory methods responsive to managerial adaptability through mechanisms of derogation.[29] For example, Naughton and Pittard draw attention to the fact that the Fair Work Commission must be satisfied that a 'low paid' workplace determination will promote future enterprise bargaining and enhance the '*productivity and efficiency in the enterprises*'.[30] This is quintessential third way rhetoric.[31]

Another ideology might be described as 'liberal neutrality'. This involves a shift away from a perfectionist view of the State's role as *promoting* the regulatory

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25 Bernard Walker and Rupert Tipple, 'The Hobbit Affair: A New Frontier for Unions?' (2013) 34 *Adelaide Law Review* 65.

26 For a theoretical analysis of the State's unique positioning through the technique of narrating public events in particular ways, see Chris Howell, *Trade Unions and the State* (Princeton University Press, 2005) ch 2.

27 Mark Bray and Andrew Stewart, 'From the Arbitration System to the *Fair Work Act*: The Changing Approach in Australia to Voice and Representation at Work' (2013) 34 *Adelaide Law Review* 21; see also William Brown, Simon Deakin, David Nash, and Sarah Oxenbridge, 'The Employment Contract: From Collective Procedures to Individual Rights' (2000) 38 *British Journal of Industrial Relations* 611.

28 Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17.

29 Paul L Davies and Mark R Freedland, *Towards a Flexible Labour Market* (Oxford University Press, 2006) 242–3.

30 Naughton and Pittard, above n 19.

31 Sandra Fredman, 'The Ideology of New Labour Law' in Catherine Barnard, Simon Deakin and Gillian S Morris (eds), *The Future of Labour Law* (Cambridge University Press, 2004) 9.

activities of representative trade unions (either through collective bargaining or through privileged participation in the system of arbitration awards) and towards a 'state neutrality' view. According to the latter view, the State should confine itself to implementing and enforcing a neutral procedural framework enabling workers to choose to be (or, equally, to choose not to be) represented by a particular trade union. This 'state neutrality' model would tend to be aligned with regulatory mechanisms such as ballot procedures, where the State's role is confined to aggregating workers' preferences, rather than shaping those preferences in order to promote particular substantive outcomes.[32] The messages are somewhat complex in the *Fair Work Act*, and hence the difference between perfectionism and neutrality is likely one of degree rather than a simple binary distinction.[33] However, the emphasis on majoritarian ballot procedures to test employees' collective preferences in respect of collective agreements,[34] along with symmetrical protection for 'negative' rights of non-membership of a union and refusal to participate in trade union activities,[35] do indicate a creeping influence of US-style 'liberal neutrality' on the Australian system. It remains to be seen how enduring the imprint of egalitarian ideology will be, given its deeper historical basis and its institutional manifestations in the political economy of Australian conciliation and arbitration.

## III The Changing Institutional Context of State Involvement

The State is not a unitary phenomenon. Its institutional manifestations are manifold. State steering of industrial relations systems can occur through a variety of institutional forms: legislatures enacting statutory labour standards; governmental influence over the bargaining activities of the social partners exercised either through corporatist structures or through the use of public procurement; arbitration courts issuing binding awards; other forms of State supported dispute resolution machinery such as conciliation or mediation; and ordinary courts interpreting legislated standards or applying common law principles. The mix of these institutional forms, and thus the ways in which the State engages with other actors in the industrial relations system, is highly organic. It is sensitive to the political and constitutional structures in a particular legal system.[36] The papers in this special issue demonstrate how the institutional profile of the State has evolved in Australia and New Zealand. In turn,

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32 For further discussion, see Alan L Bogg and Tonia Novitz, 'Recognition in Respect of Bargaining in the United Kingdom: Collective Autonomy and Political Neutrality in Context' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 225.

33 Breen Creighton and Anthony Forsyth, 'Rediscovering Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 1, 13–17.

34 Bray and Stewart, above n 27.

35 Victoria Lambropoulos and Michael Wynn, 'Unfair Labour Practices, Trade Union Victimisation and Voice: A Comparison of Australia and the United Kingdom' (2013) 34 *Adelaide Law Review* 43.

36 For discussion in a comparative context, see Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1.

this has created new opportunities for positive State influence, while also creating new risks and impediments to the realisation of effective worker voice.

The historical centrepiece of the Australian institutional tradition was the conciliation and arbitration system introduced first in New Zealand, then in a number of Australian colonies and the Commonwealth, in the 1890s and 1900s.[37] That system, or rather those systems, placed voice through union representation front and centre — for example, in the Australian context, by bestowing certain legal privileges on registered trade unions (including the ability to compel employers to engage in the conciliation and arbitration process, leading to the making of industrial 'awards' regulating terms and conditions of employment).[38] Using Bray and Stewart's taxonomy of regulatory modes this was a system of 'delegated regulation', with terms and conditions of employment set by an independent arbitral body. Other modes of regulation such as 'statutory regulation' or 'collective agreement-making' initially occupied a subsidiary role, although they have since gained in significance.

In theoretical terms, at least, this system might appear problematic in simultaneously impeding political and industrial channels of worker voice reflected in the enactment of statutory rights and the negotiation of collective agreements. Kahn-Freund famously disparaged compulsory arbitration as politically repugnant in its illiberal negation of group freedom in industrial civil society, a feature of totalitarian political regimes.[39] Yet institutions must be evaluated in their total social, political and economic context. The particular form of compulsory arbitration in Australia ensured a vigorously independent trade union movement, with registered trade unions given a privileged position in the formulation, variation and enforcement of awards.[40] In this way, and somewhat paradoxically, 'delegated regulation' through compulsory arbitration gave rise to an especially strong form of collective voice exercised through registered trade unions in the Australian system. The concept of award-making has survived through to the present day in the guise of the Fair Work Commission's regulatory activities. However, it is an institutional structure that has undergone significant change.

These institutional changes often cast light on deeper shifts in the position and prestige of worker voice in Australian labour law. For example, Bray and Stewart observe that under the new regime of 'modern awards', annual wage reviews are conducted in a spirit of civic participation, soliciting submissions from a wide range of interested parties. As such, 'unions receive no special treatment, though they

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37 See Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration* (Oxford University Press, 1989); Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 29–34. See also Bray and Stewart, above n 27; Naughton and Pittard, above n 19.

38 See further Bray and Stewart, above n 27.

39 Otto Kahn-Freund, 'Intergroup Conflicts and their Settlement', in Otto Kahn-Freund, *Selected Writings* (Stevens Stevens, 1978) 41.

40 A point acknowledged by Kahn-Freund in his later work: on which, see Paul L Davies and Mark R Freedland (eds), *Kahn-Freund's Labour and the Law* (Stevens and Sons, 3rd ed, 1983) 147–53.

clearly remain influential "stakeholders"'.[41] This is also perhaps a reflection of the influence of principles of political neutrality, eschewing privilege for special interest groups, in the legislative schema. The changes in the nature and scale of 'delegated regulation' through compulsory arbitration have corresponded with an escalating role for other State institutions.

Since the late 1980s, statutory schemes of collective bargaining have overtaken conciliation and arbitration as the major focus for determining employment conditions in both Australia and New Zealand. In the latter, the increased emphasis on collective bargaining was interrupted by the operation of the *Employment Contracts Act 1991* (NZ) throughout the 1990s.[42] This was followed by the shift back to collective voice mechanisms under the *Employment Relations Act 2000* (NZ), including the introduction of good faith bargaining obligations.[43] In Australia, a formalised system of 'enterprise bargaining' was initially grafted onto the traditional conciliation and arbitration framework, under the *Industrial Relations Reform Act 1993* (Cth).[44] Then, from 1996, union and non-union bargaining options[45] were accompanied by the availability of individual statutory agreements (known as 'Australian Workplace Agreements' or 'AWAs').[46] These were one of the main instruments through which the conservative Coalition government (1996–2007) sought to dilute collective voice for workers.[47] In contrast, the Labor government since 2007 has sought to re-orient Australia's workplace relations system towards collective bargaining.[48] As in New Zealand,

41 Bray and Stewart, above n 27.

42 With its prioritisation of individualised negotiation, this legislation significantly weakened employee voice: see Raymond Harbridge (ed), *Employment Contracts: New Zealand Experiences* (Victoria University Press, 1993); Gordon Anderson, *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, 2011).

43 See Anderson, above n 42; Rasmussen, above n 9; Breen Creighton and Pam Nuttall, 'Good Faith Bargaining Down Under' (2012) 33 *Comparative Labor Law and Policy Journal* 257.

44 See Richard Naughton, 'The New Bargaining Regime under the *Industrial Relations Reform Act*' (1994) 7 *Australian Journal of Labour Law* 147; Bray and Stewart, above n 27.

45 See Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62.

46 *Workplace Relations Act 1996* (Cth) pt VID; *Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) pt VB. See, eg, Ron McCallum, 'Australian Workplace Agreements: An Analysis' (1997) 10 *Australian Journal of Labour Law* 50; Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 1 *Australian Journal of Labour Law* 210.

47 See Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183; Cameron Roles and Michael O'Donnell, 'The *Fair Work Act* and Worker Voice in the Australian Public Service' (2013) 34 *Adelaide Law Review* 93.

48 See Breen Creighton, 'A Retreat from Individualism? The *Fair Work Act 2009* and the Re-Collectivisation of Australian Labour Law' (2011) 40 *Industrial Law Journal* 116; Bray and Stewart, above n 27.

Labor's *Fair Work Act* imposes good faith bargaining requirements on employer and employee bargaining representatives involved in enterprise agreement negotiations.[49]

A Government-initiated review found that (between 1 July 2009 and 31 December 2011) the *Fair Work Act* had;

> extended the benefits of collective agreements to approximately an additional 440 000 employees. It has provided employees with a greater voice in the bargaining process by facilitating collective bargaining when a majority of employees wish to do so and by allowing employees to be effectively represented by their union.[50]

However, some important limitations in the *Fair Work Act* bargaining framework have been highlighted in its first few years of operation, including narrow interpretations of the good faith bargaining requirements, which have allowed employers to (for example): bypass union bargaining representatives by communicating directly with employees during agreement negotiations;[51] engage in 'surface bargaining';[52] and request employees to vote on a proposed agreement once an impasse is reached, notwithstanding that a union wishes to continue negotiations.[53] There are some parallels here with the situation in New Zealand[54] — in both countries, good faith bargaining has turned out to be an avenue paved with complexities, rather than a

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49 *Fair Work Act 2009* pt 2–4, which contains a number of other innovations aimed at promoting collective bargaining, including 'majority support determinations' (the effect of which is to compel a reluctant employer to bargain, akin to the union recognition mechanisms operating in North American collective bargaining systems); and the 'low paid bargaining stream'. See Creighton and Nuttall, above n 43; Breen Creighton and Anthony Forsyth (eds), above n 24; Naughton and Pittard, above n 19.

50 John Edwards, Ron McCallum and Michael Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Australian Government, June 2012) 153, footnote omitted (and see further at chs 6 and 7). See also Anthony Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1.

51 *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 (5 May 2010). See Alex Bukarica and Andrew Dallas, *Good Faith Bargaining under the Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand* (Federation Press, 2012).

52 Cf *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia (Collieries' Staff Division)* [2012] FWAFB 1891 (22 March 2012); *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576.

53 *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 (5 May 2010); see also, eg, *Australian Municipal, Administrative, Clerical and Services Union v Global Tele Sales Pty Ltd* [2011] FWA 3916 (22 June 2011).

54 See Pam Nuttall, 'Collective Bargaining and Good Faith Obligations in New Zealand' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 290; Anderson, above n 42; Creighton and Nuttall, above n 43.

strong 'shot in the arm' to collective representation and worker voice.[55] It may be that the 'neutrality' implicit in requiring good faith from both sides does not fit with the reality of industrial relations.

Some of the papers also identify the importance of the courts in shaping regimes of worker voice. The common law, in particular, never ceases to surprise. In Walker and Tipple's fascinating exploration of the twists and turns of the Hobbit dispute, they point to the progressive judgment of the New Zealand Supreme Court in *Bryson v Three Foot Six Ltd* ('*Bryson*').[56] The Court disregarded the label inserted into the contractual documentation and concluded on the basis of the reality of the relationship that a 'contractor' in the film industry was an employee rather than an independent contractor. The effect of this was to circumvent the doctrine of restraint of trade, which might otherwise restrict collective action by workers in the film industry. There are parallels with recent developments in the UK, where the United Kingdom Supreme Court in *Autoclenz Ltd v Belcher* ('*Autoclenz*') recently deployed a purposive approach to the characterisation of contractual relations, in circumstances where the true agreement suggested personal employment and this diverged from sham contractual documentation designed to suggest otherwise.[57] In the New Zealand context, this bold judicial approach was reversed by a special legislative amendment introduced under intense pressure from a multinational film company threatening capital flight. This legislative amendment reasserted the primacy of the written contractual documentation. In the UK context, the development of a purposive doctrine was necessitated by longstanding legislative inaction to remedy the precarious position of those engaged in sham self-employment.[58] The institutional insulation of courts from the intense political pressures wielded by economically powerful actors on the legislative process means that the common law sometimes reveals itself as a technique of emancipation. Walker and Tipple's paper, along with recent UK developments, suggests that it is distorting simply to assert that the common law is, at all times and in all places, (to use Eric Tucker's terminology) 'Capital's Constitution'.[59]

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55 This generally reflects North American experience with good faith bargaining laws (although the Australian model is arguably more effective than its United States or Canadian counterparts): see, eg, Bukarica and Dallas, above n 51; Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States', above n 50; Anthony Forsyth, 'Comparing Purposes and Concepts in United States and Australian Collective Bargaining Law' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 203; Sara Slinn, 'The Canadian Conception of Collective Representation and Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 246.

56 [2005] 3 NZLR 721.

57 [2011] 4 All ER 745. For discussion, see Alan L Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 *Industrial Law Journal* 328.

58 Alan L Bogg, 'Sham Self-Employment', above n 57, 329.

59 Tucker, above n 3.

Yet Lambropoulos and Wynn's paper demonstrates that any assessment of the courts' regulatory role should be measured and circumspect. Specifically, courts in Australia and the UK have often adopted meagre interpretations of statutory freedom of association provisions that do little to protect *trade union* voice from employer victimisation. In a recent decision of the High Court of Australia such a provision was read very narrowly.[60] The employee, a trade union workplace representative, was subjected to disciplinary action for sending an email to union members alleging that the employer was implicated in fraudulent activities and encouraging union members to seek support from the union if they were affected by the alleged fraud. Mr Barclay and his union brought a claim alleging adverse action attributable to his status as a union official and engaging in industrial activity contrary to s 346 of the *Fair Work Act*. This statutory provision was supported by a reverse onus clause. In the view of the Court, however, 'a person who happens to be engaged in industrial activity should not have an advantage not enjoyed by other workers'.[61] The effect of this is to insert a strict comparator test into s 346, enabling an employer to discharge the onus where it can demonstrate that a non-union employee would have been treated in the same way. Where the adverse treatment would have been dispensed equally to workers who are not trade unionists, this operates as an effective defence to a claim of *discriminatory* victimisation. The UK case law is similarly replete with examples of judicial reasoning that are obtuse to the collective realities of workplace organisational activities.[62] Despite progressive decisions such as *Bryson* and *Autoclenz*, these other cases demonstrate that the courts are often insufficiently attuned to the distinctive position of *trade union* voice when interpreting statutory provisions.

The profile of the legislature has also changed in tandem with this realignment of 'delegated regulation' in the Australian system. As Naughton and Pittard's article outlines, there has been a gear change in the regulatory significance of legislated standards in providing a 'floor of rights' for all workers through the mechanism of the 'National Employment Standards' ('NES'). This is supplemented by a safety net of 'modern awards' administered by the Fair Work Commission. Naughton and Pittard identify a series of powerful concerns about the NES mechanism. Specifically, an increasing reliance on statutory labour standards risks static rigidity. Statutory standards may only be amended if channels of political influence are open to worker voice. As the authors observe, 'there is no systemic or enshrined right to seek and request such change, let alone ensure that it actually occurs'.[63] By contrast, channels of political influence seem highly receptive to global capital, as Walker and Tipple's account of the Hobbit dispute demonstrates.

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60 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647. Cf *Pearce v W D Peacock Co Ltd* (1917) 23 CLR 199.

61 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 662 [60].

62 Most notoriously, *Carrington v Therm-A-Stor* [1983] ICR 208, as discussed by Lambropoulos and Wynn, above n 35.

63 Naughton and Pittard, above n 19.

## IV The State as Employer

The sphere of public sector employment is vital in shaping the wider context of worker voice within a particular legal system. In Howe's terms, when the State acts as an employer it also acts as a 'role model' for employers in the private sector.[64] The ways in which the State conceptualises and implements voice arrangements in respect of its own public sector employees is therefore symbolically significant in the wider labour market, while also being of vital importance to public sector employees themselves. These signalling effects could be very powerful in steering the behaviour of private actors by identifying certain patterns of behaviour as normatively desirable.[65] It is therefore important for an evaluation of the 'State as employer' to be incorporated into an analysis of the mechanisms that States have at their disposal to steer behaviour and shape private preferences. A narrow focus on labour relations statutes will miss important elements of the total regulatory picture. Public sector employment practices are the living ideology of the government's industrial relations agenda. This is of vital contemporary significance in comparative labour law scholarship. The recent financial crisis has precipitated what some commentators have described as a 'war' on public sector collective bargaining and trade unionism in many US states and in the UK, driven by a political commitment to public spending reductions to reduce budget deficits.[66] An understanding of the recent Australian experience enables us to identify whether Anglo-American experience is part of a broader pattern of convergence, and the possibilities for a re-imagining of trade union strategies of resistance to public sector attacks in the US and the UK.

To this end, Roles and O'Donnell's analysis of collective bargaining in the Australian Public Service provides powerful insights into the regulatory context of Australian public sector collective bargaining. The *Fair Work Act* marked a decisive break with the neoliberalism of the Howard era which had 'prioritized managerial unilateralism, individualism and union exclusion in employment relations'.[67] Roles and O'Donnell conclude that this shift in ideological and regulatory context led to strongly mobilised trade union voice in public sector collective bargaining in the 2011–12 bargaining round, contributing to bargaining outcomes that maintained real wages and resisted the erosion of other terms and conditions of employment. While Australian political discourse has not been untouched by

64 John Howe, 'Government as Industrial Relations Role Model' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 182.

65 See John Godard, 'Institutional Environments, Employer Practices, and States in Liberal Market Economies' (2002) 41 *Industrial Relations* 249, cited in Howe, above n 64, 183.

66 For an account of the 'war' in the US context, see Richard B Freeman and Eunice Han, 'The War against Public Sector Collective Bargaining in the US' (2012) 54 *Journal of Industrial Relations* 386. On the UK position, see Alan L Bogg and Keith D Ewing, *The Political Attack on Workplace Representation — A Legal Response* (Institute of Employment Rights, 2013).

67 Roles and O'Donnell, above n 47.

the rhetoric of austerity and the imperatives of budgetary restraint (particularly in the States of Queensland and New South Wales), Roles and O'Donnell's analysis present a cautiously optimistic prospectus for public sector trade unionism. Three features of their analysis are particularly worthy of note.

First, their analysis reinforces the importance of considering the bargaining activities of social actors in their total regulatory context. Specifically, public sector bargaining by employers in the Australian Public Service is guided by the principles set out in the *Australian Public Service Bargaining Framework* ('*APSBF*'),[68] and in many ways the *APSBF* adopts a more promotional tone towards trade unions than the formal legal requirements in the *Fair Work Act*, which seem more closely aligned with a 'liberal neutrality' ideology. This supports the approach of those who reject a 'legal positivistic' methodology focused narrowly on the State's regulatory activity as implemented through formal statutory laws.[69] Secondly, they identify ways in which creative strategies for generating industrial pressure can emerge out of statutory rules designed to regulate and restrict industrial action. Thus, management in some public sector organisations put 'early offer' agreements to the workforce for a direct vote as a bargaining tactic, given that a majority of employees voting in favour would validate such a collective agreement under the statutory framework. Roles and O'Donnell demonstrate how unions used this opportunity to successfully mobilise employees to vote 'no', which then served to fortify the unions' bargaining positions. In a similar vein, strike ballots were also used successfully by unions to mobilise social pressure on employers. These findings echo earlier research on the use of mandatory strike ballots by unions in the UK to strengthen their negotiating position.[70] It also underscores the unpredictability of regulatory consequences in this area of the law, especially where regulatory design might reflect trite assumptions about driving wedges between the 'moderate' voices of individual employees and the 'immoderate' voice of the trade union through 'democratic' ballot procedures. Finally, the principles in *APSBF* reflect the dominance of a 'third way' competitiveness ideology in requiring salary increases to be matched by productivity improvements, and subject to an annualised wage increase ceiling of 3 per cent. While the Australian public sector unions managed to circumvent this restriction through smart bargaining in the 2011–12 round, the UK experience suggests that the ideological membrane between competitiveness and deregulation is somewhat thin and highly porous. Australian unions need to be vigilant to this kind of ideological slippage and elision, the consequences of which can be quite stark for public sector collective bargaining.

Viewed in comparative perspective, Roles and O'Donnell's paper suggests that there is no evidence of an Australian alignment with the Anglo-American pattern of events in public sector collective bargaining. In fact, the dynamics of events differ in important ways in the US and the UK.

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68 Australian Public Service Commission, *APS Public Service Bargaining Framework* (2011) <http://www.apsc.gov.au/publications-and-media/current-publications/aps-public-service-bargaining-framework>.

69 Howe, above n 64; Ewing, above n 15.

70 Jane Elgar and Bob Simpson, *The Impact of the Law on Industrial Disputes in the 1980s* (Institute of Employment Rights, 1992).

In the US, the 'war' is being conducted at the state level led by the election of conservative Republican governors in states as diverse as Indiana, Missouri and Wisconsin.[71] Public sector employees are not covered by the federal labour relations statute, the *National Labor Relations Act*.[72] Instead, public sector collective bargaining is regulated at state level with legal frameworks ranging from supportive through to prohibitive. As Freeman and Han's account demonstrates, the retrenchment of state regulation has sometimes involved the revocation of executive orders permitting public sector collective bargaining, as in Indiana.[73] It has sometimes involved the legislative dismantling of laws supporting collective bargaining and the substitution of a more restrictive legal regime, as in Wisconsin.[74] This regulatory context in the US, and especially its federal dimension, means that the optimistic prospectus offered by Roles and O'Donnell on the Australian trajectory may not shed much light on the American prospectus. Specifically, state level public sector employees in the US are not covered by the general statutory framework specifying a legal duty to bargain in good faith,[75] whereas in Australia the *Fair Work Act* framework governs the relations of both private and federal public sector employees.[76] This general statutory coverage provides an important legal bulwark against rapid shifts in the governance of Australian public sector employment, whereas the political revocation of executive orders in some US states such as Indiana has demonstrated such instruments to be a precarious foundation for worker voice.[77]

In the UK the problems have been somewhat different. The Coalition government has presided over a radical shift in public policy regarding trade unions and collective bargaining, from neutrality to thinly disguised hostility. In the public sector, the victimisation of trade union representatives has been a growing problem, and this has been coupled with the recent issuing of executive guidance to reduce trade union time off and facilities time in the public sector.[78] Compulsory collective bargaining over superannuation terms in civil service employment has been unilaterally removed

71 For an excellent discussion, see Freeman and Han, above n 66.

72 *National Labor Relations Act of 1935*, 29 USC §§ 151–69.

73 Freeman and Han, above n 66, 390.

74 Ibid 391.

75 Ibid 388.

76 The *Fair Work Act* also regulates the employment of public sector employees in the state of Victoria, and in the Australian Capital Territory and Northern Territory.

77 See Freeman and Han, above n 66, 390. This point has also been made by Howe in respect of 'non-legislative' techniques of support in the Australian context (Howe, above n 64, 200), though the existence of the *Fair Work Act* as a statutory framework provides an important point of contrast with the US position.

78 Cabinet Office, *Consultation on Reform to Trade Union Facility Time and Facilities in the Civil Service* (8 October 2012) <https://www.gov.uk/government/consultations/reform-to-trade-union-facility-time-and-facilities-in-the-civil-service>. According to *The Guardian*, these changes represented a 'massive clampdown on trade union activities in the civil service': Patrick Wintour and Nicholas Watt, 'Cabinet Office: Maude to Curb Trade Union Activities of Civil Servants', *The Guardian* (London), 6 October 2012, 7.

by legislative enactment, such that the Civil Service Compensation Scheme (once a monument to collective bargaining) emerges as highly ineffectual.[79] In the National Health Service, legislative reform enables the contracting out of healthcare provision, with the subsequent likelihood of a reduction in collective bargaining units and industrial muscle.[80] In the UK context, the general statutory law on freedom of association rights applies fully to public sector employees,[81] but those protections have been interpreted so restrictively by the courts that the protection offered is rather scant.[82] This leaves public sector voice highly sensitive to ideological shifts in the political complexion of the government: there is a form of statutory entrenchment of freedom of association rights, but what is entrenched is so vapid that it is ineffective as a brake on radical swings towards a highly deregulatory agenda.[83] Thus, Roles and O'Donnell's optimistic prospectus for Australia holds as little relevance for UK as for US public sector labour relations, at least at the current time.

## V Worker Voice and the Discourse of 'Constitutionalisation'

Lambropoulos and Wynn invoke the discourse of constitutionalisation as an opening salvo in their paper. Of course, constitutionalisation is a most slippery concept. As Harry Arthurs has observed, it is a form of discourse that encompasses 'multiple models' not all of which may be compatible with each other.[84] Yet its analytic value is that it directs attention to the ways in which worker voice is nested within a broader set of political and constitutional structures. Worker voice is a facet of political governance. It reminds us that labour law is just one domain within which legal norms and structures might realise (or impede) democratisation through worker voice. Other domains such as public law and constitutional law should also be brought more fully into view. In our view, this vital analytic dimension is touched upon by the papers in this symposium in three important ways.

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79 See the effect of the *Superannuation Act 2010* (UK), which removed the administrative entitlement of workers (under statute) to collective negotiation over such terms under what was section 2(3) of the *Superannuation Act 1972* (UK). See, inter alia, *R (PCS) v Minister for the Civil Service* [2010] ICR 1198; and *PCS v Minister for the Civil Service* [2011] EWHC 2041 (10 August 2011), discussed in Tonia Novitz, 'Labour Rights and Property Rights: Implications for (and Beyond) Redundancy Payments and Pensions?' (2012) 41 *Industrial Law Journal* 136, 153–60.

80 See the *Health and Social Care Act 2012* (UK) and further Bogg and Ewing, above n 66.

81 Except as regards industrial action for certain limited groups of public sector workers, especially firefighters and prison workers, and others working in key industries such as water provision and telecommunications; in respect of which, see Simon Deakin and Gillian Morris, *Labour Law* (Hart Publishing, 6th ed, 2012) 1045.

82 See *Carrington v Therm-A-Stor* [1983] ICR 208.

83 See Lambropoulos and Wynn, above n 35.

84 Harry Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) 19 *Social and Legal Studies* 403. For a broader view of the discourse, see Ruth Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law' (2008) 35 *Journal of Law and Society* 341.

First, 'constitutionalisation' might imply the entrenchment of a cluster of labour rights.[85] Entrenchment might occur in a strong form through a written constitution, or it might involve weaker entrenchment through a set of statutory rights. The papers demonstrate how necessary it is to engage in a careful assessment of the virtues and vices of entrenchment. On the one hand, entrenchment might lead to a kind of 'ossification' of the kind lamented by Cynthia Estlund in the US context, where structural and institutional barriers in the structures of democratic governance impede necessary political change.[86] A number of the papers highlight this risk with the rising significance of statutory labour standards in the Australian system.[87] On the other hand, Walker and Tipples' analysis of the Hobbit dispute draws attention to the ways in which some degree of ossification can be very valuable in impeding rapid legislative changes precipitated by powerful global corporations seeking favourable regulatory concessions in exchange for economic investment. The basis of public sector labour relations in discretionary executive instruments also points to the virtue of ossification. Ministerial orders and codes of practice can disappear quietly. Legislative repeal is a public legislative act that must be conducted in the public forum. This also intensifies the scrutiny of the integrity of the democratic process, the ways in which it is blocked to workers' voices (whether through trade unions or otherwise) and the ways in which it is open to the voice(s) of capital.

Secondly, the structure and function of collective bargaining is a matter of vital significance. Australasian labour law has been constructed around a model of decentralised enterprise-based bargaining, rather than European-style sectoral collective bargaining. This has enormous political ramifications. Keith Ewing has drawn attention to a most important distinction between 'representative' and 'regulatory' modes of collective bargaining.[88] The Anglo-American and, we venture to suggest, the Australasian model, envisage collective bargaining as a private market activity conducted by trade unions on a decentralised basis as agents of a circumscribed bargaining unit. This is coupled with a consent-based model of representational legitimacy, either through a pluralistic system of members-only agency bargaining or through majoritarian procedures. By contrast, the 'regulatory' mode conceives of collective bargaining as a public regulatory activity conducted either on a sectoral or a national level. It is therefore a form of public governance, more akin to legislating than bargaining.[89] This is aligned with a more organic view of trade unions, with trade unions enjoying their own prerogatives as institutions with their own inherent legitimacy.[90] In this respect, trade unions acquire their own standing in the constitutional order quite apart from any authorising act of consent by workers. This

85 Arthurs, above n 84, 405.

86 Cynthia L Estlund, 'The Ossification of American Labor Law' (2002) 102 *Columbia Law Review* 1527.

87 Bray and Stewart, above n 27, Naughton and Pittard, above n 19.

88 Keith D Ewing, 'The Function of Trade Unions' (2005) 34 *Industrial Law Journal* 1.

89 For discussion, see Alan L Bogg, 'The Death of Statutory Union Recognition in the United Kingdom' (2012) 54 *Journal of Industrial Relations* 409, 410.

90 Bogg, above n 18, 29–33.

has obvious implications for the extent to which wider democratic processes are permeable to workers' interests articulated through trade unions.

A process of coerced decentralisation of collective bargaining is now under way in Europe, especially in countries such as Greece that have sought bailout packages administered by the troika of the International Monetary Fund, the European Central Bank and the European Commission.[91] Decentralisation is viewed by critics as a technique of disempowerment of labour's collective voice. European observers will watch the Australian and New Zealand experience anxiously to determine whether this correlation of decentralisation and disempowerment is a necessity or a contingent fact.

Finally, it is vital to assess the potential for constitutionalised human rights norms to infuse processes of voice in order to enhance the 'capabilities' of workers to exercise real democratic influence over their working lives. In this respect, Reilly's exploration of the limitations of voice in ameliorating patterns of gender inequality in New Zealand universities is salutary.[92] Despite the provision of voice through participatory workplace mechanisms, subtle and invidious cultural and social constraints can silence voice through fear or distort voice through false consciousness. Moreover, we should also be wary of assuming that women's interests are unitary. Women's experiences and interests are rich, diverse and varied, and we should expect voice to reflect that variety.[93] The 'reflexive law' paradigm creates procedural spaces, within which those voices can be heard. On this reflexive approach, communicative spaces are structured by human rights norms that augment what Deakin and Koukiadaki have termed 'capability for voice'.[94] Reilly's paper points to areas for further investigation. Specifically, it raises difficult issues of regulatory theory to ascertain *why* legal gender equality norms are failing to enable the voice capabilities of women workers. Given the conclusions of Deakin and Koukiadaki that trade unions significantly enhance voice capability within the context of consultation over corporate restructuring,[95] we think that this raises

91 Aristea Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41 *Industrial Law Journal* 276; see also Youcef Ghellab and Konstantinos Papadakis, 'The Politics of Economic Adjustment in Europe: State Unilateralism or Social Dialogue?' in International Labour Organisation, *The Global Crisis: Causes, Responses and Challenges* (International Labour Organisation, 2012) 81.

92 Amanda Reilly, 'Voice and Gender Inequality in New Zealand Universities' (2013) 34 *Adelaide Law Review* 81.

93 For a 'reflexive law' analysis of this phenomenon, see Wanjiru Njoya, 'Job Security in a Flexible Labor Market: Challenges and Possibilities for Worker Voice' (2012) 33 *Comparative Labor Law and Policy Journal* 459.

94 Simon Deakin and Aristea Koukiadaki, 'Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from UK Case Studies' (2012) 33 *Comparative Labor Law and Policy Journal* 427, drawing upon Amartya Sen, *Development as Freedom* (Oxford University Press, 2000).

95 Ibid.

interesting lines of enquiry in the sphere of gender equality too. Reilly suggests that channelling voice through trade unions might ameliorate some of the difficulties she identifies, but as trade union representation is already an established part of the infrastructure of New Zealand universities, she recognises that something more than this may be necessary.[96] There is a reminder here that the State cannot necessarily, by offering opportunities for trade union representation, ensure access to voice. Capabilities are likely to be internally as well as externally constructed, posing the question as how trade unions (as workers' collectivities) can themselves reflect upon and reformulate what they offer around voice(s).

One particular fertile channel of constitutionalisation in the UK and Canada has been the utilisation of constitutional litigation to develop fundamental labour rights such as the right to collective bargaining. In Canada this has culminated in the recent Supreme Court of Canada decision in *Fraser v Ontario*.[97] In the UK, constitutional litigation strategies have been focused upon art 11's protection of freedom of association in the ECHR,[98] with a spate of recent case law recognising fundamental rights to collective bargaining and strike as inherent in the general protection of the right to form and join trade unions 'for the protection of his interests'.[99] The potentials and pitfalls of constitutional litigation in this sphere has been fiercely contested, though we agree that 'as conventional voluntary and political modes of action have been battered by a sustained neoliberal assault on workers' interests, constitutional litigation has emerged as another possible strategy for the vindication of workers' fundamental labour rights'.[100] The distinctive constitutional arrangements in Australia and New Zealand would seem to preclude this as a viable legal strategy at the present time. This may prove to be a rather acute factor for workers in the Antipodes, especially in the New Zealand context. As Walker and Tipples' paper demonstrates, fundamental ILO norms were simply disregarded in the Hobbit dispute. Scholars such as Tucker have rightly drawn attention to the ways in which labour's international constitution in the ILO setting is 'soft' when measured against the metric of enforceability.[101] The constitutional litigation in *Fraser* and *Demir and Baykara* provides a potentially powerful technique for 'hardening' ILO norms in national settings.[102]

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96 Reilly, above n 92.

97 [2011] 2 SCR 3.

98 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 11.

99 On the right to collective bargaining, see *Demir v Turkey* [2008] Eur Court HR 1345; on the right to strike, see *Enerji Yapi Yol-Sen v Turkey* [2009] Eur Court HR 2251.

100 Alan L Bogg and Keith D Ewing, 'A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2012) 33 *Comparative Labor Law and Policy Journal* 379, 413.

101 Tucker, above n 3.

102 See, for an excellent exploration of this potential, Keith D Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

## VI Conclusion

In the introduction to this symposium on Australasian 'Voice at Work', we have sought to explain the origins of our project and how the papers offered here provide a valuable resource for scholars and practitioners assessing the trajectory of worker voice in Australia and New Zealand. While we cannot do full justice to the nuance and richness of the collection, we suggest a deeper theme that recurs across the contributions, namely the role of the State in steering mechanisms for worker voice and the ways in which that role is currently being reconfigured.

We note that an egalitarian tradition played a profound role in the origins of Australian and New Zealand industrial relations law, but is (as is the case elsewhere) being challenged by the neoliberal discourse of choice and economic efficiency. In terms of institutions, we observe the shift from a central role for the State in conciliation and arbitration of awards in which unions were given a privileged position to other institutional forms which contemplate non-union actors and indeed greater individualisation of negotiation over terms and conditions. This is a shift perhaps more stark in New Zealand than in Australia, but one which all our contributors highlight as a potential concern. Notably, in neither country have the statutory good faith bargaining requirements reaped the benefits apparently intended.

The apparent weakness of trade unions as political actors may have the potential to be remedied by a strongly mobilised union voice in the public sector (and Australia offers a powerful example of what can be achieved), but in the US and the UK we have been made painfully aware of the fragility of such entitlements. In this sense, the comparative exercise can only be taken so far.

The inverse is also true, namely that Australia and New Zealand lack the scope for constitutional litigation which could reinforce and prioritise the status of labour rights as fundamental human rights, which we have observed in other jurisdictions. There remains, therefore, the potential peril that workers' freedom of association (and the freedom of speech that they thereby achieve) remains subject to political repeal and strategies of legislative restriction. The silencing of worker voice is an action unlikely to be taken by any State in totality, but remains a matter of degree as opposed to an absolute.

The Australasian message on voice is therefore mixed and complex. While not only the State has a part to play here, we can identify the myriad ways in which the State's role remains significant. This much we can detect from the effects of its manifest configurations and reconfigurations in an Australian and New Zealand setting. In different ways, the papers also reveal the vital respect in which deeply embedded public political philosophies are often the 'silent prologue' to legal norms, institutions and structures.[103]

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103 On the concept of 'public political philosophy', see Michael J Sandel, *Democracy's Discontent* (Harvard University Press, 1998) ch 1. The terminology of 'silent prologue' is borrowed from Ronald Dworkin, *Law's Empire* (Fontana, 1986) 90.

*Mark Bray* and Andrew Stewart***

# FROM THE ARBITRATION SYSTEM TO THE *FAIR WORK ACT*: THE CHANGING APPROACH IN AUSTRALIA TO VOICE AND REPRESENTATION AT WORK


## Abstract

This article explores mechanisms for employee voice and representation at work by reference to five processes for making rules about the employment relationship: statutory regulation, delegated regulation, collective agreement-making, individual contracting, and managerial unilateralism. We look in particular at five labour law regimes that have operated in Australia: the traditional conciliation and arbitration system; the enterprise bargaining regime introduced in 1993; the *Workplace Relations Act* as it operated after 1996; the 'Work Choices' amendments that took effect in 2006; and the Fair Work legislation from 2009 onwards. Our analysis of those regimes suggests three main findings. First, the support for union forms of collective voice has declined, but the laws have also changed dramatically in the types of support offered for trade unions. Secondly, the diminishing legislative support for unions has not been counterbalanced by the development of alternative collective forms of employee voice. Thirdly, the individualisation of rule-making processes and employee voice has been a consistent trend in Australian labour law.


## I Introduction

In analysing the profound changes to Australian labour law over the last two decades, we have argued elsewhere that it is valuable to focus on the mix of rule-making processes that have been promoted or discouraged by different regimes.[1] In this article, we adopt the same approach to shed light on changing forms of employee 'voice' and representation in Australia.

Our approach to employee voice is broadly consistent with the 'discourse of labour relations',[2] with an important modification. As in the mainstream industrial relations literature, we consider voice to be inextricably linked to the processes by which


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1 See Mark Bray and Andrew Stewart, 'What is Distinctive About the Fair Work Regime?' (2013) 26 *Australian Journal of Labour Law* 20. Some passages in this article are taken directly from that piece.

2 See especially, Alan Bogg and Tonia Novitz, 'Investigating "Voice" at Work' (2012) 33 *Comparative Labor Law and Policy Journal* 323, 326–32.

the rules of the employment relationship are created and enforced. Different rule-making processes require, or at least privilege, different mechanisms by which employees can contribute to rule making and enforcement, and thereby voice their concerns, represent their interests and defend their rights. The classic preoccupation of traditional labour relations analysis in the UK and USA, for example, is with the essential correspondence between collective bargaining and collective voice by employees through trade unions.[3] Consequently, laws permitting or promoting collective bargaining as a rule-making process will necessarily facilitate the formation and recognition of trade unions.

Our approach differs from more traditional analyses, however, because we consciously incorporate a wider range of rule-making processes, and thereby a wider range of voice mechanisms. Rather than privileging trade unions and collective bargaining, as the traditional approach does, we identify five types of rule-making process that can be embodied within, or promoted by, different national labour law regimes: statutory regulation, delegated regulation, collective agreement-making, individual contracting, and managerial unilateralism. Key features of each of these types and the corresponding forms of employee voice are described in Table 1.

The voice mechanisms associated with these five forms of rule-making include, but go well beyond, the traditional collectivism of trade unions and collective bargaining. For example, the importance of political parties and the political (rather than industrial) activities of trade unions is recognised for statutory regulation. Collective agreement-making acknowledges the possibility of non-union forms of collective voice, rather than the single channel of trade unions. Individual forms of voice and management-initiated forms of employee consultation are associated with individual contracting and managerial unilateralism. This presents a more comprehensive framework that can be applied to characterise national labour law regimes, whether unions are strong or not.

Employing this broad approach, we trace the transformation of Australian labour law since the early 1990s through five main national regimes: the conciliation and arbitration system that had commenced in 1904; the enterprise bargaining regime introduced in 1993; the *Workplace Relations Act 1996* (Cth) as it operated after 1996 ('*Workplace Relations Act*'); the 'Work Choices' amendments that took effect in 2006; and the Fair Work legislation from 2009 onwards. As in other work that has utilised this approach,[4] we concentrate on national labour laws that are generally applicable to private sector employees, setting aside (for reasons of space and convenience) both State and industry-specific regimes, as well as laws dealing with matters such as workplace safety, discrimination, and the like. The limits of space also mean that our account is selective, in that we cannot

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3 Particularly relevant here is Clegg's seminal account of the impact of collective bargaining structures on the form and operation of trade unions: Hugh Clegg, *Trade Unionism Under Collective Bargaining: A Theory Based on Comparisons of Six Countries* (Blackwell, 1976).

4 Bray and Stewart, above n 1.

| RULE-MAKING PROCESS | DESCRIPTION OF RULE-MAKING PROCESS | EMPLOYEE VOICE MECHANISM |
|---|---|---|
| Statutory regulation | The state directly determines through legislation the substantive rules of the employment relationship. | Since this is a political rule-making process, voice must be exercised politically. Individual mechanisms focus on voting in the election of political representatives, but collective mechanisms come through membership of political parties and politically-active interest groups, like trade unions. A key feature of much statutory regulation, however, is that it grants substantive legal rights to individual employees, which they often have to enforce themselves. |
| Delegated regulation | The legislature delegates to state agencies (such as independent tribunals) the prime responsibility for rule making. | Depends on the mode of operation of the agency in question, but individual voice is unlikely to have great effect, except in enforcement actions. Instead, collective voice comes through the role of organisations (mostly trade unions) in making submissions or participating in dispute resolution processes. |
| Collective agreement-making | Employers and groups of employees make the rules of the employment relationship through a process of bargaining or collective determination. | Depending on the model, employees may participate through a collective organisation (usually a trade union, but not always), and/or more directly (eg through being asked or required to vote to ratify an agreement). |
| Individual contracting | Individual employees make agreements directly with employers. | Employees participate as individuals by dealing directly with their employers and formally agreeing terms of employment. Collective organisations are logically not part of this process. |
| Managerial unilateralism | By default, employers can make rules by themselves, a prerogative which they exercise without sharing rule-making with others. | Employees participate as individuals by accepting the rules made by management or relinquishing employment. Management may choose to allow some form of employee input (such as through consultation committees or employee councils) but they are advisory only and operate at the discretion of management. Again, collective organisations that share decision-making power are logically not part of this process. |

**Table 1**

discuss the implications of every rule-making process in each time period. Finally, for the purpose of the current exercise, our emphasis is on the nature and mix of rule-making processes for which the relevant regimes provide, rather than their use or outcomes in practice.

## II The Conciliation and Arbitration System

The system which dominated federal labour law in Australia for most of the 20th century placed a heavy emphasis on delegated regulation. The *Conciliation and Arbitration Act 1904* (Cth) and its replacement, the *Industrial Relations Act 1988* (Cth), were primarily based on the Commonwealth's power under s 51(xxxv) of the *Constitution* to legislate for the conciliation and arbitration of industrial disputes that extended beyond any one State. The legislation authorised tribunals such as the Court of Conciliation and Arbitration and its eventual successor, the Australian Industrial Relations Commission ('AIRC'), to prevent or settle disputes by making awards prescribing wages and other employment conditions for selected industries, occupations or enterprises. Direct statutory prescription of employment standards was rare, while collective agreement-making and individual agreement-making were permitted, but their form and content was deeply influenced by the tribunals. Managerial unilateralism waxed and waned according to the scope of delegated regulation, determined in turn by changing legislative provisions and court decisions.[5]

The conciliation and arbitration system had significant implications for employee voice, in that it privileged trade unions — and more especially *registered* unions — as a mechanism for collective voice.[6] It is often observed that the tribunal system could not operate without unions and employer associations representing their constituents.[7] As O'Connor J put it in *Jumbunna Coal Mine NL v Victorian Coal Miners Association*:[8]

> if the judicial power of the Commonwealth is to be effectively exercised by way of conciliation and arbitration in the settlement of industrial disputes, it must be by bringing it to bear on representative bodies standing for groups of workmen.

This was reflected in the stated objects of the legislation. For example, both s 2(vi) of the 1904 Act and s 3(f) of the 1988 Act made it a priority to 'encourage the organisation of representative bodies of employers and employees'.

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5 See Bray and Stewart, above n 1, 27–30.

6 As to the advantages of registration, see Committee of Review into Australian Industrial Relations Law and Systems, *Report* (1985) vol 2, 442–3. It was not unknown, however, for unregistered unions to participate in the arbitration system: see, eg, *R v Portus; Ex parte McNeil* (1961) 105 CLR 537.

7 See, eg, Andrew Frazer, 'Trade Unions Under Compulsory Arbitration and Enterprise Bargaining: An Historical Perspective' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining: Trade Unions and the Law* (Federation Press, 1995) 52.

8 (1908) 6 CLR 309, 360.

While there was no *explicit* mechanism (of the type familiar in countries such as the US) for union recognition,[9] unilateral access to conciliation and arbitration meant that any employer that refused to deal with a union could find itself summoned to a compulsory conference, effectively forcing it to the bargaining table. Importantly too, as the federal system evolved, unions came to be recognised not just as agents for their current members, but as 'parties principal' that could negotiate and seek award entitlements on behalf of any employees eligible to join them, rather than just their members.[10] Hence unions could and did engage in disputes over wages and conditions at enterprises that might never see a single union member.[11]

During this period, compulsory union membership arrangements were common, while 'preference to union members' clauses were inserted in many awards.[12] More broadly, awards were highly collectivist instruments. Indeed, they were virtually 'owned' by the registered organisations that were party to them, providing both trade unions and employer associations with enforceable collective rights and many opportunities to participate in award making and variation.[13] This and other features of the conciliation and arbitration system encouraged high levels of union membership, but the unions tended towards a particular type. The fact that the federal system hinged on dealing with interstate industrial disputes, and that rule-making activity focused mostly on tribunal appearances, focused power within unions in the hands of full-time officials.[14] In practice, it was virtually impossible for individual employees to participate in the rule-making processes contemplated by the arbitral legislation. The federal tribunal could deal with disputes involving the treatment of individual employees, but generally only if those disputes had some form of collective or 'industrial' dimension[15] — and that was almost always supplied by the involvement of a union.

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9 See Ben Aaron, 'Union Security in Australia and the United States' (1984) 6 *Comparative Labor Law* 415; Rae Cooper and Bradon Ellem, '"Less Than Zero": Union Recognition and Bargaining Rights in Australia 1996–2007' (2011) 52 *Labor History* 49.

10 See *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387.

11 This was evident in the practice of unions seeking to 'rope' tens, hundreds or even thousands of small employers at a time into the coverage of an industry award: see Stephen Deery and David Plowman, *Australian Industrial Relations* (McGraw-Hill, 3rd ed, 1991) 384.

12 See Phillipa Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (Federation Press, 1995).

13 See Mark Bray and Johanna Macneil, 'Individualism, Collectivism and the Case of Awards in Australia' (2011) 53 *Journal of Industrial Relations* 149, 155–7. See also Mark Bray and Johanna Macneil, 'Individualism, Collectivism and Awards in the Australian Hospitality Industry' (2012) 22 *Labour & Industry* 333, 342–6.

14 James Kuhn, 'Why Pressure-Group Action by Australian Unions?' (1952) 24 *Australian Quarterly* 61; David Peetz, Barbara Pocock and Chris Houghton, ''Organisers' Roles Transformed? Australian Union Organisers and Changing Union Strategy' (2007) 49 *Journal of Industrial Relations* 151, 152–3.

15 See *R v Staples; Ex parte Australian TelecommunicationsCommission* (1980) 143 CLR 614; *Re Boyne Smelters Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees of Australia* (1993) 177 CLR 446, 454–5.

## III The Shift to Enterprise Bargaining

The Keating Government's *Industrial Relations Reform Act 1993* (Cth) significantly reduced the role of delegated regulation through the industrial tribunals, in favour of a particular type of collective agreement-making. The new system encouraged the making of formal, enterprise-level agreements, with awards now treated as creating a 'safety net' of minimum conditions and the AIRC discouraged from arbitrating disputes that might be resolved through enterprise bargaining. The laws also gave unions immunity from civil liability for industrial action, at least during a sanctioned 'bargaining period' leading to a single-business agreement, creating effectively the first real 'right to strike' in the history of federal labour law.[16] Direct statutory regulation remained modest, while individual agreement-making was still constrained because of the continuing restrictions imposed by awards on common law individual contracts. Managerial unilateralism narrowed somewhat, especially due to new laws against unfair dismissal; but the emphasis on enterprise bargaining gave businesses new opportunities to expand rule-making in workplaces and industries where unions were weak.[17]

The 1993 legislation had interesting consequences for the balance between collectivism and individualism in the system, and therefore for employee voice. The unfair dismissal provisions, for example, were important in giving individual employees the right to initiate a complaint, where previously they would have had to rely on a union notifying a dispute over their treatment.[18]

Similarly, while the promotion of collective agreement-making could be seen as encouraging employees to join trade unions, the 1993 legislation did not fully support unions as the collective mechanism for employee voice. Indeed, the end of compulsory arbitration meant an end to any guaranteed role for unions in rule making. They now had to negotiate with employers on a company-by-company basis, which severely stretched their resources and forced them to adopt new strategies focusing on an 'organising' rather than a 'servicing' model. This in turn encouraged a decentralisation of the locus of power within trade unions, increasing the opportunities for rank and file union members and especially workplace delegates to more directly exercise voice and participate in the negotiation of collective agreements.[19]

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16 See Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 77–8.

17 See Bray and Stewart, above n 1, 30–3; Australian Centre for Industrial Relations Research and Training, *Australia at Work* (Prentice Hall, 1999) ch 3. For a retrospective on the shift to enterprise bargaining in the early 1990s, see the various articles in (2012) 22(3) *Labour & Industry.*

18 For discussion of this change, which replicated earlier developments at State level, see Andrew Stewart, 'And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal' (1995) 1 *Flinders Journal of Law Reform* 85.

19 See David Peetz and Barbara Pocock, 'An Analysis of Workplace Representatives, Union Power and Democracy in Australia' (2009) 47 *British Journal of Industrial Relations* 623.

The legislation also brought reduced opportunities for union security, with new limitations on compulsory unionism that included a prohibition on workers being dismissed for non-membership. David Peetz argued that the legislation was part of a major 'institutional break', which weakened unions.[20] Similarly, Phillipa Weeks concluded that while the 1993 Act was not as anti-union as some State-level legislation at the time, it was nonetheless 'undeniably contributing to the cultural, paradigmatic change — by reducing the role of arbitration, by admitting non-union parties to bargaining, and … by weakening legal supports for union security and union recognition'.[21]

Most importantly perhaps, the 1993 legislation did not restrict collective agreement-making to union-negotiated instruments. An Enterprise Flexibility Agreement ('EFA') between an employer and its workers could be certified without a union being party to it, provided certain procedural conditions were met.[22] These conditions were quite restrictive, and unions were given extensive rights to intervene, but it was the first time under federal law that such agreements could be certified and opened the door for non-union forms of employee voice. A striking innovation for EFAs was that each agreement required the approval of a majority of the employees concerned. By contrast, it was sufficient with union agreements that the affected employees had been 'consulted'.[23] At this stage, therefore, unions could still be regarded as operating as general representatives of their employee 'constituency', rather than as agents for their existing members.

## IV The *Workplace Relations Act*

In 1996, following the election of the first Howard Government, the *Industrial Relations Act 1988* (Cth) was amended and renamed the *Workplace Relations Act 1996* (Cth).[24] The new law continued the 1993 legislation's approach of limited statutory regulation, but further reduced the role of delegated regulation. It retained a decentralised system of collective agreement-making, but with key new features that restricted (though by no means eliminated) the role of unions. The real priority, however, was the promotion of individual contracting and the expansion of managerial unilateralism.[25]

A central part of the narrowing of delegated regulation came through limitations placed on the range of 'allowable matters' that awards could cover. These not only reduced their effect, but also led to the exclusion of any sense of collectivism, by

20 David Peetz, *Unions in a Contrary World: The Future of the Australian Trade Union Movement* (Cambridge University Press, 1998) ch 5.

21 Weeks, above n 12, 200.

22 See Amanda Coulthard, 'Non-Union Bargaining: Enterprise Flexibility Agreements' (1996) 38 *Journal of Industrial Relations* 339.

23 See Richard Naughton, 'The New Bargaining Regime under the Industrial Relations Reform Act' (1994) 7 *Australian Journal of Labour Law* 147, 153–5, 160–1.

24 *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

25 See Bray and Stewart, above n 1, 33–7.

rendering void key supports for unions and collective employee voice. Awards were transformed into codes of minimum standards for individual employees, the enforcement of which increasingly relied on action by government inspectors and individual employees rather than trade unions.[26]

The new laws also restricted the influence of trade unions, with collective agreement-making now being permitted rather than promoted. The AIRC could no longer arbitrate over any matter related to the making of a collective agreement. This effectively allowed employers to refuse to recognise or bargain with unions. The only option for workers who wanted to bring a reluctant employer to the (collective) bargaining table was to use economic force, by taking 'protected' industrial action.[27]

In addition, the *Workplace Relations Act*'s 'freedom of association' provisions did not just extend to non-unionists the full range of protection against victimisation that had long been enjoyed by union members and officials, but explicitly outlawed provisions (whether in awards or agreements) that sought to require union membership or even just create preferential treatment for unionists.[28] The rights of union officials to enter workplaces were codified in the Act and restricted in certain ways, where previously they had been dealt with by awards.[29] Finally, agreements could also deal only with matters 'pertaining' to the employment relationships they regulated, a formula that could be used to limit union bargaining agendas — although this was not so much a designed restriction as a hangover from the old statutory definition of 'industrial dispute', and its effect was not to be fully appreciated until the *Electrolux* litigation in the early 2000s.[30] All these provisions served — to greater and lesser extents — to discourage employees from joining unions and to reduce the effectiveness of unions in representing their members. Indeed for the first time in over 90 years, it was no longer an object of the federal statute to encourage representative organisations.

The greater role accorded to non-union collective agreements served a similar purpose. Certified agreements could now be made either with one or more unions, or with a group of employees, and *all* agreements had to be put to a vote of the affected employees (other than in the case of a 'greenfields' agreement negotiated with a union to cover a new site, prior to the engagement of a workforce). A range of procedural impediments to non-union agreements were removed and the capacity of unions to

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26 See Bray and Macneil, 'Individualism, Collectivism and the Case of Awards in Australia', above n 13, 158–60; Bray and Macneil, 'Individualism, Collectivism and Awards in the Australian Hospitality Industry', above n 13, 346–50.

27 See Jenny Whittard et al, 'Collective Bargaining Rights under the *Workplace Relations Act*: The Boeing Dispute' (2007) 18(1) *Labour & Industry* 1; Cooper and Ellem, above n 9.

28 See Colin Fenwick and John Howe, 'Union Security After Work Choices' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 164, 174–7.

29 Ibid, 170–1.

30 See *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309; Jason Harris, 'Federal Collective Bargaining after *Electrolux*' (2006) 34 *Federal Law Review* 45.

intervene in such agreements or object to their approval was significantly restricted.[31] These non-union agreements represented a challenge to unions,[32] but they also raised questions about the process for making them. In theory, they could reflect or involve the operation of some form of non-union collective voice for employees. But unlike the position with individual agreements, as discussed below, the statute made no mention of non-unionised employees being able to appoint anyone to bargain on their behalf.[33] Furthermore, there was nothing to stop an employer simply drafting an agreement unilaterally and putting it to a vote of employees without any form of bargaining process.

Also highly significant was the introduction of statutory individual contracts that could exclude awards, in the form of Australian Workplace Agreements ('AWAs'). As the Minister responsible for the legislation explained, the new type of agreement was specifically designed to individualise voice by encouraging employees to deal directly with their employers:

> 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.[34]

More specifically on individual contracting:

> There will be no scope for uninvited union intervention to frustrate AWAs … AWAs will assist in developing a common purpose between management and employees for the benefit of all.[35]

This objective was reflected, among other ways, in provisions that allowed AWAs to override certified agreements.[36] Indeed, in the absence of any mechanism to force

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31 See Amanda Coulthard, 'The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion under the *Workplace Relations Act 1996* (Cth)' in Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion — An International Study* (Federation Press, 1999) 48, 51–4.

32 See Rae Cooper and Chris Briggs, '"Trojan Horse" or "Vehicle for Organising"? Non-Union Collective Agreement-Making and Trade Unions in Australia' (2009) 30 *Economic and Industrial Democracy* 93.

33 In the case of a union member, the employer could be obliged to 'meet and confer' with the union: *Workplace Relations Act 1996* s 170LK(5). But this fell well short of an obligation to bargain.

34 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1996 (Peter Reith, Minister for Workplace Relations).

35 Peter Reith, quoted in Mark Bray and Peter Waring, 'The Rhetoric and Reality of Bargaining Structures under the Howard Government' (1998) 9 *Labour & Industry* 61, 67.

36 Though not in all circumstances: see Andrew Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' in Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion — An International Study* (Federation Press, 1999) 18, 31.

union recognition, the *Workplace Relations Act* plainly now permitted employers to use either the threat or the reality of individual contracting to justify a refusal to engage in collective bargaining with unions.[37]

Section 170LK of the *Workplace Relations Act* did allow employees to appoint 'bargaining agents' on their behalf, which employers could be required to 'recognise' in relation to a proposed AWA; and there was nothing to stop an employee appointing a union official to act for them. But otherwise, the legislation made no mention of any requirement for negotiation or bargaining, and indeed it seemed to be framed on the assumption that AWAs would generally be drawn up by management and simply presented to employees for their approval.[38] While employers were prohibited from using 'duress' to compel an employee to sign an agreement, this did not necessarily prevent an employer from offering a job on the condition that the applicant agree to an AWA, on a 'take it or leave it' basis.[39] So beyond government rhetoric about allowing employers and employees to deal more directly with each other, the legislative provisions said little about the *structures* (ie. voice mechanisms) or *processes* by which they would do this. Just as non-union collective 'agreements' could earn that appellation through the assent of a majority at a ballot, the only real test of the AWA process was the outcome — that is, the signing of the agreement by both sides.

## V The Work Choices Reforms

The complex and contentious 'Work Choices' legislation,[40] which amended the *Workplace Relations Act* with effect from March 2006, represents the high-water mark (at least to date) of Australian government efforts to decollectivise and individualise both the process of rule-making and the mechanisms of employee voice; although the full impact of the reforms was never felt because of their limited period of operation. Statutory regulation was expanded, but largely to replace in a highly circumscribed way the minimum standards that had historically been provided by awards. Awards lost much of their 'safety net' function, through the removal of the 'no-disadvantage test' that had prevented employers from negotiating or imposing workplace agreements that involved a net reduction in award entitlements. Individual contracting was the privileged rule-making process, while managerial unilateralism also expanded, especially because of a major narrowing in protection for employees from unfair dismissal. Collective agreement-making was further restricted.[41]

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37 Kristen van Barneveld and Ross Nassif, 'Motivations for the Introduction of Australian Workplace Agreements' (2003) 14(2) *Labour & Industry* 21. See also Whittard et al, above n 27; Cooper and Ellem, above n 9.

38 See Margaret Lee, 'Bargaining Structures Under the Workplace Relations Act' in Margaret Lee and Peter Sheldon (eds), *Workplace Relations* (Butterworths, 1997) 29.

39 See, eg, *Schanka v Employment National (Administration) Pty Ltd* (2000) 97 FCR 186, 193.

40 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

41 See Bray and Stewart, above n 1, 37–41.

There were myriad ways in which the Work Choices laws worked against unions as a voice mechanism for employees. The almost complete undermining of delegated regulation meant that any support to unions provided by awards or the intervention of tribunals was virtually eliminated.[42] The new provisions about collective agreement-making also went to considerable lengths to limit the effectiveness of unions.[43] A wide range of provisions typically sought by unions were designated as 'prohibited content' for workplace agreements, even where they satisfied the 'matters pertaining' requirement — including restrictions on the use of contract labour and rights of entry for union officials.[44] There were new restrictions on the taking of protected industrial action, including the need for a mandatory ballot of the workers concerned.[45] And unions lost their monopoly on the making of greenfields agreements, with s 330 of the amended Act permitting businesses to start new projects or enterprises with an 'employer greenfields agreement' in place — a wholly remarkable instrument, since it involved an employer striking a deal with itself!

This attack on unions was not, however, just an expanded set of restrictions preventing unions from performing effectively their traditional role. It also entailed a new conception of the nature of that role itself. Unions could be seen in the provisions of Work Choices not in their traditional role as 'general representatives of workers' but much more narrowly as the representatives or bargaining agents of individual trade union members.[46] This was not entirely new to the Work Choices regime — the notion of being a bargaining representative was, as we have seen, enshrined in the 1996 legislation in relation to both non-union collective agreements and AWAs.[47] It was also offset by the fact that unions could still, even under Work Choices, enter into collective agreements as 'parties principal'. But the cumulative effect of the reforms was to move decisively away from the notion of unions having collective rights as organisations that were additional to and separate from the rights of individual employees or union members.

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42 See Bray and Macneil,'Individualism, Collectivism and the Case of Awards in Australia', above n 13, 158–60; Bray and Macneil, 'Individualism, Collectivism and Awards in the Australian Hospitality Industry', above n 13, 344–6.

43 See Anthony Forsyth and Carolyn Sutherland, 'From "Unchartered Sea" to the "Stormy Waters": How Will Trade Unions Fare Under Work Choices?' (2006) 16 *Economic & Labour Relations Review* 215; Greg Patmore, 'A Voice for Whom? Employee Representation and Labour Legislation in Australia' (2006) 29 *University of New South Wales Law Journal* 8; Fenwick and Howe, above n 28, 171–4, 178.

44 This effectively forced a revival in the use of unregistered agreements, as employers and unions sought to bypass these constraints: see Andrew Stewart and Joellen Riley, 'Working Around Work Choices: Collective Bargaining and the Common Law' (2007) 31 *Melbourne University Law Review* 903.

45 See Graeme Orr and Suppiah Murugesan, 'Mandatory Secret Ballots Before Employee Industrial Action' (2007) 20 *Australian Journal of Labour Law* 272.

46 Shae McCrystal, 'Re-Imagining the Role of Trade Unions After Work Choices' in Joellen Riley and Peter Sheldon (eds), *Remaking Australian Industrial Relations* (CCH Australia, 2008) 151.

47 See above nn 33, 38–39.

## VI Voice and Representation under the *Fair Work Act*

The *Fair Work Act 2009* (Cth) ('*Fair Work Act*') seemed at first blush to establish a very different mix of rule-making processes to Work Choices — an unsurprising outcome given the rhetorical conflicts between the major political parties over labour legislation in the November 2007 election campaign. Statutory regulation expanded slightly and delegated regulation regained importance through both a renovated 'modern award' system and a greater role for the AIRC's replacement, a body originally known as Fair Work Australia ('FWA') but subsequently renamed the Fair Work Commission ('FWC').[48] Unfair dismissal protection was largely restored. Perhaps most importantly for present purposes, the Labor Government claimed that the laws would 'place collective bargaining at the enterprise level at the heart of the workplace relations system'.[49] Correspondingly, the roles of individual contracting and managerial unilateralism were seen to diminish. These changes seemed to offer significant implications for employee voice. The innovations can, however, easily be exaggerated, because there was more continuity with Work Choices than many political commentators were prepared to acknowledge.[50] This included maintaining an expanded use of the Commonwealth's power under s 51(xx) of the *Constitution* to regulate corporate employers, allowing federal regulation to override state industrial laws that had (prior to Work Choices) been able to operate in parallel with the federal arbitration system.[51]

The expansion of statutory regulation, through the determination by parliament of the National Employment Standards in pt 2-2 of the *Fair Work Act*, not only creates individual employment rights which are more difficult to change than those traditionally embodied in awards or collective agreements,[52] but also has important implications for employee voice. Political action by employee representatives — presumably unions, but potentially non-union organisations as well — is now required to defend or vary these new substantive statutory rights. This can only place added pressure on the relationship between organised labour and its 'political wing', the ALP — especially during an era in which federal Labor governments have made a virtue of steering a middle course between the demands of unions and employer groups.[53]

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48 See *Fair Work Amendment Act 2012* (Cth) sch 9, which took effect on 1 January 2013.

49 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [r.186].

50 See Bray and Stewart, above n 1, 41–7; Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

51 See Andrew Stewart, 'Testing the Boundaries: Towards a National System of Labour Regulation' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 19. As to the validity of using s 51(xx) in this way, see *New South Wales v Commonwealth* (2006) 229 CLR 1; Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (Federation Press, 2007).

52 Ron McCallum, 'Legislated Standards: The Australian Approach' in Marian Baird, Keith Hancock and Joe Isaac (eds), *Work and Employment Relations: An Era of Change* (Federation Press, 2011) 6, 14.

53 See, eg, Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 45–6.

The renovation of the award system under the Fair Work regime has also helped to restore the importance of minimum standards, most notably by reimposing the requirement that what are now called 'enterprise agreements' cannot involve an overall reduction in award entitlements. However, the modern award system for which pt 2-3 of the Act provides is a distinctly different creature to the federal and State award systems it has supplanted. There is, for example, no longer any link to the existence or threat of an industrial dispute. Interested parties are at liberty to apply to the FWC, for a variation to the terms of a modern award, or for the creation of a new award. But it is the FWC now that clearly 'owns' the award system and has responsibility for its maintenance, not the unions and employer associations that effectively used to bargain over award standards and be parties to awards under previous regimes. Unions and employer associations also potentially share influence with other interested parties which are not registered organisations.

Under div 3 of pt 2-3, the permissible content of awards is somewhat broader than under the previous legislation. For example, they can once again include provisions, previously excluded under the *Workplace Relations Act*, obliging employers to consult employees if they are going to introduce major workplace change.[54] These are modest supports for trade unions. On the other hand, many other of the Howard Government's restrictions have been retained, and in particular modern awards contain little by way of collective rights for unions or their members. It is *employees* who receive the right to consultation and to a 'representative', if they so choose.[55]

As for the FWC, despite having similarities to the AIRC (not least in terms of membership), it is in many ways a very different institution to its predecessor. In particular, while it may still choose to operate as a tribunal in discharging dispute resolution functions, it has the freedom under the legislation to make decisions in a range of other ways.[56] For example, and to reinforce what has been said above about the change in the nature of the award system, it has chosen to conduct the annual wage reviews required by pt 2-6 of the Act by calling for submissions and holding public workshops, rather than simply hearing arguments from governments, unions and employer associations. All submissions and transcripts are posted online, so that the community at large can both follow what is happening and indeed contribute to the process. The end result is an administrative ruling, not an order made to resolve a dispute.[57] A similar process has been used for the first modern award review, an interim two-yearly review required by item 6 of sch 5 to the *Fair Work (Transi-*

54 See Mark Bray, 'The Distinctiveness of Modern Awards' in Marian Baird, Keith Hancock and Joe Isaac (eds), *Work and Employment Relations: An Era of Change* (Federation Press, 2011) 17, 25–6.

55 See Bray and Macneil, 'Individualism, Collectivism and the Case of Awards in Australia', above n 13, 161–3; Bray and Macneil, 'Individualism, Collectivism and Awards in the Australian Hospitality Industry', above n 13, 344–6.

56 See Andrew Stewart, 'Fair Work Australia: The Commission Re-Born?' (2011) 53 *Journal of Industrial Relations* 563.

57 Ibid 572–3; see, eg, *Annual Wage Review 2012–13* [2013] FWCFB 4000 (3 June 2013).

*tional Provisions and Consequential Amendments) Act 2009* (Cth).[58] Under this new regime, unions receive no special treatment, though they clearly remain influential 'stakeholders'.

Importantly too, for both unions and the FWC, the general power to deal with industrial disputes that was a feature of the federal statute for over a century, until it was removed by Work Choices, has not been restored under the *Fair Work Act*. Except in the context of bargaining for a new enterprise agreement, and certain individual claims (most obviously unfair dismissal complaints), the FWC can generally only deal with a workplace dispute if the parties involved consent to it having that role.[59]

As to Labor's claim to have put collective bargaining back at the 'heart' of Australian labour law, there is certainly a renewed emphasis on collective agreement-making. This is reflected in the objects of the *Fair Work Act*, which speak of 'achieving productivity and fairness through an emphasis on enterpriselevel collective bargaining',[60] while affirming that 'statutory individual employment agreements … can never be part of a fair workplace relations system'.[61] Again, however, there has been no attempt to restore any reference to encouraging representative organisations. Section 3(e) speaks only of 'enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented'.

It is also important to draw a distinction between the *Fair Work Act*'s treatment of *agreement-making*, and its promotion or regulation of *bargaining*.[62] Part 2-4 of the Act, which deals with enterprise agreements, is notable for dispensing with

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58 See Fair Work Commission, *Modern Awards Review 2012* (8 August 2013) <www.fwc.gov.au/index.cfm?pagename=awardReview2012>.

59 See Joellen Riley, 'From Industrial Arbitration to Workplace Mediation: Changing Approaches to Dispute Resolution' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009), 186; Louise Thornthwaite and Peter Sheldon, 'Fair Work Australia: Employer Association Policies, Industrial Law and the Changing Role of the Tribunal' (2011) 53 *Journal of Industrial Relations* 616; Therese MacDermott and Joellen Riley, 'Alternative Dispute Resolution and Individual Workplace Rights: The Evolving Role of Fair Work Australia' (2011) 53 *Journal of Industrial Relations* 718; Anthony Forsyth, 'Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR' (2012) 23 *International Journal of Human Resource Management* 476; Richard Naughton, 'The Role of Fair Work Australia in Facilitating Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 68.

60 *Fair Work Act* s 3(f).

61 Ibid s 3(c).

62 See further Peter Gahan and Andreas Pekarek, 'Collective Bargaining and Agreement Making in Australia: Evolution of the Legislative Framework and Practice' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 21.

the distinction between union and non-union agreements that had been formally enshrined since 1993. With the sole exception of greenfields agreements, which can once again only be made with 'relevant employee organisations' (that is, registered unions), s 172 conceives all agreements as being made by one or more employers *and their employees*.[63] There is no longer any conception of a union being 'party to' a non-greenfields agreement, which is taken by s 182 to be 'made' only when a majority of the affected employees vote it up, not before. A union that has been a bargaining representative for at least one member may opt under s 183 to be formally 'covered' by such an agreement, which enhances its rights to enforce the agreement under pt 4-1 of the Act. But again, this option can only be exercised during the short period between employee assent and formal approval by the FWC.

The only real role of a trade union in relation to the making of a non-greenfields enterprise agreement, as far as the legislation is concerned, is indeed to be a 'bargaining representative' for employees. It is true that a registered union is presumed by s 176(1)(b) to represent each of its members. But even unionists are free under s 176(3) to appoint someone else to act for them, aside from another registered union that lacks the appropriate coverage under its eligibility rules.[64] This not only makes union voice more contingent, but reaffirms and indeed extends the option — first introduced, as we have seen, under the 1993 Act — for different types of employee voice, where union voice was historically the only option.

The Act does provide unions and other bargaining representatives with important tools to promote the conclusion of a single-enterprise agreement or to influence its content.[65] Besides taking protected industrial action, these include applying for a 'majority support determination', which may be granted where the FWC is satisfied that a majority of employees in a workplace group wish to make a collective agreement, and effectively

63 By virtue of a recent amendment designed to preclude single-employee agreements, such an agreement must cover at least two employees (s 172(6)). Section 194(ba) also now provides that an enterprise agreement cannot allow an employee or employer to elect not to be covered by an agreement. Such 'opt-out' clauses had been held by FWA not to be consistent with the Act's concept of a collective agreement, though only after a series of inconsistent rulings on the point: see *Construction, Forestry, Mining and Energy Union v Queensland Bulk Handling Pty Ltd* [2012] FWAFB 7551 (3 September 2012). The amendments were recommended by an independent review of the legislation commissioned by the Gillard Government: John Edwards, Ron McCallum and Michael Moore, 'Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation' (Legislation Review, Department of Education, Employment and Workplace Relations, 18 November 2012) 160–1, 168.

64 By virtue of a recent amendment to s 176(3), the same restriction applies to an individual union official. This is to prevent officials from seeking in a 'private' capacity to represent workers who fall outside their union's coverage: see, eg, *Technip Oceania Pty Ltd v Tracey* [2011] FWAFB 6551 (7 November 2011); Edwards et al, above n 63, 146.

65 See generally Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012).

compels a reluctant employer to commence bargaining.[66] Where bargaining has been compelled in this way, or where an employer voluntarily commences negotiations, the FWC may also make a 'bargaining order' that requires compliance with a new set of 'good faith bargaining' requirements.[67] There are also various circumstances in which the FWC may terminate bargaining and arbitrate an outcome.[68]

Despite the support these tools provide for collective agreement-making, however, there is nothing in the agreement-making provisions in pt 2-4 of the *Fair Work Act* that actually *requires* bargaining to take place or that guarantees any collective voice for employees in determining the content of an agreement. An employer can validly make an agreement simply by informing the relevant group of employees of their right to be represented, showing them a copy of a draft agreement and explaining its effect, and then persuading a majority to vote in favour.[69] The FWC must be satisfied that the employees have 'genuinely' agreed to the proposed terms, which may imply at least an *opportunity* to bargain.[70] But there is no general requirement in the Act to require an employer to have complied with its good faith bargaining obligations as a prerequisite for approval of an agreement.[71]

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66 See, eg, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Cochlear Ltd* [2009] FWA 125 (20 August 2009). For a review of this and other powers given to what is now the FWC in relation to bargaining disputes, see Anthony Forsyth et al, 'Fair Work Australia's Influence in the Enterprise Bargaining Process', (Research Report, Fair Work Australia Research Partnership, 30 September 2012) <www.fwc.gov.au/documents/forsyth.pdf>.

67 See, eg, *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576. For critical analysis of these provisions and their interpretation to date by the FWC, see Alex Bukarica and Andrew Dallas, *Good Faith Bargaining Under Australia's Fair Work Act: Lessons from the Collective Bargaining Experience in Canada and New Zealand* (Federation Press, 2012).

68 As in the case of the major bargaining disputes in 2011 at Qantas: see *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 (31 October 2011); *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200; *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* [2012] FWAFB 236 (23 January 2012); *Transport Workers Union of Australia v Qantas Airways Ltd* [2012] FWAFB 6612 (8 August 2012); *Australian and International Pilots Association v Qantas Airways Ltd* [2013] FWCFB 317 (17 January 2013). For discussion of these disputes and the scope of the FWC's powers of 'last resort' arbitration, see Anthony Forsyth and Andrew Stewart, 'Of "Kamikazes" and "Mad Men": The Fallout from the Qantas Industrial Dispute' (2013) 36 *Melbourne University Law Review* 785.

69 See *Fair Work Act 2009* (Cth) ss 173–174, 180, 181; Amanda Coulthard, 'The Mechanics of Agreement Making under the *Fair Work Act 2009*: Promoting Good Faith Bargaining and Genuine Agreement' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 90.

70 See *Fair Work Act 2009* (Cth) ss 186(2)(a), 188; Coulthard, above n 69, 102–3.

71 See *Appeal by Philmac Pty Ltd* [2011] FWAFB 2668 (5 May 2011); *Queensland Pre-Stressing Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWA 5026 (20 June 2012).

It is also notable that the permissible scope and content of collective agreement-making are still significantly constrained under the *Fair Work Act*, even if some previous restrictions have been lifted. For example, s 172(1) continues to require agreements, at least as a general rule, to deal only with matters pertaining to the relationships they regulate. It is true that the Howard Government's extended list of 'prohibited content' has been trimmed, so that agreements may once again deal with a number of matters of collective concern to employees and their unions.[72] For example, it is once again permissible, as it was prior to Work Choices, for employers to commit to consult over any decision to outsource labour to an external firm, or to ensure that non-employed workers receive the same wages and conditions as employees performing the same jobs.[73] Section 205 indeed obliges *all* enterprise agreements to contain a term requiring the employer to consult its employees over any significant change that may affect them.

On the other hand, s 194 lists 'unlawful terms' which agreements cannot validly contain and which may prevent their approval by the FWC. Terms are unlawful if (among other things) they seek to broaden the rights granted by the legislation in relation to unfair dismissal, industrial action, or entry to workplaces by union officials;[74] if they involve unlawful discrimination on the grounds of race, gender, disability, age, and so on; or if they are 'objectionable', in the sense (as defined in s 12) of requiring or permitting conduct that would breach the 'general protections' in pt 3-1. These last provisions are effectively a rewrite of the *Workplace Relations Act* provisions on 'freedom of association', coercion, misrepresentation and other forms of inappropriate workplace conduct. They are notable for continuing to protect the right *not* to be a union member or participate in collective activities as strongly as the right to associate.

In effect then, as Rae Cooper, Bradon Ellem and Patricia Todd observe, collective bargaining under the *Fair Work Act* is treated as 'an individual right usually to be exercised by employees at the enterprise level, involving bargaining agents that are not necessarily unions' and where the roles of unions are 'not taken for granted, and indeed protected, as they were under arbitral system'.[75] As Colin Fenwick and

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72 See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 305–11.

73 See, eg, *Asurco Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union* [2010] FWAFB 6180 (18 August 2010); *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339. By contrast, a *prohibition* on outsourcing is still not permitted: see, eg, *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2009] FWAFB 599 (12 October 2009).

74 As to this last point, see, eg, *Re Australian Industry Group* [2010] FWAFB 4337 (11 June 2010). Rights of entry for union officials under the *Fair Work Act* have been broadened, compared to the *Workplace Relations Act*, but only in the sense that a union can no longer be 'locked out' of a workplace where it is not party to an applicable industrial instrument: see Creighton and Stewart, above n 72, 713.

75 Rae Cooper, Bradon Ellem and Patricia Todd, 'Workers' Rights and Labour Legislation: Reviving Collective Bargaining in Australia' (Paper presented at International Labour and Employment Relations Association 16th World Congress, Philadelphia, 5 July 2012) 5.

John Howe concluded in 2009, in looking ahead to the introduction of the Fair Work legislation:

> The changes [are] likely to make it easier for unions to carry out their central functions of representing workers and bargaining on their behalf and, to that extent, they will afford unions in the new system a greater measure of security than they have experienced in recent years. In many respects, however, unions will have to continue to work hard to ensure their own security. While the new provisions will give them more scope to do so lawfully, they still fall a very long way short of providing the level of support that characterised Australian labour law for most of the years since Federation.[76]

As for the role of individual contracting under the *Fair Work Act*, it is true that there is no longer any provision for registered individual agreements that can displace the operation of modern awards or enterprise agreements.[77] But there are still several elements of the Fair Work regime which allow, if not encourage, individual contracting in a way that was not present in the 1993 legislation, let alone the old conciliation and arbitration system.

For example, div 3 of pt 2-9 of the *Fair Work Act* permits high-earning employees to agree that a modern award will not apply to them. More significantly, ss 144 and 202 require all modern awards and enterprise agreements to contain terms that permit the making of 'individual flexibility arrangements' ('IFAs') that vary the effect of specified terms in those instruments. The Act provides that an employee must voluntarily agree to any arrangement, be better off overall under its terms, and (for enterprise agreements) be able to terminate an IFA on no more than 28 days' notice.[78] What the legislation again does not provide, either in relation to IFAs or 'high income guarantees', is that there be any process of negotiation or bargaining. Nor, in this instance, is there any provision for individual employees to be represented.

## VII Conclusions

The point of departure for this paper is the assertion that insight into employee voice can be gained by analysing the nature of rule-making processes embodied — and often promoted — in national labour law regimes. Using a framework that

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76 Fenwick and Howe, above n 28, 185; and see also Rae Cooper and Bradon Ellem, 'Getting to the Table? Fair Work, Unions and Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 135.

77 Although individual agreements made under the previous regime were not abolished. Hence for some years to come there will continue to be employees who are engaged under individual instruments that exclude them from the coverage of any collective agreement, unless they formally take action to terminate those instruments: see Creighton and Stewart, above n 72, 337–41.

78 As to the adequacy of these and other safeguards in the legislation, which have been attacked by employer groups as making IFAs insufficiently 'flexible', see Edwards et al, above n 63, 105–10.

identifies five main rule-making processes, we have traced changes in Australia's national legislation since the early 1990s and sought to draw out their implications for employee voice.

The first major conclusion that can be drawn is that not only has the support for union forms of voice declined (a trend which has been called 'decollectivisation'), but the laws have also changed dramatically in the type of support that is offered. The conciliation and arbitration system that dominated Australian labour law for decades until the early 1990s was deeply collectivist, providing an array of supports for trade unions. The 1993 Labor legislation began to change this, but in contradictory ways. The promotion of collective agreement-making as the privileged rule-making process was close to the traditional support common in other countries, by mostly supporting unions representing employees in genuine collective bargaining. However, the highly decentralised nature of this bargaining affected the form and strength of unions, while the (still modest) facility for non-union collective agreements opened a door for subsequent attacks on unions. There was no acceptance of individual contracting, and delegated regulation (through awards and the role of the tribunals) continued to support unions, but the end of more direct supports for union membership and, ironically, the introduction of individualised forms of protection against unfair dismissal were also harbingers of the future.

The multi-faceted attacks on unions during the Howard government's terms of office are well known. Not only were new ways of avoiding union membership embraced, but the capacity of unions to effectively conduct collective bargaining with employers was restricted. As well, non-union and individualist rule-making processes were promoted not only as alternatives to union collective agreement making, but also as opportunities to undermine unions. The role of delegated regulation narrowed hugely, ensuring that awards and other aspects of tribunal operations were stripped of any support they offered to unions.

The place of unions under the Fair Work regime is far more ambiguous than many of its critics in the media and the business community might suggest. Far from giving unions their 'greatest increase in power in more than a century', as the chief executive of the Australian Mines and Metals Association has suggested,[79] the *Fair Work Act* represents at most a modest shift back towards collective agreement-making.

It is particularly interesting to compare the current approach to employee voice and representation with that adopted in Labor's previous attempt at labour regulation, the 1993 legislation. The Keating government's laws quite clearly privileged the role of trade unions, even if their overall influence was arguably less than it had been under the arbitral model. Only a registered union could make a certified agreement, and the union's assent was sufficient to bind all those (both members and non-members) for which it was purporting to act, with no provision for any employee vote — though employees did have to be consulted. While the 1993 legislation also provided for

79 'Unions Thrilled to See Back of Work Choices', *The Australian* (Sydney), 21 March 2009, 4.

non-union EFAs, the secondary nature of that 'stream' of agreement-making was apparent from the fact that additional requirements were imposed, and that unions could intervene to argue against their approval. Furthermore, the industrial dispute system continued to provide opportunities for unions both to influence the content of delegated regulation and to enhance their organisational security. The legislation accorded no formal role for individual employees to participate in rule-making, other than to vote on a proposed EFA.

If we fast forward to today, we find a very different approach. With the exception of greenfields agreements, unions no longer 'make' agreements — they are merely representatives (at least by default) for their members. In that capacity, they have no greater rights or protections than anyone else selected to be a bargaining representative, and they cannot prevent employers from going 'over their heads' to communicate directly with their members.[80] They can negotiate for various forms of support, such as employer-provided facilities or leave for union delegate training. But their capacity to bargain for any form of preferential treatment for their members is constrained by the 'freedom of association' provisions retained from the *Workplace Relations Act*, and it is unlawful to seek to broaden the statutory rights of entry for their officials. Finally, the expansion of statutory regulation under the *Fair Work Act* demands a different, and distinctly political, form of employee voice if these new individual employment rights are to be defended or varied.

The second main conclusion is that the diminishing legislative support for union forms of employee voice has not produced support for alternative non-union collective forms of employee voice. Despite the introduction of non-union collective agreements in 1993 and their growing importance over subsequent labour law regimes, there has been no attempt to specify or support collective mechanisms by which employees could contribute to the determination of these collective agreements that regulate their employment relationship. Rather, the process by which non-union collective agreements has gained legitimacy and legal effect — under governments of both political persuasions — has been a simple requirement for a ballot of affected employees. Under the *Fair Work Act*, as under previous statutes, there is no legal guarantee that 'bargaining' has actually taken place in the creation of these 'agreements' and no consideration of employee voice other than a specification that individual employees can self-nominate or nominate bargaining agents to bargain on their behalf.

Thirdly, the individualisation of rule-making processes and employee voice has been the dominant trend in Australian labour law. Statutory regulation and most features of delegated regulation have in fact become supports for individualism, establishing individual employment rights and promoting individual rule-making processes rather than the collective rights and processes they supported in the past. Even the

80 See *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 (5 May 2010); Rosalind Read, 'Direct Dealing, Union Recognition and Good Faith Bargaining Under the *Fair Work Act 2009*' (2012) 25 *Australian Journal of Labour Law* 130.

*Fair Work Act*'s emphasis on collective agreement-making seems to support the individualisation of rule-making rather than the development of alternative forms of collectivism.

Again, this is apparent from comparing the current enterprise agreement provisions to those introduced in 1993. It is clear that, except in relation to greenfields agreements, individual employees have a far greater role than they previously did. Apart from the capacity to select a bargaining representative, they must have any proposed enterprise agreement explained to them by their employer, and they are guaranteed a vote before it can be approved, even where a union has effectively negotiated on their behalf. Furthermore, once an agreement is made, they are free to enter into an IFA that varies the terms of that instrument, even if only in some minor respect. Individual employees have a similar (and often broader) right to agree to vary the operation of a modern award — or indeed displace its operation altogether if they earn enough.

To many observers from overseas, not to mention those who grew up with the traditional model of Australian labour arbitration, this kind of emphasis on individual autonomy must look very odd. So too does the notion that employers can make 'collective' agreements without any element of bargaining or even representation. The current legislation clearly embodies a very distinctive approach to voice and representation at work — but one far removed from any traditional notion of collectivism.

*Victoria Lambropoulos* and Michael Wynn***

# UNFAIR LABOUR PRACTICES, TRADE UNION VICTIMISATION AND VOICE: A COMPARISON OF AUSTRALIA AND THE UNITED KINGDOM

## Abstract

The protection of collective worker voice in common law countries with strong collectivist traditions like Australia and the UK is problematic where collective bargaining and trade unions are no longer promoted by state apparatus. This article examines the changing nature of voice in the context of freedom of association protections in these two jurisdictions. We examine the effects of declining union security on trade union victimisation rights and consider whether increasing constitutionalisation of labour law results in a weakening of individual and collective voice. A particular focus of the article concerns the individualisation of collective processes in the Australian *Fair Work Act 2009* (Cth).

## I Introduction

> The problem of labour law has become the problem of an entire economic order. A renovation of labour law is no longer possible without a renewal of that economic order … The social requirements of labour law are no longer compatible with the individual character of the economic system.[1]

Hugo Sinzheimer, writing in 1933, warned labour lawyers of the dangers of an individualised economic system that undermined the social nature of labour law. Sinzheimer accepted as axiomatic that labour law cannot be separated from economic substructure. Lord Wedderburn took up this theme in a Sinzheimer Lecture in 1993, commenting on the apparent dichotomy between individual and collective interests, and prophesying that the wave of individualism would cause adaptations across the common law world and provide an opportunity to 'disestablish collectivism … and dismantle machineries of corporatist consensus in the name of competitiveness.'[2] Lord Wedderburn asked what the *employer* might gain by the introduction of new types of *individual* rights or interests.

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1 Hugo Sinzheimer, '*Die Krisis des Arbeitsrechts*' (1933) 1 *Arbeitsrecht* 1, quoted in Lord Wedderburn, 'Labour Law and the Individual: Convergence or Diversity?' in *Labour Law and Freedom*, *Further Essays in Labour Law* (Lawrence & Wishart, 1995).

2 Wedderburn, above n 1, 311.

More recently, it has been noted that shifts in attitudes to union security arrangements are one of the outcomes of the constitutionalisation of labour law.[3] Does a shift to individual rights necessarily change the locus and quality of individual voice as well as collective voice? Our purpose in this article is to examine the changing nature of voice in the context of protection of freedom of association in two common law jurisdictions, Australia and the UK, focusing particularly on recent changes to the legislative framework under the Australian *Fair Work Act 2009* (Cth) ('*Fair Work Act*').

## II Individual and Collective Conceptions of Voice

Worker voice in the context of freedom of association depends on how freedom of association is conceived and framed. For the purposes of this article, we are concerned primarily with traditional understandings of the concept of 'voice' as developed in industrial relations and labour law contexts, which focus on the expression of collective interests of workers.[4] We acknowledge the changing nature and functions of voice, particularly in terms of economic objectives, charted by Bogg and Novitz in their survey of voice for the *Voices at Work* project.[5] We aim to understand the processes and contexts in which collective voice has become muted in this changed environment and assess the effects of this on individual voice. It is contended that both individual and collective voice are weakened by the framing of rights as individually-based freedom of association rights founded on the ideology of choice, particularly the choice not to join a union.[6] Collective voice is also weakened if 'the fruits of collective action', particularly collective bargaining, are not adequately protected.[7] In this sense, further exploration of the strength of collective bargaining arrangements is essential to an analysis of rights to freedom of association. The libertarian individual rights approach to freedom of association emphasises the individual interests and choices of the worker, particularly the choice not to join a trade union,[8] while the collective approach emphasises the importance of trade union security for the protection of individual interests.

To treat the right as a purely individual right is to focus on the choice of the individual as an agent making a decision as to whether to associate and with whom to associate. This freedom of choice is considered important to individual freedom of speech and freedom of association. Libertarian conceptions of these rights embedded in

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3 Frances Raday, 'The Decline of Union Power — Structural Inevitability or Policy Choice?' in Joanne Conaghan, Richard Fischl and Karl Klare (eds), *Labour Law in an Era of Globalisation* (Oxford University Press, 2004) 353, 359.

4 Alan Bogg and Tonia Novitz, 'Investigating Voice at Work' (2012) 33 *Comparative Labor Law and Policy Journal* 323, 326–32.

5 Ibid 323.

6 Ibid 330.

7 David Quinn, 'To Be or Not to Be a Member — Is that the Only Question? Freedom of Association Under the *Workplace Relations Act*' (2004) 17 *Australian Journal of Labour Law* 1, 2.

8 Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 529.

successive labour frameworks have promoted the right to dissociate as an integral element of the right to associate. The 'choice' theory of freedom of association, despite its hegemony in current liberal discourse, has been strongly refuted. Kahn-Freund, for example, observed that the positive freedom of association does not logically presuppose the negative freedom of association, otherwise any constitutional guarantee of a right would forbid all aspects of its opposite.[9]

As part of a set of individual freedoms, freedom of association is also linked with the right to free speech. The right to associate prevents the State from restricting group expression where individual members of the group have rights to speak out on the same issues.[10] This linkage of two fundamental rights highlights an important connection between freedom of association and worker voice. When workers group together, voice acquires a different quality of expression. This voice has greater impact and power and is more able to face other powerful voices such as capital and the State. From this, we can see the relevance and effect of restricting the locus of voice to individual rather than collective mechanisms as a means of controlling labour power.

The liberal focus on individual voice tends to deny the relevance of both the act of association and the function of the group in protecting the interests of the individual. This exclusivity of focus also treats the individual as the natural bearer of rights with the result that the collective entity remains unprotected. There has been much debate about the viability of group rights.[11] For the purposes of the present discussion, we will focus on the complementarity of individual and group interests for the proper functioning and exercise of rights of association. It is only by joining together that the mutual interests of the individual worker and the group can be realised. Kahn-Freund recognised this mutuality in stating that freedom of association is not just a fundamental human right but also 'complementary to collective bargaining, a condition sine qua non of industrial relations'.[12] The idea that the group itself is necessary for the individual right to exist is a powerful argument in favour of group rights and strong trade union voice.[13] The group right is more than the sum of individual

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9 Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (Yale University Press, 1992) 17.

10 Ibid 26.

11 See the discussion in Alan Bogg and Keith Ewing, 'A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2012) 33 *Comparative Labor Law and Policy Journal* 379, 401–8.

12 Paul Davies and Mark Freeland, *Kahn-Freund's Labour and the Law* (Sweet and Maxwell, 3rd ed, 1983) 201.

13 As Judge Sorensen (dissenting) stated in *Young, James and Webster v United Kingdom* [1982] 4 EHRR 38:

> Individuals associate with each other for the purpose of pursuing common interests and pursuing common goals … [positive freedom of association] concerns the individual as an active participant in social activities and it is in a sense a *collective* right in so far as it can only be exercised jointly by a plurality of individuals.

interests and more than a procedural right or act of participation.[14] Deakin characterises social, civil and political rights as part of a continuum (rather than being in opposition), in which social rights function through the act of association as a means of social integration and solidarity in the institutions of collective bargaining and the welfare state.[15] This depiction provides a space for integrating labour's constitution more effectively in capital's constitution,[16] thus reconciling Sinzheimer's dilemma regarding the problems of individualisation of the economic order.

We agree with Bogg and Ewing that the protection of worker interests in terms of real worker benefits, in the sense that Sinzheimer projected,[17] requires a dynamic or 'thick' version of freedom of association based on collective strength, which includes rights to collective bargaining and rights to strike, protected by the State.[18] A failure to maintain these collective institutions of voice, portrayed in the ensuing account of Australian and UK labour history, provides some evidence to support Sinzheimer's fears regarding the fate of labour rights in an individualistic economic order. The developing neo-liberal project arises to different degrees in a number of common law countries including Australia and the UK and also Canada and New Zealand. We now turn to discuss the freedom of association protections in their unique contextual frameworks, recognising that freedom of association as a substantive concept is capable of developing different paths in varied historical and institutional settings.

## II The Law

### A *Australia*

#### 1 *The Early Era: 1904 to 1996*

Trade unions were the dominant voice that spoke and acted on behalf of employees in Australia's early industrial relations system; they had an elevated status as parties principal and were not confined to acting as agents of their members.[19] The system, which was based on compulsory conciliation and arbitration, encouraged and promoted the formation of employee and employer organisations, as it relied

14 See Bogg and Ewing, above n 11, 403–6.

15 Simon Deakin, 'Social Rights in a Globalized Economy' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press, 2005).

16 Eric Tucker, 'Labor's Many Constitutions (and Capital's Too)' (2012) 33 *Comparative Labor Law and Policy Journal* 355, 358.

17 For a fuller discussion of Sinzheimer's views on labour constitutions, see Ruth Dukes, 'Constitutionalising Employment Relations: Sinzheimer, Kahn-Freund and the Role of Labour Law' (2008) 35 *Journal of Law and Society* 341, quoted in Tucker, above n 16.

18 Bogg and Ewing, above n 11, 389 adopt Eric Tucker's terminology of 'thin' and 'thick' labour rights, noting that a 'thin' right of freedom of association would involve the right to join and not join a trade union, *simpliciter*.

19 Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35 *Industrial Law Journal* 343, 351.

on the effective operation of collective groups, especially trade unions.[20] This was reflected in the chief objects of the *Conciliation and Arbitration Act 1904* (Cth) and in this context, trade unions were bestowed with an integral and privileged role.[21] Registration by trade unions was not compulsory, however if a trade union sought recognition before the Court of Conciliation and Arbitration, it had to be registered. Registration conferred upon trade unions a corporate legal personality, which also gave them an exclusive right to represent workers who fell within their constitutional coverage.[22] Further, as the system was compulsory, unions also had the power to compel employers to enter into conciliation and arbitration once an industrial dispute arose.[23]

The privileged role granted to trade unions in the industrial relations system came at a price however, in the form of a high degree of legal regulation which allowed the State to intervene in the affairs of trade unions.[24] Examples of the kind of intervention to which trade unions have been subject include broad powers to strike down union rules that are judged 'oppressive, unreasonable or unjust' and general duties on trade union officials which mirror the duties imposed on directors and officers of companies under corporations legislation.[25] The level of regulation in Australia is considered to be higher than in most of Australia's international counterparts, and it continues under the *Fair Work Act*.[26] The original freedom of association provision that applied to union employees, as introduced in 1904, read as follows:

> No employer shall dismiss any employee from his employment by reason merely of the fact that the employee is an officer or member of an organization or is entitled to the benefit of an industrial agreement or award. Penalty: Twenty Pounds.[27]

This provision has survived successive repeals of the industrial relations laws throughout the last century. The current protections contained in ss 346(a) and 341(1)(a) of the *Fair Work Act* are the 'lineal descendant(s)' of the original provision.[28]

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20 Henry Bournes Higgins, 'A New Province for Law and Order: Industrial Peace through the Minimum Wage and Arbitration' (1915) 29 *Harvard Law Review* 13, 23; Rae Cooper and Bradon Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46 *British Journal of Industrial Relations* 532, 535.

21 *Conciliation and Arbitration Act 1904* (Cth) s 3(vi).

22 Anthony Forsyth, 'Trade Union Regulation and the Accountability of Union Office-Holders: Examining the Corporate Model' (2000) 13 *Australian Journal of Labour Law* 28; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 668 [20.20].

23 Creighton and Stewart, above n 22, 29 [2.24], 36 [2.45], 37 [2.47].

24 Ibid 34 [2.37], 669–70 [20.23].

25 *Fair Work Registered Organisations Act 2009* (Cth) s 142(1), pt 2 ch 9.

26 Forsyth, above n 22, 2; Creighton and Stewart, above n 22, 669 [20.22].

27 *Commonwealth Conciliation and Arbitration Act 1904* (Cth) s 9(1).

28 Creighton and Stewart, above n 23, 566–7 [17.87].

The original protection included a reverse onus of proof to assist employees; this remains in the present legislation in a modified form.[29] Laws were introduced to expand the protection so that it applied to circumstances not confined to dismissal from employment. The phrases 'injure the employee in their employment' and 'alter the position of the employee to their prejudice' were introduced in 1909 and 1914 and now form part of the present 'adverse action' provisions.[30] These concepts capture a wide range of conduct. Injury in employment covers injury of any compensable kind.[31] Prejudicial alteration is the broadest category as it covers injury of any compensable kind and 'any adverse affectation of, or deterioration in, the advantages enjoyed by the employee before the conduct in question'.[32] Later amendments expanded the proscribed grounds and were part of a framework that provided trade union security. Many of these protections, albeit in different legislative form, remain in the present Act.[33]

Public policy favoured the expansion of the protections for trade unionists until the mid-1970s. Laws were then introduced in a piecemeal fashion that effectively weakened the privileged role of trade unions and with it, their status as the exclusive voice on behalf of employees. In 1977, the Fraser Liberal/National Coalition government introduced the strike-break protections, which were designed to weaken the effectiveness of closed shop arrangements by making it illegal for employers to adversely treat employees who refused to take strike action.[34] In 1993, under the Keating Labor government, a provision was introduced protecting non-unionists from dismissal if they refused to join a trade union.[35] In the same context, the Keating government also introduced structural changes to the system through the *Industrial Relations Reform*

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29 *Conciliation and Arbitration Act 1904* (Cth) s 9(3); *Fair Work Act* s 361.

30 Amended by *Conciliation and Arbitration Act 1909* (Cth); *Conciliation and Arbitration Act 1914* (Cth); see discussion in *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* (2001) 112 FCR 232, 244–5 [51]–[52]. The relevant phrases are now in *Fair Work Act* s 342(1).

31 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 195 CLR 1 [4] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

32 Ibid.

33 The protected grounds included: appearing as witness or giving evidence in a proceeding under the Act (*Conciliation and Arbitration Act 1914* (Cth), now in the *Fair Work Act* s 341(1)(b)); and participation in union activities which were expressly authorised by the union (*Conciliation and Arbitration Act 1973* (Cth), now in an expanded form in the *Fair Work Act* s 347 (b)(ii)–(v)). The protections which have not subsisted in current legislation are: a union member who is dissatisfied with their conditions of employment and seeks better industrial conditions (*Conciliation and Arbitration Act 1920* (Cth)); and an employee who was absent from work because of trade union duties (*Conciliation and Arbitration Act 1947* (Cth)).

34 *Conciliation and Arbitration Act 1904* (Cth) s 5(1)(aa) amended by *Conciliation and Arbitration Act 1977* (Cth); D R Hall, 'Commonwealth Controls with Respect to Victimisation of Employees' (1982) 56 *Australian Law Journal* 176, 183; see also *Fair Work Act* ss 346(b), 347(b)(iii)–(iv).

35 *Industrial Relations Act 1988* (Cth) s 170DF(1)(c).

*Act 1993* (Cth) to reorient 'the system away from conciliation and arbitration, and in favour of collective bargaining' mainly at the single enterprise level.[36] The Australian Industrial Relations Commission ('AIRC') had power to conciliate and ensure that parties met good faith bargaining requirements,[37] but it had no power to compel an employer to commence bargaining.[38] This was in stark contrast to the power unions had to compel employers to appear before the AIRC under the conciliation and arbitration system. Under the enterprise bargaining regime introduced in 1993, trade union security declined and with it, the privileged role of unions.[39]

2 *The Workplace Relations Act Era: 1996 to 2009*

The dominant theme that arises in the next era is the individualisation of labour law and policy in Australia, which was strongly promoted by the Coalition government led by John Howard.[40] Unions and the AIRC were viewed as third party interveners in the workplace.[41] Further, employers could refuse to negotiate with employees and unions for a collective agreement even if there was majority support for collective bargaining by workers.[42] Two of the most controversial changes were the introduction

36 Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (Federation Press, 2nd ed, 1994) 133 [627]; see also *Industrial Relations Reform Act 1993* (Cth) s 4, objects 3(a), (d).

37 Creighton and Stewart, above n 36, 134 [630]. Under the present system the Fair Work Commission can only make bargaining orders upon application by one of the bargaining representatives: see ss 229, 230 of the *Fair Work Act.* In contrast, the 1993 laws gave the Australian Industrial Relations Commission the power to intervene of its own accord: *Industrial Relations Reform Act 1993* (Cth) s 170QH(2).

38 See discussion on *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385 in Ron McCallum, 'Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws' (2002) 57 *Relations Industrielles/Industrial Relations* 225, 235–236; Richard Naughton, 'Bargaining in Good Faith' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining Trade Unions and the Law* (Federation Press, 1995) 84.

39 Phillipa Weeks, 'Union Security and Union Recognition in Australia' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining Trade Unions and the Law* (Federation Press, 1995) 184, 194.

40 Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion: An International Study* (Federation Press, 1999); Amanda Coulthard, 'The Individualisation of Australian Labour Law' (1997) 13 *International Journal of Comparative Labour Law and Industrial Relations* 95; David Peetz, *Brave New Workplace: How Individual Contracts are Changing Our Jobs* (Allen and Unwin, 2006); Richard Mitchell and Joel Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292.

41 Richard Naughton, 'Sailing into Unchartered Seas: The Role of Unions Under the *Workplace Relations Act 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 1.

42 Rae Cooper and Bradon Ellem, 'Getting to the Table? Fair Work, Unions and Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 135, 138.

of individual statutory agreements called Australian Workplace Agreements ('AWAs') and the promotion of the negative right of association.[43] In this framework, the Howard government introduced substantial changes to the freedom of association laws. The laws were couched in terms of individual choice and the rights of individuals.[44] This, however, did not entail a reduction of the positive rights of association developed over the last century; instead, the rights of workers not to join a union were strengthened by the *Workplace Relations Act 1996* (Cth). The new freedom of association laws outlawed a range of actions broader than dismissal from employment including 'injury to employment' and 'prejudicial alteration of the employee's position'.[45] This elevated protection for non-unionists to the same level as unionists, by affording them equal protection in relation to their right not to join a union.[46]

The object of encouraging and facilitating the organisation of representative groups, which had been part of the industrial relations laws from 1904, was also abandoned. In its place was inserted a new object which ensured that both the positive and negative aspects of freedom of association would be upheld.[47] The union movement secured important wins before the courts using the freedom of association laws throughout this period, which was probably an unintended outcome.[48] However, in spite of the union successes, the protections 'were largely devoid of substance' as employers were not compelled to recognise employees' demands to bargain collectively.[49] The Howard government introduced more dramatic reforms in 2005 through the *Work Choices* legislation, which further individualised Australia's industrial relations system.[50] The freedom of association protections, however, were left relatively untouched,[51] but the institutional framework and the bargaining system were significantly altered to orient the system further towards private individual agreement-making governed by a low safety net of five minimum conditions.[52] Space does not allow us to discuss the complexities of the *Work Choices* reforms in

43 Naughton, above n 41.

44 Ibid. See also Quinn, above n 7, 2–3.

45 *Workplace Relations Act 1996* (Cth) pt XA, ss 298K(1), 298L(1)(b).

46 Ibid ss 298K(1), 298L(1)(a).

47 Ibid s 3(f); Naughton, above n 41.

48 Cooper and Ellem, above n 42, 138.

49 Ibid.

50 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth); Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations Under Siege: the Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183.

51 The Work Choices amendments imposed a higher burden of proof in relation to actions based on the one ground on which the union movement seemed to have most success: see Colin Fenwick and John Howe, 'Union Security After Work Choices' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: the New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 164, 178.

52 Murray, above n 19; Jill Murray and Rosemary Owens, 'The Safety Net: Labour Standards in the New Era' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: the New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 40.

great detail; suffice to say, the reforms overall further undermined the role of trade unions and collective bargaining.

3 *Fair Work Act*

The *Fair Work Act* was introduced by the Labor government led by Prime Minister Kevin Rudd.[53] Breen Creighton has aptly described the legislation as 'an attenuated return to collectivism'.[54] The Act has reinstated collective bargaining as the prime form of statutory agreement-making.[55] Legislative support has also been introduced to enable unions to fulfil their representative role in bargaining for workers, including the ability to compel an employer to bargain if a majority support determination is obtained,[56] and the low threshold requirement for a union to be a bargaining representative. A union only needs one union member in the workplace to be involved in bargaining.[57] Australia has avoided the complications that arise from the union recognition procedures in other countries such as the UK and the US.[58] The *Fair Work Act* has also introduced good faith bargaining obligations.[59] These are important changes which can facilitate and protect trade union voice in the face of employer resistance to union involvement in collective bargaining. However, the *Fair Work Act* does not endow unions with the measure of security they enjoyed during the conciliation and arbitration era.[60] A trade union can still be displaced as a bargaining representative by the choice of its own members.[61] Further, the legislation permits multiple bargaining representatives as each employee has the right to appoint their own bargaining representative, which may or may not be a union. There is no concept of an exclusive bargaining representative under the *Fair Work Act*

53 For a detailed discussion of the Act see Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3.

54 Breen Creighton, 'A Retreat from Individualism: the Fair Work Act and the Re-Collectivisation of Australian Labour Law' (2011) 40 *Industrial Law Journal* 116, 134.

55 Ibid 123. The ability to enter into new AWAs was removed by transitional legislation in 2008.

56 *Fair Work Act* s 237; Richard Naughton, 'The Role of Fair Work Australia' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 68, 75–6.

57 *Fair Work Act* s 176(1)(b)(i).

58 Anthony Forsyth, 'Comparing Purposes and Concepts in United States and Australian Collective Bargaining Law' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 203.

59 *Fair Work Act* s 228; Naughton, above n 56, 78–84.

60 For examples of collective bargaining under the Act, see Cooper and Ellem, above n 42, 139.

61 *Fair Work Act* s 176(1)(c).

unlike other jurisdictions.[62] Cooper and Ellem have perceptively characterised collective bargaining under the *Fair Work Act* as 'an individual right to be exercised, for the most part at single enterprise level, involving bargaining agents that are not necessarily unions.'[63]

*(a) Industrial Activities*

The freedom of association protections, now called the 'industrial activities' provisions,[64] also display features of individual rights that may or may not be exercised in favour of a union. The provisions are located in Part 3-1 of the *Fair Work Act* dealing with 'General Protections'. This part also contains a bundle of individual rights encompassing discrimination and a wider form of victimisation protection called 'workplace rights'.[65] The industrial activities protections apply to activities done, or conversely not done, on behalf of an 'industrial association' which encompasses trade unions and informal groups of employees; therefore the protections are clearly not confined to trade unions.[66] Further, the protections are still founded upon the ideology of choice and give equal weight to the positive and negative aspects of the freedom.[67] The *Fair Work Act* has adopted a neutral stance regarding the positive and negative concepts of freedom of association in terms of the legislative language in the relevant sections.[68] The right to freedom of association is recognised in the objects of the *Fair Work Act* but it has been placed in the context of fairness, the right to representation at work and the prevention of discrimination.[69] There is now no reference to the organisation of representative groups in the principal objects of the *Fair Work Act* at all. The *Act* appears to characterise associational rights in an

62 Breen Creighton and Anthony Forsyth, 'Rediscovering Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 1, 13.

63 Cooper and Ellem, above n 42, 139. See also Creighton, above n 54.

64 *Fair Work Act* ss 346–7.

65 *Fair Work Act* pt 3-1 ss 334–64. For cases dealing with 'workplace rights' see *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association* (2012) 202 FCR 244; *Barnett v Territory Insurance Office* (2011) 196 FCR 116; *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* (2011) 193 FCR 526; *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* (2010) 186 FCR 22.

66 *Fair Work Act* s 12. See Rosemary Owens, Joellen Riley, Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 461 [10.3.2.4].

67 The ideology of choice is reflected in the objects of the General Protections pt 3-1, s 336(b) of the *Fair Work Act*; see John Howe, 'Government as Industrial Relations Role Model' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 182, 189. See Naughton, above n 41, 8 regarding the debate as to whether the rights should be given equal weight.

68 This is done by using the exact same expressions for the positive and negative choice to participate or not participate in an industrial activity; see *Fair Work Act* ss 346, 347(a)–(b).

69 *Fair Work Act* s 3(f).

individualised way, as the individual is at the centre of the freedom. At all stages of engaging in industrial activities, associational rights are conceived primarily as an individual's choice, which may or may not be exercised in favour of the union.[70]

The relevant provisions are complex and space does not permit a detailed examination of them here.[71] We briefly explain the main protections in ss 346 and 347. A breach of s 346 occurs if an employer has taken 'adverse action' against an employee *because* the employee (a), is or is not, or was or was not, an officer or member of an industrial association;[72] or, (b), engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of ss 347(a) or (b); or, (c), does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of ss 347(c)–(g).[73] The causation element is central to finding a breach of the *Act*, and therefore its interpretation is crucial to the scope of the protections. The High Court in the decision of *The Board of Bendigo Regional Institute of Technical and Further Education v Barclay* ('*Barclay*')[74] adopted a narrow reading of the relevant provisions. It is worth examining the decision more closely.

Mr Barclay worked as a senior teacher at the Bendigo Regional Institute of Technical and Further Education ('BRIT') and was also a sub-branch president of the Australian Education Union ('AEU'). Mr Barclay sent an email to AEU members warning them to refuse to do anything fraudulent, as some members had approached him alleging they had been asked to sign fraudulent documents relating to an upcoming audit.[75] Dr Harvey, the Chief Executive Officer of BRIT, was given a copy of the email and suspended Mr Barclay, denying him access to his emails and the premises. Dr Harvey's principal concern was that the email was distributed without involving management, and she also took issue with Mr Barclay's refusal to provide particulars in response to the allegations.[76] In relation to the latter point, Dr Harvey seemed not to be cognisant of Mr Barclay's duty to keep the confidences of the union members, which was acknowledged by the Court.[77] Dr Harvey also considered Mr Barclay's conduct to be a breach of the relevant public sector code of conduct. The High Court affirmed the primary judge's decision[78] that BRIT had not breached the

70 This is indicated by the protection of the choice to engage or not in engage in industrial activities in *Fair Work Act* ss 346–7.

71 For a detailed discussion see Creighton and Stewart, above n 22, 566–8 [17.87]–[17.91].

72 This includes 'activities carried out as an incident of membership' or activities incidental to being an official: *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 224 [39]–[40]. Although the High Court overruled this decision (see below), they did not disturb this aspect of the Full Federal Court's reasoning.

73 Section 347(c) is intended to catch industrial activities that are unlawful under the Act.

74 (2012) 290 ALR 647.

75 Ibid 650 [11] (French CJ and Crennan J).

76 Ibid 654 [30] (French CJ and Crennan J).

77 Ibid.

78 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

*Fair Work Act*.[79] In making its decision, the Court clarified the causation test for the purposes of the 'adverse action' provisions. The test is whether the employer has acted against the employee because of a proscribed reason.[80] This proscribed reason must be an immediate or operative reason for the conduct to breach the *Fair Work Act*.[81] Dr Harvey's evidence, which was accepted by the primary judge, was that she suspended Mr Barclay for reasons other than the proscribed or protected reasons under the *Act*. Further, the Court expressly rejected a reading of the provisions that could give union officials an advantage not enjoyed by other workers.[82] The decision demonstrates that unionists are not granted an advantage over other employees in the workplace. In the light of the wider framework of the legislation, this interpretation is most likely correct.

The approach to causation adopted by the High Court does not address situations where people may have unconscious bias or reasons of which they are not cognisant whilst acting. In anti-discrimination law it has long been accepted that a perpetrator may still discriminate against an employee even though there was no deliberate intent.[83] Further, the High Court's approach may not protect a union official where their duty to their members comes into conflict with their position as an employee. There will be occasions where a unionist acts lawfully as a union official but it will not be agreeable to management, and, therefore can be categorised as misconduct. As occurred in *Barclay*, an employer can take action against the union official in their capacity as an employee. This will mean there will be no breach of the Act if this was the only reason for the action.[84] The Australian law will be discussed again in Part III of the article; we now turn to the United Kingdom provisions.

## A *The United Kingdom*

### 1 *Early History*

The UK victimisation provisions now embedded in *Trade Union Labour Relations (Consolidation) Act 1992* (UK) c 52 ('*TULR(C)A*') are the product of a very different historical development to Australian law. Whereas Australian trade unions operated in a highly regulated labour environment as a result of their role in the compulsory

79 *Barclay* (2012) 290 ALR 647, 662 [65] (French CJ and Crennan J), 676 [128], 677 [131] (Gummow and Hayne JJ).

80 Ibid 654 [31] (French CJ and Crennan J).

81 Ibid 662 [62], 671 [104], 677 [140].

82 Ibid 662 [60] (French CJ and Crennan J).

83 Anna Chapman et al, 'Adverse Action, Discrimination and the Reverse Onus of Proof: Exploring the Developing Jurisprudence' (Paper presented at Australian Labour Law Biennial Conference, Canberra, 16 –17 November 2012) 16, 18.

84 *Barclay* (2012) 290 ALR 647, 653 [27] (French CJ and Crennan J). The independent review of the *Fair Work Act* has also recommended that the approach essentially adopted by the High Court be maintained: see Commonwealth of Australia, *Towards More Productive and Equitable Workplaces: an Evaluation of the Fair Work Legislation* (2012) recommendation 47, 236–7.

arbitration and conciliation system, British trade unions prospered in a voluntary system which gave precedence to free collective bargaining between the industrial parties. When Kahn-Freund termed this system as one of 'collective laissez-faire' he was referring to the lack of legal compulsion on both sides to reach any agreement and also to an industrial balance achieved between capital and labour in the absence of formal legal controls.[85]

Given the laissez-faire or abstentionist industrial environment where collective bargaining provided labour norms, but where there was no duty to bargain and collective agreements themselves were not legally enforceable, it is thus not surprising that the first victimisation provisions in the UK did not appear on the statute book until the *Industrial Relations Act 1971*.[86] Even then, the provisions were primarily designed as part of a corporatist initiative in which the government attempted to overturn the UK's voluntary system and get trade unions to register in a public framework as a mechanism of State control and restriction. When trade unions refused to register and the legislation failed dramatically in 1974, Kahn-Freund wryly observed that 'the proclamation of freedom of organisation was a dead, one might say, a still-born letter'.[87] Nevertheless these provisions have remained the bedrock of the UK's protection against trade union victimisation, so it is important to consider further their overall context.

The Report of the Royal Commission on Trade Unions and Employers' Associations ('Donovan Report', named after the Chairperson of the Commission, Lord Donovan) in 1968 gave the specific impetus to the UK's trade union victimisation provisions. The recommendations were contained in a chapter headed 'The Extension of Collective Bargaining' and were designed to support the collective framework involving collective bargaining, trade union recognition and wages councils. At this time, collective bargaining was widespread: about half of British manual workers were trade union members; Wages Councils, originally introduced in 1909, covered three and a half million workers[88] and trade union recognition was actively supported by the State in order to encourage collective bargaining. The Donovan Report identified discrimination against employees in the context of recognition as a primary reason for introducing specific measures supporting freedom of association.[89] The

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85 O Kahn-Freund, 'Labour Law' in Morris Ginsberg (ed), *Law and Opinion in England in the Twentieth Century* (Stevens, 1959):

> allowing free play to the collective forces of society and (limiting) the intervention of the law to those marginal areas in which the disparity of these forces, … is so great as to prevent the successful operation of what is so very characteristically called negotiating machinery.

86 UK trade unions had not ever argued for such legislation, preferring to rely on their own industrial power.

87 Davies and Freedland, above n 12, 211.

88 *Wages Councils Act 1959,* 7 & 8 Eliz 2, c 69; they were introduced by the *Trade Boards Act 1909*, 9 Edw 7, c 22.

89 Royal Commission on Trade Unions and Employers' Association, *Report*, Cmnd 3623 (1968) [219] ('Donovan Report') clearly recognises collective objects: 'It is impossible to separate problems of freedom of association from those of trade union recognition. Unless employees join a union there will be no union for the employer to recognise'.

language of the original statutory provision in s 5 of the *Industrial Relations Act 1971* (UK) c 72 followed closely the language of International Labour Organisation's *Right to Organise and Collective Bargaining Convention 1949* art 1 on anti-union discrimination.[90] Membership and activities were protected under separate limbs of the statutory section and a dissociation right was also included. This statutory rubric was largely crystallised in the Social Contract legislation of 1975-6, when a Labor government re-enacted the original provisions. It was this legislation that Wedderburn referred to with confidence as 'building a collective "right to associate" out of the bricks of certain "individual" employment rights'.[91]

The original victimisation protections in 1971 were enacted, however, in the framework of unfair dismissal laws. The rights were later consolidated in the *Employment Protection (Consolidation) Act 1978* (UK) c 44 ('*Employment Protection Act*') to include a right not to be dismissed because of membership or participation in the activities of an independent trade union at an appropriate time[92] and a right not to be subjected to action short of dismissal.[93] The rights were intended, as Donovan had prescribed, to promote collective bargaining in a collective framework. For example, the previous statutory procedure under section 8 of the *Terms and Conditions of Employment Act 1959* was strengthened under schedule 11 of the *Employment Protection Act 1975* to enable independent trade unions to apply for awards of common terms and conditions not less favourable than the 'general level'. In addition, a statutory recognition procedure gave the Advisory, Conciliation and Arbitration Service ('ACAS') a wide discretion to recommend recognition on the application of a trade union and interestingly, the remedy for failure to comply by an employer was an award by the Central Arbitration Committee ('CAC'). This was done by compulsory unilateral arbitration of the relevant terms in employees' contracts of employment. This period of British labour law can be seen as the high point in terms of support for collective institutions and the examples above indicate a high degree of State intervention to support collective bargaining, albeit in a voluntary system. Collective voice was actively promoted as the natural adjunct of a system of mature collective bargaining and the individual framework protecting freedom of association was designed to further this.

### 2 *The Margaret Thatcher Reforms: 1979 to 1990*

When these 'collective props' were dismantled under the Thatcher administration, which came to power on a mandate to reduce trade union power in 1979, the trade union victimisation rights became isolated as purely individual rights. The

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90 *Right to Organise and Collective Bargaining Convention 1949*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force generally 18 July 1951; entered into force for Australia 28 February 1973) art 1; Stephen Evans and Roy Lewis, 'Anti-Union Discrimination: Practice, Law and Policy' (1985) 16 *Industrial Law Journal* 88, 106, 89.

91 Lord Wedderburn, 'The *Employment Protection Act 1975*: Collective Aspects' (1976) 39 *Modern Law Review* 169.

92 *Employment Protection Act 1975* (UK) c 71, s 58(1)(a)(b).

93 Ibid s 23(1)(a)(b).

incoming Conservative government moved swiftly to repeal the statutory recognition procedure and the Schedule 11 procedure for extension of collective agreements.[94] The repeal of the Fair Wages Resolution in 1982 and wages councils in 1986 further damaged long-standing collective bargaining structures. In this context, Wedderburn's individual 'building blocks' for a right to organise appeared more fragile than he had anticipated in 1976. The statutory framework now became subject to two major forces: first, the individualist rhetoric favouring the right to dissociate and second, a narrow and sometimes arcane interpretation by the judiciary.

The theme which encapsulates the Thatcher industrial relations policies from 1979 onwards was the attack on solidaristic behaviour associated with trade unions and the encouragement of individual values.[95] The appeals to the individual to define his or her own interests, in opposition to the collective, involved an appeal to libertarian ideology which emphasised a market of free individuals. The latter was distorted by trade union compulsion of any form.[96] This ideology presupposed a conflict between individual rights and collective interests.[97] The individualisation of working life was promoted in all areas: strikes were limited to individual workplaces, individual union members were encouraged to oppose union collective discipline[98] and workers were encouraged not to join trade unions. The rhetorical appeal to liberal notions of freedom and democracy combined to cement a matrix of individual rights as moral claims to undermine legitimate collective interests.[99] In effect, individual voice, through the medium of democratic choice, became an instrument to deny collective power.

The selective appeal for individual rights is seen most starkly in the dissociation rights which were introduced incrementally throughout the 1980s in order to destabilise trade unions generally and the closed shop in particular. The process of prioritising dissociation began as early as 1980[100] and reached its culmination in 1990 with the introduction of an absolute ban on the pre-entry closed shop. Section 1 of the *Employment Act 1990* provided a right, for the first time, for job applicants not to

94 *Employment Act 1980* (UK) c 42.

95 Paul Davies and Mark Freedland, *Labour Legislation and Public Policy: A Contemporary History* (Clarendon Law Series, 1993) 428.

96 The writings of Hayek were an important influence: see Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *Industrial Law Journal* 1. Hayek was also invited to Australia at the same time.

97 James Prior, introducing the first Employment Bill in 1979, while talking of balance between individual and collective action, asserted that '[o]ur guiding principle has been … to ensure that the rights of the individual are respected and upheld, at the place of work as in every facet of our lives': United Kingdom, *Parliamentary Debates*, House of Commons, 17 December 1979, vol 976, col 59.

98 *Employment Act 1988* (UK) c 19, s 3.

99 Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 24.

100 *Employment Act 1980* (UK) c 42, s 15 introduced a limited dissociation right for 'action short of dismissal'.

be discriminated against on grounds of trade union membership. However, it failed to prevent the real object of recruitment discrimination, as it only protected the bare right of membership but not activities necessary or incidental to union membership and, in any event, had been introduced with an attack on the pre-entry closed shop in mind.[101]

3 *The Tony Blair Government: 1997 to 2007*

The return of a New Labour government in 1997 retained the core of the previous administration's restrictions on trade unions, including the restrictive strike laws and trade union internal controls. Thus the collective base, despite the re-introduction of a statutory recognition procedure in 1999, remained weak. In this climate, the re-assertion of individual choice as the ultimate criterion for collective representation and the promotion of trade unions as business partners[102] rather than collective defenders resulted in an industrial landscape where individual worker voice became fragmented across a variety of non-union mechanisms[103] and collective voice has often become a muted voice of cooperation. The continuing decline in collective bargaining has been complemented by an expansion of individual rights in the areas of minimum wages, working time and family-friendly rights. In this de-collectivised environment, the UK trade union victimisation rights have been considerably weakened, and depend on the declining strength of trade unions to prosecute individual cases.

4 *The Current Provisions: the* Trade Union Labour Relations (Consolidation) Act 1992

The UK rights now comprise a bundle of individual remedies contained in the *TULR(C)A*. The protections relate to three types of discrimination: dismissal, detriment and refusal of employment. Dismissal on grounds of trade union membership, activities, or making use of trade union services is unlawful under *TULR(C)A* s 152; dismissal for failing to accept an inducement not to be a trade union member or relinquish collectively agreed terms is also proscribed under this section. 'Detriment' on similar trade union grounds is covered under *TULR(C)A* s 146. Finally, refusal of employment on grounds of union membership arises under *TULR(C)A* s 137.

The protections relating to inducements were introduced by the *Employment Relations Act 2004* (UK), ('*Employment Relations Act*') in order to correct deficiencies exposed by the European Court of Human Rights decision in *Wilson v United Kingdom* ('*Wilson and Palmer*').[104] Unlawful inducements cover two broad categories: inducements relating to union membership, activities and services: *TULR(C)A* s 145A and inducements relating to collective bargaining: *TULR(C)A* s 145B.

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101 Bob Simpson, 'The *Employment Act 1990* in Context' (1991) 54 *Modern Law Review* 418, 422.

102 Department of Trade and Industry, *Fairness at Work White Paper*, Cmnd 3968 (1998) 16 [4.3]: 'collective representation can help achieve important business objectives'.

103 ACAS now actively promotes non-union representation channels alongside trade union machinery.

104 *Wilson v United Kingdom* [2002] V Eur Court HR 49.

It is worth examining these rights a little more closely as they form the basis of a right to representation in UK law and as such, provide substance to individual and collective voice at work. Section 145B is important in protecting workers from inducements to forgo rights to representation by a trade union for collective bargaining. In *Wilson and Palmer*, the applicants were denied pay increases for refusing to relinquish representation by their union (*Palmer*)[105] or refusing to sign personal contracts in lieu of collective bargaining (*Wilson*).[106] The European Court of Human Rights held that representation rights involved two aspects: the right to instruct the union to make representations and the right to be represented by the union in regulating relations with employers.[107] Protection under s 145B is dependent on the union being recognised or seeking to be recognised. This section is also limited by a dominant purpose test: the employer must show what was the sole or main purpose in making the offers.[108] In addition, UK law has restricted the representation right to individual workers who are trade union members and maintained its rigid exclusion of collective dimensions of voice, despite the fact that trade union voice is given specific recognition by the European Court of Human Rights under art 11 as a separate and independent right from the individual.[109]

Section 145A recognises that membership of a union involves more than just holding a union card and is not confined to representation. It also includes other services and benefits,[110] so the 'use of union services' is given explicit protection. Under the section, workers have rights not to have offers made to relinquish their rights to membership, activities and the use of union services. 'Trade union services' are broadly drafted to include 'services made available to the employee by an independent trade union by virtue of membership of the trade union'.[111] This would include raising grievances with employers, negotiating terms for individual employees and also extend to financial and other services.[112] These provisions are important to the expression of individual voice at work, protecting individual mechanisms of grievance and representation. To the extent that representation rights are important union organising tools, the inducement provisions recognise substantive aspects of collective voice, albeit that they are only vested in the individual.

We have seen from this preliminary discussion of the inducement rights arising from *Wilson and Palmer* that UK law makes a rigid distinction between individual and collective voice. We will develop this argument by an examination of the statutory wording of the concept of 'detriment'. *TULR(C)A* s 146 states as follows:

105 Ibid 56–7 [14].

106 Ibid 55 [10].

107 Ibid 67 [46].

108 *TULR(C)A* s 145D(2).

109 *Wilson and Palmer*, 68 [48].

110 Keith Ewing, 'The Implications of Wilson and Palmer' (2003) 32 *Industrial Law Journal* 1, 7.

111 *TULR(C)A* s 145A(4).

112 Simon Deakin and Gillian S Morris, *Labour Law* (Hart Publishing, 6th ed, 2012) 828.

> A worker has the right not to be subjected to any detriment *as an individual* by any act or any failure to act, by his employer if the act or failure to act takes place for the sole or main purpose of—
>
> (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
>
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time.
>
> (ba) preventing or deterring him from making use of union services …
>
> (c) compelling him to be or become a member of any trade union or of a particular trade union

Three particular concepts are worthy of note. The first illustrates the individualism of the English approach in the fact that victimisation must be suffered 'as an individual'. This phrase was not part of the original enactment and was inserted in 1975 by Parliament with the probable object of preventing claims by rival trade unions and fostering the maintenance of stable bargaining arrangements.[113] Despite these apparently collectivist origins, the phrase has been interpreted to draw a distinction between individual and collective activities rather than distinguishing between organising and negotiating activities.[114] This has resulted in a reduction of the scope of the protection so that it only applies in situations where individuals can prove an effect on them as individuals rather than when they are acting together as a collective.[115]

The UK provisions only protect an individual employee's activities in a trade union context rather than the activities of the union. In *Therm-A-Stor Ltd v Atkins*,[116] protection was denied to 20 individuals who were dismissed after a trade union had begun a concerted recruitment drive in order to obtain recognition with an employer. The employment tribunal found that the employer held strong anti-union views and further, the dismissals were a reaction to the union's efforts to seek recognition. The Court of Appeal, however, refused a purposive construction of the statute, with Lord Donaldson holding that 'the reason for the dismissal had nothing to do with anything which the employee concerned had personally done'.[117] Lord Donaldson stated further that 'the section is not concerned with an employer's reactions to a trade union's activities, but with his reactions to an individual employee's activities in a

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113 As a result of *Post Office v Union of Post Office Workers* [1974] ICR 378, where the House of Lords supported the right of a minority but registered trade union which the employer did not recognise, to gain facilities as against the recognised union which had no claim as it remained unregistered.

114 Deakin and Morris, above n 108, 841.

115 *Farnsworth v McCoid* [1999] IRLR 626 established that the protection is not confined to the individual in his capacity as such, so a shop steward who was de-recognised was protected.

116 [1983] IRLR 78 ('*Atkins*').

117 Ibid 80 [13].

trade union context'.[118] While this interpretation is justified on a literal construction of *TULR(C)A* s 152, it highlights the delicate borderline between individual and collective activities. A worker is now protected against detriment or dismissal in cases of victimisation where a trade union has applied for statutory recognition,[119] but the lacuna left by *Atkins* remains a serious limitation in the UK provisions.

The second point relates to the onus of proof provisions. A breach of the provision is based on an employer's act where the employer's 'sole or main purpose' is to subject the employee to detriment relating to a proscribed ground in section 146. Once the actions are alleged it is up to the employer to show what their sole or main purpose for acting was.[120] The employee still, however, has the major burden of showing that the employer's purpose breached the provision. English courts have applied a narrow construction of purpose in cases such as *Gallagher v Department of Transport*[121] where Neill LJ stated that 'purpose' and 'effect' were quite different. This approach permits employers to disguise their motives for acting. The sole or main purpose test has also caused difficulties in relation to the inducements protections. In the *Wilson and Palmer* cases, the employer relied on ostensibly 'neutral' business reasons: the stated aim in *Wilson* was to introduce individual contracts and in *Palmer* to achieve 'flexibility'. Despite extensive re-drafting of the provisions on employer purpose in the light of the employees' successful appeals to the European Court of Human Rights, a Labour government still felt justified in permitting business reasons to override other factors in the determination of the employer's 'sole or main purpose'.[122]

The third point relates to the protection of trade union activities by means of the concept of 'participation in the activities of an independent trade union at an appropriate time'. Trade union 'activities' have been left to definition by case law. Typical organisational activities such as recruitment are covered.[123] English law specifically protects the activities of an independent trade union so that trade union voice is protected, as opposed to the more general protection accorded to an 'industrial association' in Australian law. The concept has, however, caused difficulties both in terms of the issue of authorisation of activities by the trade union[124] and consent from employers for such activities.[125]

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118 Ibid 80 [15]. The Court of Appeal reversed the Employment Appeal Tribunal which applied a purposive construction on the grounds that any other interpretation would leave the Act a dead letter.

119 *TULR(C)A* sch A1 para 156.

120 *TULR(C)A* s 148.

121 [1994] IRLR 231.

122 *TULR(C)A* s 145D(4)(c): 'rewarding those particular workers for their high level of performance … or special value to the employer'.

123 *Lyon v St James Press Ltd* [1976] IRLR 215.

124 Specific authorisation may be required for individual members who are not shop stewards: *Chant v Aquaboats* [1978] ICR 643.

125 Agreement or consent of the employer is required for activities within working hours: *TULR(C)A* s 146(2)(b).

## III Comparative Linkages on Voice

We have traced two different approaches to freedom of association through a brief *excursus* into Australian and UK labour history, showing how a liberal individualist approach has dominated over collectivist approaches. The trends in both jurisdictions in recent decades have tended to result in weak or 'thin' expressions of collective voice. Australia and the UK have followed very different paths in labour history, where strong trade union movements grew in both countries out of quite different regimes. Conciliation and arbitration were instrumental in providing the state machinery to support a strong autonomous voice for trade unions in Australia whereas collective voice in the UK was promoted through autonomous collective bargaining. However with the loss of these institutions, collective voice has been replaced by more fractured and diffuse voice mechanisms. Paradoxically, the weakening of collective voice arose in Australia with the establishing of enterprise bargaining to replace the system of conciliation and arbitration, augmenting collective bargaining from 1993 onwards, whereas collective voice was diminished in the UK by means of reducing collective bargaining.

The *Fair Work Act* in Australia has strengthened collective voice mechanisms compared to the previous *Workplace Relations Act* era. However, the *Act* presents a mixed picture. The *Act* has strengthened the ability to take collective action. It has introduced innovative procedures to support unions in bargaining, which importantly avoid some of the complications experienced by unions in other countries such as the US and the UK.[126] However, individual rights and choices are firmly the dominant voice mechanisms adopted by the *Act*. This is particularly evident through the laws regarding the choice of bargaining representatives and the fact that a bargaining representative need not be a collective.[127] Trade unions are one of many potential voices in collective bargaining. This power given to the individual makes the collective voice vulnerable to the choice of disparate individuals who may or may not act consistently in favour of the collective. The 'industrial activities' protections also primarily protect the choices of individuals. The prime focus of the protection is the choice of the individual regarding whether to join a union or not, participate in lawful industrial activities or not participate in them, etc.[128] This paradigm, upon which the rights are built, obscures the need to protect the viability of the collective. Individual voice may also be weakened by the primacy given to choice. If a strong collective does not exist to represent the individual's interests then the ability of the individual voice to have an impact in the face of other powerful interests is 'muted'[129] or at least muffled.

126 *Fair Work Act* ss 176, 237: unions only need one member in the workplace to be a bargaining representative, avoiding the need to establish majoritarian support before they can be recognised during bargaining. As a bargaining representative, they also have the power to compel an employer to bargain if a majority support determination is obtained.

127 Ibid s 176.

128 *Fair Work Act* ss 346–7.

129 Bogg and Ewing, above n 11.

In considering the UK environment, it might be helpful to note the influence of different notions of voice. As in Australia, traditional conceptions of voice expressed in terms of bargaining power have, both in state policy and other forms of discourse, been in competition with different paradigms, such as economic efficiency.[130] The inclusion of economic objectives, particularly in recent Human Resource Management ('HRM') models of voice,[131] has paved the way for a renewed ascendance of neo-liberal thinking on UK labour policy with the effect that trade unions have to some extent, become harnessed to business objectives, reducing their essential autonomy. Hyman has proposed the criteria of autonomy, legitimacy and efficacy as yardsticks to measure voice and representational mechanisms.[132] Judged by these criteria, it is hard to see that the voice of the British worker at an individual or collective level has been adequately safeguarded since 1979.

In terms of the structure and locus of worker voice in the UK, moves to apply broader principles of representativity to the workplace as a result of EU frameworks of information and consultation, have resulted in a bifurcation of voice mechanisms, with employers being able to consult with elected 'employee representatives' where no independent union is recognised. European Union-imposed requirements have thus promoted wider constituencies for the expression of individual voice, but this alternative representation has effectively reduced national collective bargaining.[133] Collective voice has been progressively weakened as non-union forms of employee representation such as 'workforce agreements' have been introduced in many areas of employment.

Economic imperatives have led to the decentralisation of wage fixing machinery in both jurisdictions. Different routes have been taken to confine bargaining to local levels. State-regulated enterprise bargaining is the preferred method in Australia, whereas the UK has reduced national collective bargaining with a variety of strategies including abolition of statutory wages councils for low-paid workers, compulsory competitive tendering in the public sector and outlawing of secondary industrial action.[134] The pursuit of flexibility has thus led to a reduction of collective voice as union monopoly power has been eroded. In this competitive climate, unions have been unable to attract individual members, particularly where preference is made on an individual cost-benefit analysis.[135]

The UK has not witnessed a return to any form of collectivisation, as has occurred in Australia, albeit in an 'attenuated'[136] form. The only major support for collective

130 Bogg and Novitz, above n 4, 324.

131 For further discussion of these models, see ibid 340 ff.

132 Richard Hyman, 'The Future of Employee Representation' (1997) 35 *British Journal of Industrial Relations* 309, 310–11.

133 Deakin and Morris, above n 108, 870; see Paul Davies and Claire Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *Industrial Law Journal* 121.

134 Deakin and Morris, above n 108, 38.

135 Raday, above n 3, 360.

136 Creighton, above n 54, 134.

bargaining to be introduced by the New Labour administration was a weak statutory recognition procedure[137] imposing a majoritarian requirement for union representation — a process which Australia has avoided. Against this background, individual voice ultimately remains fractured and uncertain. The UK's protection of freedom of association has recently been expanded in scope as a result of the discourse of human rights under art 11 by means of the intervention of the European Court of Human Rights. The recognition of rights vested separately in a trade union is an important step forward. These, however, will not concretise fully if trade unions are treated merely as associations of individual members.

## IV Conclusion

The *Fair Work Act* is attempting to bring together strong individual choice mechanisms with legislative supports that also enable a strong collective voice to grow through collective bargaining. This attempt to balance collective and individual voice is an interesting experiment that seems not to have been attempted in other common law jurisdictions. It is too early to tell whether this experiment will also lead to stronger voice for workers overall in the traditional sense that we have adopted in this article. UK law has not, so far regained the balance that was lost when State policy promoting collective bargaining was reversed in the 1980s. Collective laissez-faire did not survive the strong economic currents which swept through the UK system of labour relations in this period.[138] If the balance of industrial forces were to be readjusted and a 'thicker' form of freedom of association introduced, perhaps following developments in the European Court of Human Rights, then UK collective voice might be re-invigorated and individual voice both stabilised and strengthened. This, however, is doubtful in the current chill winds of economic austerity.

137 *TULR(C)A* sch A1.

138 In this sense, Hugo Sinzheimer's forebodings regarding the hegemony of 'capital's constitution' were indeed prescient: see above n 1.

*Bernard Walker* and Rupert Tipples***

# THE HOBBIT AFFAIR: A NEW FRONTIER FOR UNIONS?


## Abstract

The industrial action surrounding the making of *The Hobbit* movie presented a contentious interaction between global business, lawmakers, and unions. The debate centred upon the employment status of film industry workers and their ability to involve unions in negotiating their terms of employment, culminating in a legislative amendment which defined their employment status. One narrative interpreted these events as a pragmatic solution which brought considerable economic benefits for both the industry and the country. Alternative views, however, construed the situation as involving constitutional challenges, curtailing union influence, and removing employee choice and employment protection. Seen in the context of the increasing use of independent contracting arrangements, the events can be viewed as eroding union influence and the protection available to workers. The case highlights the interdependence between differing arenas of voice, with diminution of economic and political voice contributing to a loss of industrial voice. This paper explores a number of crucial questions regarding the future role and influence of unions in the ever-growing sphere of non-standard employment relationships.


## I Introduction

The industrial action surrounding the making of *The Hobbit* movie involved a contentious interaction between a range of global players associated with the international film production including business, lawmakers, and unions. The debate centred upon the employment status of workers and their resulting ability to involve unions in negotiating their terms of employment. The dispute culminated in a legislative amendment which defined their employment status as contractors. The events can be interpreted in a number of different ways. One interpretation is that the episode simply corrected a legislative anomaly by clarifying the employment status of a small group of workers in one specific industry. This was the rationale of the government and filmmakers and was well publicised in the debate surrounding the Hobbit dispute. A second, less publicised view, however, involves a range of critiques and concerns. The events take on greater significance if the episode is viewed as an example of the wider debate regarding the growing use of independent contracting. This reframes the dispute as the juxtaposition of two competing interests. A business viewpoint affirms contracting as an alternative type of employment arrangement which provides much needed industry flexibility. An opposing perspective emphasises


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a range of threats that this poses for worker voice including employment protection, the ability to choose the nature of their employment arrangements, and the ability to form collectives and to bargain for collectively agreed terms of employment.

While the events occurred in New Zealand, the dispute has far broader implications as it raises fundamental questions regarding worker voice and the rights of independent contractors worldwide. For example, do those contractors have the right to form collectives, to engage in strike action, and collectively influence their terms and conditions of work — or are contractors excluded from these rights? In a context where contracting arrangements are expanding, if contractors are not entitled to collective representation this suggests that a growing proportion of the workforce will have neither legislative employment protection nor access to collective representation, with the possibility that this is likely to both erode working conditions and further reduce the influence of unions. From this perspective, the episode highlights major, untested issues that are likely to prove crucial determinants of the future of workers' rights and voice.

This article stems from a wider dialogue regarding the Hobbit dispute and non-standard employment, encompassing both supportive and critical commentaries.[1] The present discussion explores themes from a number of those analyses in order to investigate the implications and asks, what are the potential implications of such a case for unions and worker voice?

The structure of the discussion commences with a brief overview of the events of the Hobbit dispute. It then moves to explore a range of less obvious political, economic, legal, and employment relations issues that combined to create and shape the dispute. This leads to a discussion regarding the possible future for unions.

## II An Overview of the Hobbit Dispute

To begin, it is useful to briefly outline the dispute.[2] A key part of the background to the Hobbit dispute concerns an earlier legal challenge in the film industry involving *Bryson v Three Foot Six Ltd* ('*Bryson*')[3] and the question of determining employment status. Section 6 of the *Employment Relations Act 2000* (NZ) ('*ERA 2000*') established, for the purposes of the Hobbit dispute, that whether a worker was an employee or independent contractor was not to be determined by a statement in an employment agreement but by 'the real nature of the relationship'. This was to be determined by considering all relevant matters which, the courts held, included application of the traditional common law tests. Bryson, a film model maker, was

1 Rupert Tipples and Bernard Walker, 'Editorial: Introducing the Forum' (2011) 36 *New Zealand Journal of Employment Relations* 1.

2 A range of in-depth accounts of the dispute are available. See, eg, A F Tyson, 'A Synopsis of The Hobbit Dispute' (2011) 36 *New Zealand Journal of Employment Relations* 5; Helen Kelly, 'The Hobbit Dispute', *Scoop Independent News* (online), 12 April 2011 <http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm>.

3 [2005] 3 NZLR 721.

working for Three Foot Six Ltd on the *Lord of the Rings* trilogy. Contractual documentation supplied to him after he commenced work purported to classify him as an independent contractor. At the end of September 2001, he was terminated when his unit was downsized. In 2003, Bryson's case for unjustifiable dismissal, posited on the existence of an employment relationship rather than a contracting arrangement, went to the Employment Court, which ruled him to be an employee. In 2005, the case became the first employment case before the Supreme Court which stated that the Employment Court had used the existing legal principles correctly under s 6. The end result was that, despite widespread film industry practice, the decision of the Employment Court stood and Bryson was an employee.

*The Hobbit* is a multiple film venture by Warner Brothers based on the novel by Tolkien and directed by Sir Peter Jackson, producer of *The Lord of the Rings* trilogy. When the production of *The Hobbit* was being developed the local actors' union, New Zealand Actors Equity ('NZAE'), expressed dissatisfaction with the terms offered and so approached international actors' unions for support. This led to the International Federation of Actors ('FIA') instructing its members and affiliate unions not to work on the project until collective negotiation of terms and conditions had occurred with Media Entertainment and Arts Alliance ('MEAA'), which incorporated NZAE. These tactics were rejected by Sir Peter, who claimed they would ruin the New Zealand film industry. Sir Peter argued that the *Commerce Act 1986* (NZ) prevented his company from negotiating collectively with potential staff since they were contractors and not employees. This view was later supported by the New Zealand Government but disputed by the unions. Warner Brothers then announced they were seeking other production locations for making the films. The potential loss of the films to another overseas location created a furore with demonstrations taking place across the country. The peak union body, the New Zealand Council of Trade Unions ('NZCTU'), and the government both sought to intervene, concerned by the potential loss of jobs and economic benefits. The parties met and the unions agreed to discontinue their action in order to keep the films and film industry jobs in New Zealand. Warner Brothers' executives met the Prime Minister and colleagues to discuss their concerns regarding the possibility of industrial action and what they perceived as the adverse consequences of the *Bryson* decision for the contractual status of actors and film crew. After negotiations with Warner Brothers, the government announced it was urgently amending the *ERA 2000*, specifically addressing actors and film crew to 'clarify' that they would be independent contractors unless their written employment agreement stated otherwise. In addition, the government granted Warner Brothers another $15 million subsidy to help retain *The Hobbit* production in New Zealand, in return for which the premiere was to be held in New Zealand in association with a tourism promotional campaign. The legislative changes were enacted in October 2010 and filming commenced in 2011. The premiere of the completed movie was held in November 2012.

## III Economic and Political Influences

To analyse the Hobbit dispute it is necessary to chart the range of powerful but less visible factors that shaped the events. This discussion commences with the economic and political elements. The global film sector constitutes a large and

powerful industry. The scale of productions and the huge associated business opportunities they bring, lead many nation states to compete with each other to become locations for film productions. For some years, New Zealand has offered subsidies to match other countries in seeking to be a site for international productions. The main multinational film companies can therefore exert considerable power even in the largest nation states. From a business perspective, New Zealand was a seller in an oversupplied market competing for the attention of Warner Brothers and MGM, and consequently this afforded those companies considerable negotiating power.[4]

The film companies were not entirely free agents though as they were under considerable pressure to complete *The Hobbit* films within a short time frame. The companies faced a range of financial demands and *The Hobbit* series held the promise of major earning potential, building on the earlier success of *The Lord of the Rings* trilogy. Sir Peter was critically important for making this happen, being the creator of the earlier trilogy and having the capacity to once more deliver high quality films that were completed on time. According to Haworth, the companies needed Sir Peter.[5]

At the same time, Sir Peter was also important to New Zealand. He was the film-making icon who had grown from a small player in the local industry to become an internationally acclaimed producer, bringing *The Lord of the Rings* and other major productions to the country, making him an industry leader and agent of the global film sector. Haworth suggests that these factors combined to allow the film companies and producers direct access to senior levels of the New Zealand Government, giving them considerable influence with regard to industry arrangements and government subsidies.[6]

At a political level, the New Zealand Government's public statements and actions, not surprisingly, focused on the major economic benefits of securing the productions for the country. The local film industry was expected to receive significant immediate benefits, while the wider country could gain from the short-term economic impetus with *The Hobbit* films expected to bring in NZ$670 million and create 3000 jobs. In the longer term, it was argued, the project would also enhance New Zealand's reputation as a film production destination with gains from publicity benefiting areas such as tourism.[7] The threat of losing the productions to another location provided a strong motivation for the government's actions. Protecting the public interest was framed in terms of these commercial matters. The government asserted that the need to avoid losing the productions gave it a mandate to intervene urgently for the greater good of both the local film industry and the nation's economy by passing the legislative amendment without the usual consultation and submissions processes.

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4 Nigel Haworth, 'A Political Economy of "The Hobbit" Dispute' (2011) 36 *New Zealand Journal of Employment Relations* 100.

5 Ibid 107.

6 Ibid.

7 Kate Wilkinson, 'One Law to Rule them All' (2011) 36 *New Zealand Journal of Employment Relations* 34.

The government's rationale was that it was necessary to address the concerns of the producers by providing conditions that would accommodate their preferences, particularly regarding employment arrangements and subsidies, in order to retain the productions. Specifically, the *Bryson* decision and the threat of industrial action had led Warner Brothers to state the employment relations environment in New Zealand was 'unstable'.[8] The government supported the film producers' assertion that workers are hired for a specific project, working on productions that are entirely events based, and therefore they are individual contractors. The ability of the courts to 'look past' the written contract and determine that an arrangement was actually a contract of service, was seen as creating what the government referred to as 'uncertainty'.[9] The government's legislative change was therefore 'to remove that uncertainty' and reflect longstanding industry practice.[10] Under the amendment, it was established that workers have a choice of being either contractors or employees, purportedly based on the decision they make at the beginning of the engagement, and the government asserted that this amendment 'does not remove rights from anyone'.[11]

## IV Contracting and Non-Standard Employment

Contracting arrangements represent one aspect of the growing area of non-standard[12] temporary employment, which some writers suggest is one of the most spectacular and important evolutions in Western working life.[13] From a company perspective, contracting provides the potential for flexibility in aspects such as the tasks workers can do, the number of workers needed, and the rates of pay that can be offered. These gains, particularly the labour cost savings, are important in addressing global competition. Many of these benefits stem from the fact that contracting arrangements are outside the usual regulations governing standard employment relationships and this permits rapid adjustment through adding or subtracting workers with no long term contractual ties.[14]

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8 Ibid 34.

9 Ibid.

10 Ibid.

11 Ibid 35.

12 Non-standard employment is a broad category covering a variety of forms; in some situations the workers are employees, while others are contractors. As with the North American term 'contingent work', it is frequently characterised by its temporary nature involving situations where there is no explicit or implicit contract for long-term employment, or where the minimum hours worked can vary in a non-systematic manner. See Bernard Walker, 'How Does Non-standard Employment Affect Workers? A Consideration of the Evidence' (2011) 36 *New Zealand Journal of Employment Relations* 14.

13 Cuyper et al, 'Literature Review of Theory and Research on the Psychological Impact of Temporary Employment: Towards a Conceptual Model' (2008) 10 *International Journal of Management Reviews* 25.

14 Tui McKeown and Glennis Hanley, 'Challenges and Changes in the Contractor Workforce' (2009) 47 *Asia Pacific Journal of Human Resources* 295.

The benefits for employers may, however, constitute costs for workers. The research evidence suggests that some workers do benefit from self-employment or agency work, particularly when they voluntarily enter this type of work, 'pulled' by the lure of greater autonomy, increased earning potential, a flexible lifestyle, and more control over work-life balance.[15] Other workers are, however, disadvantaged by temporary work which may or may not be within a contract of service.[16] These are largely people with lower labour market power who are 'pushed' reluctantly into these alternative forms of employment as large organisations shed their less valued workers as part of a process of casualisation, replacing standard employment arrangements with alternatives such as part-time, casual, and outsourcing through the use of temporary agencies. While business groups argue that this approach increases labour productivity, critics respond that those gains are made by transferring the commercial costs and risks onto workers.[17]

There is evidence to suggest that casualisation can create 'economic refugees' who are unable to find standard employment.[18] The negative aspects of non-standard work can include the loss of job security, irregular work with periods of unemployment, low and variable earnings, along with the loss of non-pay benefits and training. Non-standard employment typically involves lesser protection for workers. Independent contractors are the most deprived group of workers, excluded from many employment related statutory benefits and entitlements such as protection against unfair dismissal, minimum wages, sick leave and aspects of annual leave.[19] From that perspective, non-standard employment is viewed as precarious and potentially substandard. In the longer term, non-standard arrangements are seen as leading to the de-unionisation of workplaces, lowered levels of health and safety, and the deterioration of working conditions in industries, producing an eventual erosion of labour

15 Petricia Alach and Kerr Inkson, 'The New "Office Temp": Alternative Models of Contingent Labour' (2004) 29 *New Zealand Journal of Employment Relations* 37; Gideon Kunda, Stephen R Barley and James Evans, 'Why Do Contractors Contract? The Experience of Highly Skilled Technical Professionals in a Contingent Labour Market' (2002) 55 *Industrial and Labour Relations Review* 234.

16 Walker, above n 12.

17 John Burgess, Erling Rasmussen and Julia Connell, 'Temporary Agency Work in Australia and New Zealand: Out of Sight and Outside the Regulatory Net' (2004) 29 *New Zealand Journal of Employment Relations* 25; Ian Watson, 'Contented Workers in Inferior Jobs? Re-Assessing Casual Employment in Australia' (2005) 47 *Journal of Industrial Relations* 371.

18 Ian Kirkpatrick and Kim Hoque, 'A Retreat from Permanent Employment? Accounting for the Rise of Professional Agency Work in UK Public Services' (2006) 20 *Work, Employment and Society* 649; Deborah Smeaton, 'Self-Employed Workers: Calling the Shots or Hesitant Independents? A Consideration of the Trends' (2003) 17 *Work, Employment and Society* 379.

19 Colin P Green and John S Heywood, 'Flexible Contracts and Subjective Well-being' (2011) 49 *Economic Inquiry* 716; Tui McKeown, 'Non-standard Employment: When Even the Elite are Precarious' (2005) 47 *Journal of Industrial Relations* 276; Walker above n 12.

market standards.[20] Fenton lists a range of New Zealand sectors where she reports that independent contracting arrangements are having a negative impact including fast food delivery workers, truck drivers, couriers, construction workers, caregivers, security guards, cleaners, telemarketing workers, forestry workers, actors, and musicians. She provides case studies of telecommunications engineering services, truck drivers, couriers, and advertising mail delivery to illustrate the nature of the adverse effects on workers.[21]

While workers in the New Zealand freelance film production sector may be attracted by the country's film successes, a study by Rowlands and Handy, looking specifically at the industry, concluded that the contract workers were a 'vulnerable and under-powered group working in a highly competitive and insecure industry'.[22] They report that the individualistic, project-based contracting arrangements cause workers to constantly compete with each other, eroding collective relations and group loyalties.[23] The short-term nature of the work, with highly intensive but rewarding periods that inhibited the workers' ability to pursue other interests, produced an addictive environment that was difficult to leave.[24]

## V Alternative Views of the Hobbit Dispute

Against this backdrop, critics argue that the events of the Hobbit dispute significantly compromised workers' rights in a range of ways. From a political and legislative perspective, Wilson proposes that the process by which the legislative changes were introduced undermined the essential requirements of good faith by failing to provide the workers affected with either information about the proposed changes or an opportunity to participate in determining the arrangements for their core work conditions.[25] Although acknowledging that there was a degree of urgency, she asserts that there would still have been sufficient time for public participation by referring the amendment to a select committee for submissions and allowing public debate on the implications of the legislation. Wilson portrays the government's failure to consult in matters which brought major costs to workers, altering their status and removing their capacity to collectively negotiate their conditions of work, as an abuse of constitutional power. The sequence of events is interpreted as eroding the workers' political voice, leaving them 'very vulnerable and without effective representation or legally enforceable employment rights'.[26]

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20 Burgess, Rasmussen and Connell, above n 17.

21 Darien Fenton, 'Insights into Contracting and the Effect on Workers' (2011) 36 *New Zealand Journal of Employment Relations* 44.

22 Lorraine Rowlands and Jocelyn Handy, 'An Addictive Environment: New Zealand Film Production Workers' Subjective Experiences of Project-Based Labour' (2012) 65 *Human Relations* 677.

23 Ibid 675.

24 Ibid 677.

25 Margaret Wilson, 'Constitutional Implications of "The Hobbit" Legislation' (2011) 36 *New Zealand Journal of Employment Relations* 91.

26 Ibid 91–2.

Haworth analyses the political and economic influences in terms of the power and interests of government and business. In the context of globalised trade, the relative power of a sovereign government, especially a smaller state such as New Zealand, is limited compared to a powerful multinational company which can exert greater influence.[27] The ideologies of the government were also seen as having a major bearing on the dispute. The centre right government of the time was portrayed as opposing trade unions while supporting foreign direct investment. *The Hobbit* production was an important investment which could boost the domestically based film industry, enhancing the technical skill base, as well as growing tourism and promoting New Zealand's international reputation. Haworth contends that the government of the time gave priority to the desires of the business sector, enacting their preferences into legislation, and thus increasing the power of employers while reducing employee rights. Consequently, he asserts that the government 'conceded, financially and legislatively, to the global film sector', offering considerable additional subsidies.[28] In his view, the amendments to the *ERA 2000* thus served two goals; they were a concession to the filmmakers' requests and, at the same time, the legislative changes also fitted the government's own plan of liberalising employment law and countering the local trade union movement. Again, the weakening of political and economic voice produced a loss of industrial voice for workers.

## VI The Role of Unions

On many levels the Hobbit dispute functioned against the unions involved. The events highlighted the growing challenge for unions as they confront globalised competition and multinational companies. This implies a need for union collaboration across a number of countries in order to provide a consistent approach, so as to avoid fragmentation and competition among workers which could lead to a constant lowering of working conditions. Prior to the Hobbit dispute, unions were already involved in such an international campaign to counter the power of the increasingly large global film sector. At the same time, within New Zealand, attempts by the local union to negotiate conditions in the film and TV sector had made little progress due to opposition from production companies. The planned production *The Hobbit* drew renewed attention to these matters, merging them together into the one dispute. The fact that this production was driven by the international companies necessitated that local unions work with the New Zealand Council of Trade Unions and international unions. Haworth proposes that given this situation, international involvement in the Hobbit dispute should have been expected and 'understood as acceptable and proper'.[29]

In practice though, the public did not accept international union involvement in what was viewed as a New Zealand dispute. Media coverage and statements from producers denied the legitimacy of involving international unions, discrediting them and portraying them as self-interested outsiders intruding in a local issue. Sir Peter

27 Haworth, above n 4.

28 Ibid 104.

29 Ibid 105.

described the MEAA leadership, for example, as an 'Australian bully boy' motivated more by their own industry interests than worker solidarity.[30] The fact that unions were seen as challenging a specific individual, Sir Peter, the iconic New Zealander who had created award-winning movies and made the country famous, caused the unions to appear as unreasonable troublemakers. The public seemingly did not distinguish between the different unions, even though the unions' approaches differed. The unions' actions were viewed unfavourably, even to the point of provoking widespread public protests opposing the unions. The dispute demonstrates the increasing challenges confronting unions as strong negative public perceptions hamper their ability to have any input into a situation. Furthermore, these negative perceptions present a significant barrier to unions being able to exert a credible united international approach for dealing with multinational companies at a time when this may be most needed.

Haworth proposes a radical interpretation of these specific political dynamics.[31] He alleges that the government's actions compounded this situation by fostering a public view that the unions were self-interested troublemakers whose short-sighted actions were jeopardising the welfare of the country. He interprets the government's actions as a deliberate attempt to disempower and exclude unions. Both the government and the NZCTU entered the dispute as external parties who had the potential to broker a solution and save the production. Haworth argues that although this situation presented an opportunity for creating an effective tripartite solution involving unions, government and film-makers, the government chose not to follow this path. Instead the government formed a very different type of alliance with the producers and the film companies. The outcomes then benefited those three parties but excluded the unions. The producers and film companies gained higher subsidies along with special legislation instituting their own preferred employment conditions. According to Howarth's view, by excluding and discrediting the unions, the government was able to claim all the credit for saving the situation while, at the same time, prejudicing public attitudes against the union movement and further weakening the unions' influence.

At the level of the workers, Rowlands and Handy describe the Hobbit dispute as also pitting groups of workers against each other.[32] While the actors and their union sought to safeguard their own rights, they found themselves in conflict with the non-unionised production crew, who joined protest marches when they saw their chances of working on the production threatened by the actors' industrial voice. The authors propose that the project-based contracting arrangements led the production workers to claim the short-term gains of another period of temporary employment, rather than work together with other groups for longer-term gains through industry wide, collectively negotiated arrangements.

Together the Hobbit dispute highlights the interrelated influence of a cluster of factors; with the economic power of global capital, along with a complex range of

30 Tyson, above n 2.

31 Haworth, above n 4.

32 Rowlands and Handy, above n 22.

internal domestic political dynamics, combining to impede economic and political voice. Those factors then directly influence the extent of collective, industrial voice in shaping the terms and conditions of work. The expansion of international companies in an increasingly global marketplace presents a formidable challenge which demands new intercountry union responses. Yet, in the absence of strong political support, the ability of unions to provide this type of response is severely constrained. Non-standard work, and particularly contracting, has the potential to become an expanding area where unions are excluded with little influence or involvement.

## VII The Amendment: Redefining Employment Status

From a legislative perspective, the Hobbit amendment to the *ERA 2000* that resulted from the dispute is also the subject of critiques. Nuttall argues that the existing law at the time of the dispute was not problematic and public perceptions that there were major flaws stemmed largely from 'misunderstanding and misinformation'.[33] The government and others lobbying for legislative change presented the view that, due to the *Bryson* decision, workers who were 'really' contractors could in some way be 'deemed' to be employees by the court, with workers signing up as contractors but then using the court to change their status to employees.[34] There was an implication that the court was creating a status that differed from what the parties had initially intended or agreed to, and perhaps even differed from the reality of the working situation. In contrast, Nuttall contends that the *Bryson* decision applied well-established principles of employment law and did not create legal confusion or difficulties which needed the Hobbit amendment to resolve. The reasoning adopted by the Employment Court in the *Bryson* decision was not disturbed by the Supreme Court; it was noted that the decisions related to the specifics of that case and could not be readily generalised to other situations and did not fix the status of a whole industry. The associated case law was established and consistent. From those bases, Nuttall proposes that the law and its application in the *Bryson* decision were not faulty and did not need fixing.

The original provisions of the *ERA 2000* had reiterated the established common law position that employers could not avoid responsibility for employee rights and entitlements simply by 'labelling' a worker as a contractor. The 'label' approach asserts that the written statement made by the parties at the time of commencing the working arrangements, describing the work status as either contractor or employee, determines whether the person is an employee or contractor. Prior case law did not support this approach though and, in addition, the *ERA 2000* introduced a much wider requirement that, in determining the real nature of working arrangements, the court or authority must consider 'all relevant matters' including any matters that indicate the intention of the persons, while the labelling in 'any statement by the persons that describes the nature of their relationship' should not be treated as if this

33 Pam Nuttall, '"… Where the Shadows Lie": Confusion, Misunderstanding, and Misinformation about Workplace Status' (2011) 36 *New Zealand Journal of Employment Relations* 73, 73.

34 Ibid.

alone determined employment status.[35] The courts confirmed that ascertaining the real nature of the relationship requires a much broader evaluation of the situation which includes the common law tests such as the control, integration and the fundamental tests.[36] Any determination by the court or authority should identify the real status and this could potentially show that the label used in written statements was at variance with the reality of the arrangements.

Nuttall asserts that, despite this well established interpretation, the amendment sought to exclude the courts from being able to ascertain the real nature of the employment arrangement, instead introducing a simple labelling criterion. Therefore the 'uncertainty' that the labour Minister criticised was the fact that the written statement was not the sole determining criterion.[37] Nuttall argues that it appears from the Explanatory Note accompanying the amending legislation that the policy intent is to impose a 'label' criterion, which would serve to exclude a whole industry from the protections of the *ERA 2000*, with their status determined solely by the terms used in a written document. The Hobbit amendment to the *ERA* 2000 purports to restrict the effect of the Supreme Court *Bryson* decision by making all workers in the film industry contractors, unless an employment agreement provides otherwise. Wilson adds to this by suggesting that the labelling approach becomes more problematic when dealing with organisations such as major multinational corporations with very clear preferences regarding working arrangements. Despite claims to the contrary, workers are likely to have little choice as to the type of work arrangement.[38] If an employer proposes an arrangement and labels it as a contract for services then the worker will have little opportunity to either challenge that offer or the subsequent working arrangements. Once more, another set of factors contributed to a very pessimistic prognosis for the future of unions and worker voice.

## VIII Legislating for Non-standard Employment

The real significance of the Hobbit dispute concerns the extent to which it reflects the more general situation of workers in non-standard employment and particularly independent contracting. Defenders argue that the Hobbit amendment produced little change since workers in the film industry have traditionally been contractors. The crucial difference, however, concerns the two fundamental premises used to justify the events. The first is the assertion that independent contractors are excluded from employment protection and collective action, and this abolishes their industrial voice. Accompanying this, Haworth suggests that the justification, based on the economically defined public interest, used to legislatively prescribe the employment status of film production workers could equally be applied to workers in other sectors — with

35 *Employment Relations Act 2000* (NZ) s 6.

36 *Bryson v Three Foot Six Ltd* (2003) 2 NZELR 105 [19]; although the appeal from this decision was decided on different grounds, the analysis of the Employment Court was not disturbed when the decision reached the Supreme Court, see, eg, *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721, 735 [32] (Blanchard J).

37 Wilson, above n 25.

38 Ibid.

the consequence that an increasing number of workers would also lose their rights as employees and their collective representation.[39]

The Hobbit dispute therefore points to a need to challenge the assumptions regarding the rights of contractors and others in non-standard employment. The fundamental question is whether the rights and protections of contractors should be less than those of employees. Writers such as Spoonley observe that with the rapid growth of non-standard employment and corresponding decline of standard employment, there is now a mismatch between the contemporary world of work which is comprised of radically changed employment arrangements, yet employment legislation and policy are still heavily premised upon notions of 'standard' employment from an earlier era.[40] Changes to the nature of work and the labour market are leaving an increasing number of workers with few employment rights.

Wilson argues that the 'current unreality' of the law suits the interests of politicians.[41] By omitting to make any changes to protect the rights of workers in non-standard employment, successive governments have effectively created an expanding sector of unregulated, unprotected and de-unionised work, which accords well with neoliberal economic ideologies. In the Hobbit dispute, she argues that the fact the changed nature of work is no longer reflected in the law allows a government to 'conveniently change the legal definition on the grounds of clarifying the law', and so the reclassification of workers serves to 'deprive a class of employees' access to employment rights' with the intention that this would lower the cost of labour and so benefit the employers.[42] From that perspective, the Hobbit dispute therefore highlights the broader need to bring the law into line with the reality of the modern labour market and changed work arrangements by addressing the consequences for individual workers.[43] There is an unrealistic legal vacuum surrounding contracting arrangements and this situation should be revised so as to extend protections and rights to non-standard work. Business groups, however, are less likely to be supportive of such changes. From their perspective, the very essence of non-standard employment is the flexibility that it offers; increasing legislative protections would remove that flexibility.

## IX The Rights of Contractors: Local and International Labour Standards

Existing international conventions and local statutes already support the development of workers' rights, especially the right to engage in collective approaches. Haworth refers to the International Labour Organisation's ('ILO') 1998 *Declaration on Fundamental Principles and Rights at Work*, which he argues gives trade unions the ability to use international action in support of extended collective bargaining.[44] ILO

39 Haworth, above n 4.

40 Paul Spoonley, 'Is Non-standard Work Becoming Standard? Trends and Issues' (2004) 29 *New Zealand Journal of Employment Relations* 3.

41 Wilson, above n 25, 93.

42 Ibid 92.

43 Ibid.

44 Haworth, above n 4.

member countries, such as New Zealand, are required to adhere to these core labour standards even if they have not ratified them.[45] Furthermore, Kelly notes that ILO Conventions Nos 87 and 98 regarding the *Freedom of Association and Protection of the Right to Organise*, and the *Right to Organise and Collective Bargaining*, extend to contractors who are explicitly recognised in the decisions of the Freedom of Association Committee;[46]

> By virtue of the principles of freedom of association, all workers — with the sole exception of members of the armed forces and the police — should have the right to establish and join organisations of their choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which so often is non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organise.[47]

Similarly, the ILO states that '[n]o provision in Convention No 98 authorizes the exclusion of workers having the status of contract employee from its scope'.[48] Howarth therefore proposes that while the Hobbit dispute placed considerable emphasis on protecting local investment issues, there appeared to be less attention to exploring and implementing global labour standards.[49]

The restraint of trade provisions contained in the *Commerce Act 1986* (NZ) were cited as a major obstacle that prevented contractors on *The Hobbit* production from engaging in collective action to establish terms and conditions. Conflicting legal opinions were proposed but no consensus was reached. Kelly raises a number of questions regarding the application of this legislation to the situation of contract workers, including whether contractors are actually in competition with each other and whether the situation would represent grounds for the Commerce Commission to grant exemptions, as provided in the Act.[50] Furthermore, she points to the provisions of the *Trade Unions Act 1908* (NZ) which evolved from legislation establishing that

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45 Wilson, above n 25.

46 See, respectively, International Labour Organisation, *Freedom of Association and Protection of the Right to Organise Convention 1948*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force generally 4 July 1950; entered into force for Australia 28 February 1973) art 11 ('*ILO Convention No 87*'); International Labour Organisation, *Right to Organise and Collective Bargaining Convention 1949*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force generally 18 July 1951; entered into force for Australia 28 February 1973) arts 3–4 ('*ILO Convention No 98*'); and see Helen Kelly, 'The Hobbit Dispute' (2011) 36 *New Zealand Journal of Employment Relations* 30.

47 International Labour Office, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (International Labour Organization, 5th ed, 2006) [254].

48 International Labour Office, *Digest of Decisions of the Committee on Freedom of Association* (International Labour Organization, 1996) [802].

49 Haworth, above n 4.

50 Ibid.

union activity was not anti-competitive and instead explicitly permitted workers to combine to regulate arrangements with employers. If these alternative opinions are correct, then the belief that contractors were barred from engaging in collective activities in negotiating their terms and conditions may be erroneous.

In order to achieve greater protection for contractors, Wilson and Kelly both contend that a necessary starting point is for workers to exercise the basic right to unite in collective action through trade unions in order to protect and further their interests.[51] In the context of contracting relationships this may take the form of establishing common standards which are then applied in individual contracts. Other options have also been mooted. Fenton, for example, has suggested adopting provisions similar to Britain by legislating a minimum wage which applies not just to employees but all 'workers', defined as 'any individual who has entered into, or works under a contract of employment, or any other contract where the individual undertakes to do or perform personally any work or services for another party to the contract'.[52]

The conundrum is that if both global standards and local legislation support workers, including contractors, engaging in collective activities and taking part in international union action, then why is this not occurring? The Hobbit dispute provides insight into this by exemplifying how the problems associated with traditional industrial action and attempts at international union collaboration are thwarted by domestic politics, economic influences, lobby groups and public opinion. While international standards may support workers' rights, the implementation of those standards through local policy and legislation is dependent on the political and legislative situation in an individual country. Nonetheless, there is a need to highlight the question of workers' rights, for both employees and contractors, and this is particularly relevant in relation to the ILO's Decent Work Agenda, which countries such as New Zealand have to support as ILO members.[53] Having recourse to international standards is not a sure-fire solution on its own but it may be one influential element that contributes towards bringing about a change whereby local workers receive the range of basic rights at work mandated by the ILO. International expectations may prove better determinants of working standards than lobbying by domestic interest groups.

Union groups could extend their focus on establishing a fundamental code of New Zealand workers' rights based on the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*. The new Secretary-General of the ILO, Guy Ryder, has highlighted in his first interview how maintaining workers' rights is essential to economic recovery — the unemployed need work but 'Decent Work' and should not adding further to the ranks of '*The Precariat*'.[54]

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51 Kelly, above n 46; Wilson, above n 25.

52 Fenton, above n 21, 54.

53 Rodgers et al, *The ILO and the Quest for Social Justice 1919–2009* (International Labour Office, 2009) 224.

54 ILO, *Employment Rights Essential to Economic Recovery, Says New ILO Boss* (1 October 2012) <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_190435/lang--en/index.htm>; Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic, 2011).

Australia already has its own Australian Institute of Employment Rights, and its own Charter and Standard of Employment Rights. These might form the basis of a new code of workers' rights and are summarised in 10 key points:

(1) Good faith performance;
(2) Work with dignity;
(3) Freedom from discrimination and harassment;
(4) A safe and healthy workplace;
(5) Workplace democracy;
(6) Union membership and representation;
(7) Protection from unfair dismissal;
(8) Fair minimum standards;
(9) Fairness and balance in industrial bargaining;
(10) Effective dispute resolution.[55]

Wilson highlights the problems of the New Zealand system of government and in particular its lack of constitutional protections which makes workers particularly vulnerable to core issues being determined by the legislative changes of whichever party is in power.[56] Introducing a code may reduce this vulnerability and help provide greater direction from the judicial system. Roles and Stewart have recently highlighted the increasing role of the courts in Australia and Britain in clarifying when contracting arrangements are really employment.[57]

## X Conclusion

The Hobbit dispute highlights a set of pivotal, inter-related factors which have previously received little attention, yet which are likely to determine the future of unions and worker representation worldwide. Kelly asserts that the dispute was, at its core, a situation where a group of workers sought to have a say on the setting of their terms and conditions.[58] Their ability to do this was constrained by a wide range of factors. Traditional analyses of union efficacy have focused on issues such as employer attitudes and the strategic approaches and structures of unions. However, that list now needs to be extended to acknowledge the factors demonstrated in the Hobbit dispute.[59] While the role of the state continues to be evident, with economic policies and legislation exerting a major influence on the future of trade unions, it

55 Australian Institute of Employment Rights, *The Australian Charter of Employment Rights* (30 May 2013) <http://www.aierights.com.au/resources/charter/>.

56 Wilson, above n 25.

57 Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *Australian Journal of Labour Law* 258.

58 Kelly, above n 46.

59 David Metcalf, 'British Unions: Resurgence or Perdition?' (Provocation Series Report No 1, The Work Foundation, January 2005).

now needs to be seen in the context of the growing power of multinational organisations which can be larger and more influential some than nation states. International corporations have the potential to directly influence government policies and legislative frameworks. The existence of these corporations also presents a need for unions to enter into new types of cross border collaborative action with renewed urgency. Associated with this, the Hobbit dispute illustrates that it is no longer solely the employers' and employees' perceptions of unions that are important, but rather the perceptions of the wider population can have a major influence on the perceived legitimacy and support for local and international union action.

The Hobbit dispute exemplifies the issues involved in the debate concerning non-standard employment and the potential fragility of employment rights in contracting arrangements. While some groups of workers may benefit from this arrangement, there are indications that others are currently disadvantaged. This area potentially represents a new frontier where fundamental issues such as workers' rights and union involvement are yet to be negotiated. The international conventions agreed by member states may form one element of regulation and protection with the potential to support workers' rights yet as the Hobbit dispute illustrates, this is dependent on the extent to which these are interpreted at local levels.

At the same time, an analysis of workers' rights does not exist in isolation but needs to acknowledge the viability of local economies. Some working arrangements may simply reflect the nature of specific industries which, as in the film industry, can be short-term, project-based events where it is not financially or practically feasible to prescribe continuity of employment. More significantly, the globalised nature of trade means that if one nation did introduce changes to employment arrangements on its own, in a way that increased the cost of its goods or services, this could compromise the nation's ability to compete internationally. The potential trade-off between workers' rights and economic competitiveness will be a challenging issue in predominantly neoliberal environments. In the Hobbit dispute, economic arguments dominated in response to assertions that if New Zealand did not offer concessions to the international corporations the country would lose the productions. The dilemma, however, is that those economic arguments could readily be extended to a host of other industries. Does this justify further legislation which expands contracting arrangements to other industries?

Overall, this range of international and local issues raises many untested questions that have the potential to prompt significant debate. The outcomes are likely to have a pivotal influence on both the rights of workers and the future of union membership and involvement. If the outcomes prove unfavourable then the Hobbit dispute may provide an indication of a rather unhopeful future of worker representation worldwide. Conversely, the Hobbit dispute may prompt renewed attention to addressing fundamental rights and lead to improved conditions for those workers who currently do not fare well in non-standard employment, bringing a new dimension to worker representation which extends workers' rights and voice to contractors.

*Amanda Reilly**

# VOICE AND GENDER INEQUALITY IN NEW ZEALAND UNIVERSITIES

## Abstract

New Zealand universities exhibit a typical gender hierarchy with women predominating in lower status and less well-paid roles. This is despite the fact universities are governed by regulations prohibiting discrimination. Literature on gender inequality in universities suggests that the causes for this are structural and systemic.

Voice mechanisms, such as ensuring there are women on decision making committees, may improve gender equality and thus compliance with the law. However, this article draws on organisational and other literature to argue that the benefits of this are limited; women do not all 'speak with one voice' and the experience of gender may divide women as much as it unites them. There are also risks for individual women who speak out regarding gender inequality which may result in them choosing to remain silent. It is concluded that those seeking to design effective voice mechanisms as well as universities seeking to comply with their legal obligations should be sensitive to the limitations of voice.

## I Introduction

New Zealand prides itself on being the first country in the world to grant women the vote. It has had two female Prime Ministers. Yet despite the successes of a few high-profile women, progress towards equality and pay equity has stalled. Senior levels of most sectors remain dominated by men. New Zealand universities exhibit a typical gender hierarchy with women predominating in lower status and less well-paid roles.[1] This is despite the fact universities are governed by regulations intended to promote equal employment opportunities ('EEO') and prohibit discrimination.

This article considers how voice as a mechanism may or may not be helpful in terms of improving gender equality (and thus compliance with the law) within universities. Its central thesis is that while voice may have a part to play in improving gender inequality in universities, it has some limitations. While discussion is focused on women in New Zealand universities much of the analysis on the limitations of voice is applicable to other minorities in other institutions.

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1 New Zealand Human Rights Commission, *New Zealand Census of Women's Participation* (Report, 2010).

The article is structured as follows: First, the regulatory framework surrounding New Zealand universities is described. Secondly, the reasons why women continue to predominate in lower status roles are considered and it is concluded that structural and subtle forms of gender bias and discrimination are, at least in part, to blame. Thirdly, some problematic aspects of expecting individual women to address discrimination through exercise of voice are discussed. It is argued that women do not all 'speak with one voice' and the experience of gender may divide women as much as it unites them. There are also risks for individual women who speak out regarding gender inequality which may result in them choosing to remain silent. The conclusion summarises the implications of this analysis.

## II The Regulatory Framework of New Zealand's Universities

'Regulation' encompasses more than legal instruments such as primary and delegated legislation. Black suggests that regulation is 'the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes'.[2]

While individual organisations are located within an external legal framework, organisations have their own internal regulatory structures which are shaped in response to the law. The external legal framework New Zealand's universities are located within is comprised of the following elements. New Zealand has ratified the Convention on the Elimination of All Forms of Discrimination against Women. As such, it is committed to taking all appropriate measures to eliminate discrimination against women in the field of employment and recognising that women have the right to the same employment opportunities, equal remuneration and equal treatment in respect of work of equal value, as well as equal treatment in the evaluation of the quality of the work.[3] The *Human Rights Act 1994* (NZ) prohibits direct and indirect discrimination against women in the workplace. The *Equal Pay Act 1972* (NZ) provides for equal pay for women for the same or similar work in both the public and private sectors.[4]

New Zealand's universities have responded to this external legal framework by stating Equity Objectives in their strategic plans, developing EEO Policies, appointing Pro-Vice Chancellors with responsibility for Equity, and establishing Equity Committees at both university-wide and individual faculty level.

Promotions processes generally have an independent Equity Observer as well as a Union Observer. The Tertiary Education Union represents both academic and

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2 Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 20.

3 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) arts 11(1)(b), 11(1)(d).

4 New Zealand Human Rights Commission, *Tracking Equality at Work* (Report, 2011). As discussed by Margaret Wilson in the report, this legislation is not particularly effective as there is no transparency around remuneration rates in New Zealand.

general staff in New Zealand universities and it too has structures in place intended to address gender inequality. Local branch committees have a designated Women's Representative' and at the national level there is a national Women's Committee with a Women's Vice President. Collective agreements typically make reference to the employer's commitment to EEO.

## III Universities Remain as Gendered Hierarchies

Despite laws and policies prohibiting discrimination and promoting EEO, women hold only 22.45 per cent of senior academic positions in New Zealand's eight universities.[5] Women also dominate the so-called 'ivory basement' of lower level tutors and research assistants, often on short-term contracts with limited opportunities for advancement.[6] It is clear that a glass ceiling exists for women academics. At the same time, female-dominated administrative staff represents an example of occupational segregation; a pink collar ghetto of women clustered in lower status and lower paid occupations. Thus it would appear that 'the rhetoric of policies concerning equity issues, academic fairness and equality, through which academic institutions image themselves, is belied too often by their practices'.[7] There is nothing unique about these patterns, which are replicated in other universities as well as other sectors internationally.[8]

There is a well-established body of research advancing a variety of explanations for the general state of women's persistent inequality within organisations. At a fundamental level, according to Acker, organisational structures are not gender neutral. Instead, assumptions about gender are deeply embedded in the structure of organisational logic.[9] As such, gender hierarchies are not necessarily a product of conscious conspiracies against individual women but instead are a consequence of the regular operation of standard operating procedures.[10] For example, ostensibly neutral job evaluations are not neutral in that the skills more often found in men's jobs receive more points than the skills found in women's jobs.[11] Status is awarded to jobs on the basis of their perceived level of complexity and responsibility. 'Lower-level' positions, ie, the level of most jobs filled predominantly by women, are assumed to have 'low levels' of complexity and responsibility. Complexity and responsibility are

5 Human Rights Commission, above n 1, 83.

6 Colin Bryson, 'The Consequences for Women in the Academic Profession of the Widespread Use of Fixed Term Contracts' (2004) 11 *Gender Work and Organization* 187.

7 Janet Mansfield and Shirley Julich, 'Researching Women at Auckland University of Technology' (2006) 25 *Critical Perspectives on Communication, Cultural and Policy Studies* 17, 23.

8 Laura Kessler, 'Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict' (2007) 34 *Pepperdine Law Review* 313, 316.

9 Joan Acker, 'Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations' (1990) 4 *Gender and Society* 139, 146.

10 Patricia Roos, 'Together but Unequal: Combating Gender Inequality in the Academy' (2008) 13 *Journal of Workplace Rights* 185, 187.

11 Acker, above n 9, 150.

defined so as to reinforce these assumptions. Hence 'the child-care worker's responsibility for other human beings or the complexity facing the secretary who serves six different, temperamental bosses can only be minimally counted if the congruence between position level, responsibility and hierarchy is preserved'.[12]

Bird translates this to an academic context:

> the segregation of academic disciplines and institutions, the construction of faculty and administrative roles in ways that are more consistent with men's lives and the maintenance of evaluation processes that disproportionately value the disciplines and activities that men dominate are all examples of how university structure and associated cultures and practices are gendered.[13]

Another explanation for female predominance in lower status roles is historical discrimination which has subsequently been remedied so that more women are now moving through the 'pipeline'. However, a number of studies suggest that the 'pipeline' is leaky and that women are not moving up it in sufficient numbers to support the view that women now face a level playing field.[14] Furthermore, Baker notes in recent years, equity initiatives in universities have been counteracted by increased managerialism and research audit regimes which have intensified unequal outcomes for women.[15]

It is sometimes suggested that women choose low status, low paid positions. However, the fact that women often have to manage greater family responsibilities than their male colleagues undoubtedly feeds into such 'choices'.[16] As noted by Kessler, while we all make decisions for complex reasons and all decisions can fairly be understood as personal it is also arguable that discrimination is a significant contributing factor to women 'choosing' secondary status.[17] Work aspirations of individuals are shaped by the expectations of those around them and by their experiences. Research suggests discrimination contributes to the downsizing of women's dreams, lowered aspirations and reduced human capital investments in work.[18] It is questionable whether the same choices would have been made were discrimination absent.

Discrimination may be of two kinds: there is direct, personal and intentional discrimination and there is also indirect, impersonal and unintentional discrimination. Overt intentional discrimination and sexual harassment still occur in universities but, by and

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12 Ibid 149.

13 Sharon R Bird, 'Unsettling Universities' Incongruous, Gendered Bureaucratic Structures: A Case Study Approach' (2011) 18 *Gender, Work and Organization* 202, 208.

14 Kessler, above n 8, 330.

15 Maureen Baker, 'Gender, Academia and the Managerial University' (2009) 24 *New Zealand Sociology* 24, 26.

16 Maureen Baker, 'Choices or Constraints? Family Responsibilities, Gender and Academic Careers' (2010) 41 *Journal of Comparative Family Studies* 1.

17 Kessler, above n 8, 331.

18 Ibid 322–4.

large, patterns of discrimination, while entrenched, are less obvious. As explained by Sturm, contemporary discrimination is quite subtle and embedded 'in patterns of interaction, informal norms, networking, training, mentoring and evaluation'.[19]

In a university context, the concept of a 'chilly climate' is frequently utilised to explain the 'ubiquitous and insidious problem of subtle and unconscious sexism' which impacts upon 'work distribution, student evaluations, and promotion and hiring decisions'.[20] The literature suggests that this sexism is rooted in gender stereotyping and cognitive bias. For example, studies suggest that academic women find it harder to establish their competence than their male colleagues for a number of reasons.[21] Objective standards tend to be applied rigorously to women and leniently to men. While men may be judged on potential, women are judged strictly on their accomplishments. Due to attribution bias, women's achievements may be attributed to luck, while their male colleagues' achievements are viewed as deserved. In addition to finding it harder to establish competence women may also be penalized for being 'too' competent if they upset submissive female stereotypes. Women may also, due to social isolation, not be aware of informal norms such as the unwritten rules of what behaviours are required to present an appearance of competence.

Discrimination potentially affects all women in universities but it has an especially detrimental impact on women who are mothers. The so-called motherhood penalty or the maternal wall is the strongest form of gender bias in today's workplace.[22] Studies suggest that mothers are less likely to be hired, less likely to be promoted, are paid less and are held to higher performance and punctuality standards than non-mothers.[23] The presence of the maternal wall in academia has been well documented.[24]

New Zealand universities have a moral and a legal responsibility to address discrimination against women. However, the persistence of gender inequality suggests that law and related policies are not functioning particularly well as a tool for addressing this inequality. In support of this proposition, a number of participants in a recent survey at a New Zealand university actively questioned the role of legal rights to non-discrimination, deeming them 'not helpful' in resolving challenges faced in their work lives, stressing the risks of undertaking such actions in terms of creating conflict with colleagues, or stating that they preferred to resolve issues at a personal

19 Susan Sturm, 'Second Generation Employment Discrimination: a Structural Approach' (2001) 101 *Columbia Law Review* 458, 469.

20 Jennifer Freyd and J Q Johnson, *References on Chilly Climate for Women Faculty in Academe* (2010) University of Oregon <http://dynamic.uoregon.edu/~jjf/chillyclimate.html>.

21 See generally Joan Williams, Tamina Alon and Stephanie Bornstein, 'Beyond the 'Chilly Climate': Eliminating Bias Against Women and Fathers in Academe' (2006) *The NEA Higher Education Journal* 79, 79–86.

22 Joan Williams, *Reshaping the Work–Family Debate: Why Men and Class Matter* (Harvard University Press, 2010) 28.

23 See especially Shelly Correll and Stephen Bernard, 'Getting a Job: Is There a Motherhood Penalty?' (2007) 112 *American Journal of Society* 1297. See also Kessler, above n 8, 319.

24 Williams, Alon and Bornstein, above n 21, 83.

level.[25] Similarly a US survey reported that female faculty find legal mechanisms and direct political action of limited utility.[26] Finally, according to Bird, typical diversity training programmes 'with a focus on reviewing laws and policies regarding illegal workplace practices and teaching employees how to avoid sexual and racial harassment' achieve 'little in terms of the necessary systemic transformation of university structures, practices and cultures'.[27]

Universities pose particular challenges in that they are characterised by complex decentred decision-making processes where matters such as promotions and appointments are delegated to various committees. As described by Bird these decentralised decision-making structures permit disjunctures between formally stated expectations and informal practices. These may often coincide with disjunctures between expectations and reward structures at university level and department level.[28] Hence a high-level intention to (for example) prohibit bias or to not penalise staff for working part-time due to family commitments will not necessarily be implemented at a lower level.

To systematically change the culture and remove structural discrimination against women so as to ensure universities are fully in compliance with their legal obligations is a complex undertaking. This article does not purport to provide a comprehensive blueprint for change but instead addresses one piece of the puzzle.

## IV The Role of Voice in Addressing Discrimination

One corrective to the disjuncture between high level directives and intentions and their lower level implementation is surely for concerned parties to speak about gender inequality. This is to exercise 'voice', which is defined as the opportunity to express ideas, to be listened to with respect, and potentially make a difference or proactively make suggestions for change.[29] For example, an individual sensitised to gender bias could, if appointed to an appointments or promotions committee, point out manifestations of bias. It need not necessarily be a woman that fulfils this role, although Bird suggests that the overrepresentation of men in important decision making positions 'increases the likelihood that what men take for granted as normal and appropriate will inform the ways in which they interpret the strategies for success and corresponding accomplishments of faculty'.[30]

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25 Deborah Jones et al, 'Women Staff in Business Schools: An Exploratory Study' (Working Paper No 9-11, Victoria Management School, 4 January 2012) 13.

26 Kristen Monroe et al, 'Gender Equality in Academia: Bad News from the Trenches, and Some Possible Solutions' (2008) 6 *Perspectives on Politics* 215, 223.

27 Bird, above n 13, 211, citing Kalev et al, 'Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Practices' (2006) 71 *American Sociological Review* 589.

28 Ibid, 206; Williams, above n 22, 24.

29 Linn Van Dyne, Soon Ang and Isabel C Botero, 'Conceptualizing Employee Silence and Employee Voice as Multidimensional Constructs' (2003) 40 *Journal of Management Studies* 1359, 1370.

30 Bird, above n 13, 210.

In the next section it is suggested that women do not all speak with one voice on matters concerning gender discrimination and they should not be expected to. This highlights the limitations of having token women serving on committees as a means of addressing structural discrimination.

## V Women Do Not Speak with One Voice

While it is important that women take part in decision-making committees there are some problematic aspects to this. Carol Gilligan has argued that women 'speak with a different voice'[31] which, broadly speaking, would suggest that the mere presence of a woman could bring a caring, relational, unified female perspective to the table. However, as noted by Williams, feminists have fought long and hard to establish biology is not destiny. Accordingly 'the assumption that women will join in automatic sisterhood reflects an unwarranted premise: that women are inevitably bound together by their experience of womanhood. [In fact] the experience of gender divides women as often as it unites them'.[32] In short, women do not all naturally agree on issues of gender and nor do they necessarily see common cause with each other.

It is apparent that not all women in universities perceive discrimination. A recent study exploring the equity issues encountered by women in a New Zealand university found that while some participants saw women as disadvantaged relative to men others were reluctant to frame their experience in gender terms. Some participants strongly rejected the proposition that there were any gender differences in terms of opportunities.[33]

There are a number of possible explanations for this. Recent research on women and gender has identified the phenomenon of 'gender fatigue', that is, women are 'tired of seeing gender discrimination and prefer to see a world that is gender egalitarian, where gender no longer matters'.[34] This is so even in environments, such as universities, where objectively and statistically, it is quite apparent that women are unequal.

It is also possible that some very high achieving women may genuinely not have much personal experience of discrimination. Studies suggest that gender bias is a complex phenomenon in that women are not always and invariably assessed less favourably than their male colleagues. In fact, 'superstar' women tend to achieve better assessments than their male equivalents, while merely very good women feel the full force of gender bias in terms of lower assessments than their male equivalents.[35]

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31 Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

32 Williams, above n 22, 91.

33 Jones et al, above n 25, 12.

34 Elisabeth K Kelan, 'Gender Fatigue: the Ideological Dilemma of Gender Neutrality and Discrimination in Organisations' (2009) 26 *Canadian Journal of Administrative Sciences* 197, 198.

35 Williams, Alon and Bornstein above n 21, 81.

Another relevant factor is that successful academic women often pay a higher price for success than their male counterparts. In an academic context, the ideal worker norm is embodied in a male academic who has little or no responsibility for the day to day care of dependents, who is willing and able to work whatever hours are required, as well as to travel frequently and extensively. Many academic women who have conformed to this ideal have sacrificed having children or have faced daily challenges struggling with the dual demands of work and motherhood. Having sacrificed so much these women 'have a lot invested in the view that being an ideal worker is what the job takes: otherwise, why did they sacrifice having children or having time with them?'[36] They thus may have little sympathy with claims regarding discrimination or any attempts to find a middle ground where both men and women could expect some recognition of a need for work life balance or of family life.

The above analysis suggests that the mere presence of token women on committees will not ensure that consciousness will be raised regarding subtle forms of discrimination. In fact, representative women may not feel that discrimination is present due to not having experienced any personally. There is also a risk of 'queen bee syndrome'. This is a pattern of conflict among women which, as identified by Williams, occurs 'where one woman is taken into the in-group and fails to support or even targets other women'.[37]

The point that is that women do not all speak with one voice; however, this is not to argue that women should have to. Indeed, to place expectations on particular women to represent all women is symptomatic of their disadvantaged minority status.[38] Members of majority groups are treated as individuals; it is only token members of minorities who are expected to represent that minority. If men and women were equal then women would have the same freedom as men to form and express idiosyncratic, individual views and would not be expected to represent, nor be held accountable to, the imagined sisterhood. It is also problematic (as well as ironic) that positive discrimination practices intended to give women more of a voice can mean that women do more work serving on committees than their male colleagues which is hardly equitable.

In the next section some of the factors which may operate to silence women, who perceive discrimination and wish to speak out against it, are outlined.

## VI How the Chilly Climate Silences Women

While some women may feel a sense of gender fatigue or an absence of discrimination others may have gender equality concerns. For these individuals a choice of whether to speak out or remain silent has to be made. Silence is the corollary of voice. In Van Dyne, Ang and Botero's taxonomy, silence is not simply an absence

36 Ibid 91.

37 Ibid.

38 Rosabeth Kanter, *Men and Women of the Corporation* (Basic Books, 1977). Kanter first, and most influentially, developed the concept of tokenism and explored its implications.

of voice but refers to situations where employees intentionally withhold information.[39] The choice of whether to speak up or remain silent will be made within the context of a social hierarchy that has implicit norms about the desirability of speaking up.[40]

Speaking up generally involves risk. Van, Ang and Botero note that 'prosocial' voice, that is, voice that is intentional, constructive and aimed at contributing to positive change involves personal risk and is not necessarily perceived positively by observers. Where those in authority are comfortable with the status quo they may not wish to hear about problems.[41] Consequently the decision to remain silent about problems is a fairly common one.[42] Employees may withhold relevant ideas, information, or opinions if they believe that speaking up is unlikely to make a difference, or if they feel powerless to influence the situation.[43] People who are lower in hierarchies (such as women) instinctively do not send bad news upstream.[44] Employees may also be defensively silent. This is silence based on fear of the consequences of making suggestions for change.[45] Employees may fear that speaking out will damage their image and that they will be negatively labelled and isolated and that their views may not be taken seriously.[46] Someone who is labelled as a 'whiner' or 'troublemaker' will often be perceived as merely whining or trouble making when they raise concerns.

Women who speak out on gender equality issues have good reason to fear that doing so will result in negative consequences.[47] According to Williams, in sexist universities, in order to gain acceptance and avoid marginalisation women are frequently 'forced to play accepted feminine supporting roles: i.e. 'the mother' who is non-threatening and nurturing; the 'princess' who aligns with a stronger man; or the 'pet' who is perky and deferential'. She further suggests that 'in a culture in which men are expected to be assertive and powerful and women are expected to be sociable and reassuring a forceful woman who exercises authority is likely to be viewed in a negative light'.[48]

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39 Van Dyne, Ang and Botero, above n 29.

40 Frances J. Miliken and Elizabeth Wolfe Morrison, 'Shades of Silence: Emerging Themes and Future Directions for Research on Silence in Organisations' (2003) 40 *Journal of Management Studies* 1563.

41 Van Dyne, Ang and Botero, above n 29, 1371, citing Dennis W Organ, *Organisational Citizenship Behaviour: The Good Soldier Syndrome* (Lexington Books, 1988).

42 Frances J Milliken, Elizabeth W Morrison and Patricia F Hewlin, 'An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why' (2003) 40 *Journal of Management Studies* 1453.

43 Van Dyne, Ang and Botero, above n 39, 1361. They refer to this form of silence as acquiescent voice.

44 Milliken, Morrison and Hewlin, above n 42, 1455, citing Leon Festinger, 'A Theory of Social Comparison Processes' (1954) 40 *Human Relations* 117.

45 Van Dyne, Ang and Botero, above n 29, 1367.

46 Milliken, Morrison and Hewlin, above n 42, 1470.

47 Ibid 1456.

48 Williams, Alon and Bornstein, above n 21, 82.

There are identifiable patterns in how debates over the presence or otherwise of discrimination in universities play out.[49] While it is possible for both men and women to speak up regarding gender issues, if a women speaks up on gender equality issues affecting women people are more likely to ascribe self-serving motives to her.[50] According to Prentice, since most men do not consciously act in discriminatory ways they frequently assume that claims concerning the chilly climate are false.[51] It is also common for findings of systemic discrimination to be reinterpreted as direct accusations against specific individuals provoking aggressively defensive responses whereby the equality-seekers who have pointed to systemic discrimination are denied status and authority[52] and sometimes vilified and demonised[53] as 'the feminist police'.[54] Rowan contends that 'the forms of discrimination now negotiated by academic women are a "new problem with no name": a form of violence that it is both emotionally and professionally dangerous to declare'.[55]

The chilly climate can also silence women in other, more subtle ways. One effect of the chilly climate is a sense of isolation and of not feeling 'at home' in the university.[56] Unfortunately, these feelings of isolation are likely to reinforce silence on gender equality issues. Bowen and Blackmon argue that 'individuals will be more likely to speak up in organizations when they believe that others will support their position and they are likely to remain silent when they believe that others will not support their positions'.[57] Piderit and Ashford suggest that building coalitions is one way for individuals to manage risk to image in terms of 'selling an issue' to those above them in an organisational hierarchy'.[58] However, individuals who feel isolated will not have a good sense of whether or not others will support their positions and they may struggle to build coalitions.

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49 Susan Prentice, 'The Conceptual Politics of Chilly Climate Controversies' (2000) 12 *Gender and Education* 195.

50 Sandy Piderit and Susan Ashford, 'Breaking Silence: Tactical Choices Women Managers Make in Speaking Up About Gender Equity Issues' (2003) 40 *Journal of Management Studies* 1477, 1479.

51 Prentice, above n 49, 201.

52 Ibid 205.

53 Ibid 200.

54 Ibid 203.

55 Leonie Rowan, 'You Ought to Think Yourself Lucky My Girl, You're Alive and You've Got a Job: New Manifestations of Discrimination Against Women in Australian Universities' (Paper presented at the Joint New Zealand Association for Research in Education and Australian Association for Research in Education, Rotorua, New Zealand, 29 November 2009) 22, quoted in Mansfield and Julich, above n 7, 23.

56 Jones et al, above n 25, 5.

57 Miliken and Morrison, above n 40, 1565, citing Frances Bowen and Kate Blackmon, 'Spirals of Silence: The Dynamic Effects of Diversity on Organisational Voice' (2003) 40 *Journal of Management Studies* 1393.

58 Piderit and Ashford, above n 50, 1495.

Sadly, silence on gender equality issues is likely to contribute to further negative consequences and disempowerment. Miliken and Morison suggest that the feeling of being unable to speak up about issues and concerns may result in a sense of helplessness and reduced job satisfaction. They also suggest that 'contagion' is a consequence of silence in organizational settings in that 'what begins as silence about one issue can spread to become silence about a range of issues'.[59]

This silencing of employees, in this context of women who choose not to speak up about issues of gender discrimination, is problematic. Silence is easy to misinterpret[60] and it leads to serious distortions in the knowledge on which decisions are made, leading to faulty decisions and the undermining of 'the reporting of unethical and illegal practice and the likelihood of effective organisational learning'.[61]

## VII Conclusion

The analysis above has a number of implications both for universities seeking to be compliant with the law and for those seeking a deeper understanding of how to design effective regulatory mechanisms which utilise voice to address structural and subtle forms of discrimination.

Voice has a role to play in terms of bridging the gap between formal regulation intended to address inequality and the informal norms which may subvert these good intentions. However, merely appointing token women to committees will not necessarily achieve this. As has been argued above women do not all speak with one voice and some may not see discrimination even when this is present for a variety of reasons. There are also, as has been identified above risks to individual women who might wish to voice concerns regarding the presence of discrimination.

Piderit and Ashford argue that 'top managers wishing to encourage open dialogues about gender-equality issues must find ways to immunize their members against image risk in order to get a clear reading of managers and employees levels of concern about gender equality issues'.[62] This may require training middle managers on the subtle forms that discrimination takes as well as on the forces that cause individuals to be silent.

Piderit and Ashford also suggest that coalition building is a way for individuals to immunise themselves against the backlash associated with raising gender related issues in organisations.[63] This analysis suggests that unions may have a role to play as they could potentially provide a way for individuals to minimize personal risk by enabling them to raise gender equality issues collectively. However, it is important

59 Miliken and Morrison, above n 40, 1564.

60 Van Dyne, Ang and Botero, above n 29, 1359.

61 Miliken and Morrison, above n 40, 1563.

62 Piderit and Ashford, above n 50, 1498.

63 Ibid 1477.

that unions themselves ensure that organisers and other officials are suitably trained regarding gender equality issues and the need to protect individuals who raise gender equality concerns.

Finally, given the unfortunate reality of the phenomena of gender fatigue and the hostility towards gender-based claims, equality seekers in universities and elsewhere should give careful thought to when it might be appropriate to formulate claims in gender neutral terms in order to form coalitions around particular issues. For example women who resist discrimination claims may agree on the need for greater flexibility to accommodate family responsibilities. Many men might also be in agreement on this proposition and so it may be that, in this instance, a unified non gender-based claim might ultimately advance the cause of workplace equality more effectively than a gender-based claim could.

*Cameron Roles* and Michael O'Donnell***

# THE *FAIR WORK ACT* AND WORKER VOICE IN THE AUSTRALIAN PUBLIC SERVICE


## Abstract

The Australian Public Service ('APS') has always been something of a testing ground for federal governments' industrial relations policies. Under the Coalition government from 1996 to 2007, workplace relations laws and strict parameters regulated bargaining in the APS and promoted managerial unilateralism, individualism, and union exclusion. By contrast the Labor government's *Fair Work Act 2009* (Cth) favoured collective agreement making, but retained some features of previous workplace laws such as tight regulation of industrial action. The Labor government's bargaining framework provided increased recognition of trade unions and for the role of workplace union representatives in the bargaining process. This article examines the role of worker voice during the 2011–12 APS bargaining round. The government as employer, through the Australian Public Service Commission, sought to limit Average Annualised Wage Increases to three per cent and also proposed a range of cuts to working conditions. The paper demonstrates how worker voice was mobilised in APS agencies following campaigns by public sector unions and workplace representatives for 'no' votes in response to initial agency offers, for 'yes' votes for protected action ballots, and through engagement in creative forms of industrial action.


## I Introduction

The Australian Public Service ('APS') has always been something of a testing ground for the industrial relations policies of the government of the day.[1] Since the 1990s governments of both political persuasions have promoted their various industrial relations agendas, using the APS as an exemplar of their policy approaches. This has typically been done through the government's industrial relations legislation, along with strict policy parameters regulating bargaining.

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1 John O'Brien and Michael O'Donnell, 'From Workplace Bargaining to Workplace Relations: Industrial Relations in the Australian Public Service under the Coalition Government' in Marilyn Pittard and Phillipa Weeks (eds), *Public Sector Employment in the Twenty-First Century* (ANU E Press, 2007) 127.

From March 1996 to late 2007, Australia was ruled by a Coalition (Liberal–National Party) government which was both socially conservative and economically neoliberal and which prioritised managerial unilateralism, individualism and union exclusion in employment relations.[2] During this period worker voice was significantly downplayed, as the government sought to maximise the impact of its legislation and policy prescriptions as they applied to its own workforce.

The successful 'Your Rights at Work' campaign in the lead-up to the 2007 federal election, which was undoubtedly a significant factor in the Australian Labor Party's victory that year, heralded an era of enhanced worker voice. In keeping with past practice, the APS was once again an exemplar of Australian government industrial relations policy. But, on this occasion, the emphasis was on a return to collective agreement making. In the APS context, government policy also mandated an increased role for unions in bargaining, including an increased recognition of the role and responsibilities of unions as bargaining representatives, additional rights for union delegates and improved rights of entry for union officials. Whilst many of the restrictions on the taking of industrial action have remained in place, the increased recognition and legitimation of trade unions in bargaining allowed them to mobilise members and to engage in a range of creative forms of industrial action that enhanced worker voice in bargaining across the APS.

We develop these arguments in four sections. Firstly, we briefly examine worker voice under both Labor and Coalition governments prior to the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'). We then turn to examine how the *Fair Work Act* and government bargaining parameters have promoted worker voice. Thirdly, we turn to the recently concluded 2011–12 APS bargaining round, and examine how worker voice was mobilised, particularly through the organising of 'no' votes in response to initial management offers, 'yes' votes for protected action ballots and creative forms of industrial action. The outcomes of the bargaining round are then discussed, and we conclude that the *Fair Work Act* and government policy have enhanced worker voice in the APS when compared to the earlier period of Coalition government.

## II Worker Voice in the APS Prior to the *Fair Work Act*

In the early 1990s, the federal-level conciliation and arbitration system was gradually displaced by moves towards more decentralised workplace bargaining that took place above a floor established by the award framework, with the Australian Industrial Relations Commission ('AIRC') retaining a diminished, but still significant, regulatory role.[3] The new model was quickly applied in the APS. In December 1992, the Labor government and 27 public service unions[4] signed an agreement on

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2 For an excellent collection dealing with these matters, see Stephen Deery and Richard Mitchell *Employment Relations: Individualisation and Union Exclusion — An International Study* (Federation Press, 1999).

3 Roy Green and Andrew Wilson, 'Unemployment, Labour Market Deregulation and the "Third Way"' (2000) 21 *International Journal of Manpower* 424.

4 Many of these unions amalgamated to form what is now the Community and Public Sector Union.

the introduction of agency-level wage bargaining, to occur on top of an APS-wide pay increase. The Labor government wanted to demonstrate that its version of decentralised bargaining was more equitable than the alternative deregulatory and individualistic model being proposed by the Coalition opposition parties in the lead up to the 1993 federal election. The Labor government was also keen to involve public service unions in a broader reform agenda that involved simplifying employment classification levels and the introduction of new technology, alongside moves to enterprise bargaining.[5] Following the re-election of the Labor government, public service unions sought to take advantage of the new rules for enterprise bargaining[6] and return to a less resource-intensive and APS-wide approach to bargaining in 1995–96.[7] This service-wide agreement remained in place in the APS up to the election of the Howard government in early 1996.

During this time worker voice across the APS was primarily promoted through trade unions and trade union activity. Awards still played a key role in Australian industrial relations, generally acting as a safety net to enterprise bargaining but in some instances setting actual terms and conditions of employment. The enterprise bargaining reforms adopted in 1994 guaranteed union involvement in enterprise bargaining.[8] The AIRC still had broad powers to settle industrial disputes between trade unions and employers. While the frequency of industrial disputation had declined significantly by the mid 1990s, public sector unions continued to rely upon industrial bans, particularly in large departments such as the Australian Taxation Office and Department of Social Security, to challenge managerial prerogatives. The temporary withdrawal of services would cause widespread disruption and bring significant political pressure to bear on the government of the day. Federal public service employees faced few sanctions for participating in these work bans because of the unwillingness of departmental managers to enforce the common law 'no work as directed, no pay' rules.[9] Therefore, under the Labor governments of the 1980s and 1990s worker voice was mainly channelled through unions in negotiations over awards, classifications and the introduction of new technology.

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5 Peter Fairbrother et al, *Unions and Globalisation: Governments, Management, and the State at Work* (Routledge, 2012) 151.

6 For an excellent account of the bargaining laws under the *Industrial Relations Reform Act 1993* (Cth), see Richard Naughton, 'The New Bargaining Regime Under the *Industrial Relations Reform Act*' (1994) 7 *Australian Journal of Labour Law* 147.

7 See Department of Industrial Relations, Commonwealth of Australia, *Continuous Improvement in the Australian Public Service Enterprise Agreement: 1995–96: Agreement Between the Commonwealth Government and the Public Sector Unions* (Canberra, 1995).

8 Agreements made under the *Industrial Relations Reform Act 1993* (Cth) between the Commonwealth and relevant unions were known as certified agreements, and could only be made in settlement of an industrial dispute or situation — for details of these laws see Naughton, above n 6.

9 John O'Brien and Michael O'Donnell 'Government, Management and Unions: The Public Service under the Workplace Relations Act' (1999) 41 *Journal of Industrial Relations* 446.

Worker voice within workplaces came under considerable strain from 1996 following the election of the Howard government. The new government's industrial relations policy objective was to facilitate more direct relationships between employees and employers,[10] minimising the role of unions and of the AIRC.[11]

This objective was achieved through the enactment of what became the *Workplace Relations Act 1996* (Cth) ('*Workplace Relations Act*').[12] Of most significance in the APS context was the introduction of Australian Workplace Agreements ('AWAs'), which were statutory individual agreements which overrode provisions of awards and, in certain circumstances, certified agreements.[13] AWAs were enthusiastically promoted by the Commonwealth in the APS, essentially through the government's policy parameters on agreement-making.[14] These parameters prescribed certain requirements which agencies must meet concerning workplace agreements. Whilst these parameters changed over the years, one constant was that Senior Executive

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10 This can be seen in the policy parameters for agreement making, set by the then government from 1997 to 2007. See Department of Industrial Relations, *Policy Parameters for Agreement Making in the APS*, May 1997, cl 1 ('*1997 Parameters*'); Department of Employment, Workplace Relations and Small Business, *Supporting Guidance for the Policy Parameters for Agreement Making in the APS*, May 1999, 2–7 ('*1999 Parameters*'); Department of Employment, Workplace Relations and Small Business, *Supporting Guidance for the Policy Parameters for Agreement Making in the APS*, April 2000, 3–7 ('*2000 Parameters*'); Department of Employment and Workplace Relations, *Supporting Guidance for the Policy Parameters for Agreement Making in the APS 2001,* 7–15 ('*2001 Parameters*'); Department of Employment and Workplace Relations, *Supporting Guidance for the Policy Parameters for Agreement Making in the Australian Public Service*, July 2002, 8–12 ('*2002 Parameters*'); Department of Employment and Workplace Relations, *Supporting Guidance for the Policy Parameters for Agreement Making in the APS*, April 2006 ('*2006 Parameters*') (copies on file with authors).

11 See especially the objects of the *Workplace Relations Act 1996* (Cth) ss 3(b), (c), (d), (f).

12 The Howard government created the *Workplace Relations Act 1996* (Cth) by enacting legislation which significantly amended and renamed the *Industrial Relations Act 1988* (Cth) — see *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

13 An AWA could prevail over a certified agreement to the extent of any inconsistency, or exclude a certified agreement if the agreement permitted this to occur, or if the certified agreement had passed its nominal expiry date (*Workplace Relations Act* ss 170VQ(6)(a)(iii), 170VQ(6)(c)). For an analysis of AWAs, see Ronald McCallum, 'Australian Workplace Agreements — An Analysis' (1997) 10 *Australian Journal of Labour Law* 50.

14 See Department of Industrial Relations, *1997 Parameters*, above n 10; Department of Employment, Workplace Relations and Small Business, *1999 Parameters*, above n 10; Department of Employment, Workplace Relations and Small Business, *2000 Parameters*, above n 10; Department of Employment and Workplace Relations, *2001 Parameters*, above n 10; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10; Department of Employment and Workplace Relations, *2006 Parameters*, above n 10.

Service ('SES') employees were to be engaged on AWAs.[15] It was government policy that AWAs be made available to all APS employees, even those covered by certified agreements which had not passed their nominal expiry date. However, in practice most APS employees continued to have their terms and conditions set by certified agreements, with AWAs most prevalent amongst some middle managers and technical specialists, mostly at the Executive Level 2 classification, and amongst the SES. Although purportedly 'negotiated' with employees, AWAs were generally template agreements. Case law under the legislation permitted the offering of AWAs as a condition of employment,[16] and this resulted in at least one agency having almost all employees engaged on AWAs.[17] These agreements were made with an almost complete lack of worker voice.

Collective rights and worker voice exercised by employees through trade unions were also diminished under the *Workplace Relations Act*. Changes to awards meant that whilst they continued to act as a safety net, the AIRC was restricted to the inclusion of twenty 'allowable award matters',[18] and its arbitration powers were significantly curtailed.[19]

Union and non-union agreement streams were maintained,[20] although it was now possible to make either a union or a non-union agreement with the Commonwealth.[21]

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15 See Department of Industrial Relations, *1997 Parameters*, above n 10, cl 1; Department of Employment, Workplace Relations and Small Business, *1999 Parameters,* above n 10, 6; Department of Employment, Workplace Relations and Small Business, *2000 Parameters*, above n 10, 7; Department of Employment and Workplace Relations, *2001 Parameters*, above n 10, 12; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10, 12; Department of Employment and Workplace Relations, *2006 Parameters*, above n 10, 19–20.

16 There was no difficulty per se in offering an AWA as a condition of engagement to new employees: see *Maritime Union of Australia v Burnie Port Corporation Pty Ltd* (2000) 101 IR 435. However, it was not lawful to require existing employees, or those transferring as part of a transmission of business, to sign AWAs as a condition of employment: see *Schanka v Employment National (Administration) Pty Ltd* (2000) 97 FCR 186.

17 The most extreme instance of this was in the Department of Finance and Administration: see O'Brien and O'Donnell, 'From Workplace Bargaining to Workplace Relations', above n 1, 134.

18 For a discussion of the changes brought about to awards and collective agreements see Marilyn Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62.

19 For a discussion of the role of the tribunal during this time see Geoffrey Giudice, 'The Evolution of an Institution: The Transition from the Australian Industrial Relations Commission to Fair Work Australia' (2011) 53 *Journal of Industrial Relations* 556.

20 Union agreements could be made under the *Workplace Relations Act* with a constitutional corporation or the Commonwealth even if there was no industrial dispute or situation — these became known as s 170LJ agreements.

21 Under the *Industrial Relations Reform Act 1993* (Cth), non-union agreements could only be made with constitutional corporations (s 4). Under the *Workplace Relations Act* they could now also be made with the Commonwealth — these became known as s 170LK agreements.

This was to have profound consequences for worker voice, as the legislation effectively allowed management to choose the type of agreement to be offered to staff, enhancing managerial unilateralism. Two tactics were available to employees wishing to resist and force a union deal. One was through the taking of industrial action which, as will be discussed shortly, became increasingly difficult under the *Workplace Relations Act*. The second was to have union members stand for election as staff representatives on enterprise bargaining consultative committees, thus indirectly ensuring union involvement in the negotiation of non-union agreements.[22] The latter tactic was partially successful, and over time agreements made with unions became the norm for most APS employees. By 2005 almost 70 per cent of the 103 agreements in operation were negotiated with trade unions, with the remaining 30 per cent involving direct negotiations between management and employees.[23] Despite this spread of union agreements, management in agencies with low union density could effectively exclude unions from negotiations, even if the union had members whose interests it was entitled to represent.[24] A good example is the Department of the Prime Minister and Cabinet, which from 1998 to 2010 negotiated non-union agreements.[25] Only after the introduction of the *Fair Work Act*, and the expiry of its agreement in 2010, did the department negotiate with unions.[26]

Collective voice was further diminished by new freedom of association laws, which gave non-unionists essentially similar rights to those long enjoyed by trade unionists with respect to non-membership, and which prohibited the inclusion in awards and agreements of many traditional union security provisions.[27] From 2001 government policy was also tightened around facilities for payroll deduction of union dues.[28]

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22 John O'Brien and Michael O'Donnell, 'Individualism, Union Organisation and Management Prerogatives in the Australian Public Service 1983–2000' (2002) 12 *Labour and Industry* 103.

23 John O'Brien and Michael O'Donnell 'Retrospect and Prospects for Collective Regulation in the Australian Public Service' (2008) 50 *Journal of Industrial Relations* 630.

24 Under the non-union agreement provisions, union members were entitled to request that the employer 'meet and confer' with the relevant union, but this did not require an employer to negotiate with the union: see *Workplace Relations Act* ss 170LK(4)–(5).

25 See *Department of the Prime Minister and Cabinet Certified Agreement 1998–2000*; *Department of the Prime Minister and Cabinet Certified Agreement 2000–2002*; *Department of the Prime Minister and Cabinet Certified Agreement 2002–2004*; *Department of the Prime Minister and Cabinet Certified Agreement 2004–2007: Working Smarter to Achieve a Better Work–Life Balance*; *Department of the Prime Minister and Cabinet Collective Agreement 2007–2010*. All available agreements can be found at <http://www.fwc.gov.au/index.cfm?pagename=agreementsfind>.

26 See *Department of the Prime Minister and Cabinet Enterprise Agreement 2010–11*; *Department of the Prime Minister and Cabinet Enterprise Agreement 2011–14*.

27 See Colin Fenwick and John Howe, 'Union Security After Work Choices' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 164.

28 Department of Employment and Workplace Relations, *2001 Parameters*, above n 10, 10; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10, 10.

Industrial action became more restricted, including the introduction of prohibitions on the taking of industrial action concerning matters covered by an agreement prior to its nominal expiry date, and on payments to employees during periods of industrial action.[29] APS agency managers were directed to apply a strict interpretation of these 'no work, no pay' provisions.[30] Thus one of the traditional weapons of choice — selective bans without cost to employees — was no longer available to unions. This resulted in a substantial reduction in industrial action in the APS during the period the Howard government held office.

Worker voice was also diluted through new restrictions on unions' 'right of entry' to recruit or to monitor breaches in pay and working conditions. Among other things, union officials needed to hold a right of entry permit, and were required to give 24 hours' notice prior to entering premises.[31] Howard Government policy encouraged APS managers to apply these restrictions to public sector unions' right of entry to agencies.[32] Interviews with industrial officers of the CPSU in 1998, and again in 2003, highlighted that management had adopted a more hostile approach to right of entry by union officials. It was not unusual for agency management to designate a particular meeting room removed from the main workplace for union meetings and to monitor which employees participated in these meetings. Faced with increased difficulties in gaining access, and the reluctance of some union members to attend meetings for fear of retribution, the main trade union, the Community and Public Sector Union ('CPSU') resorted to leafleting potential recruits on their way into work, or at lunchtime. In agencies where they experienced particular difficulties gaining access to members, union officials and activists would generate telephone and email lists of union members and potential new recruits.[33]

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29 See Greg McCarry, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 133.

30 Department of Industrial Relations, *1997 Parameters*, above n 10, cl 1; Department of Employment, Workplace Relations and Small Business, *1999 Parameters*, above n 10, 5; Department of Employment, Workplace Relations and Small Business, *2000 Parameters*, above n 10, 6; Department of Employment and Workplace Relations, *2001 Parameters*, above n 10, 12; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10, 10; Department of Employment and Workplace Relations, *2006 Parameters*, above n 10, 27.

31 For a discussion of these right of entry provisions, see John H C Colvin, Graeme R Watson and Paul Burns, *The Workplace Relations Handbook: A Guide to the Workplace Relations Act 1996 (Cth)* (LexisNexis Butterworths, 2nd ed, 2004) ch 5.

32 Department of Industrial Relations, *1997 Parameters*, above n 10, cl 1; Department of Employment, Workplace Relations and Small Business, *1999 Parameters*, above n 10, 5; Department of Employment, Workplace Relations and Small Business, *2000 Parameters*, above n 10, 6; Department of Employment and Workplace Relations, *2001 Parameters*, above n 10, 13; Department of Employment and Workplace Relations, *2002 Parameters*, above n 10, 11; Department of Employment and Workplace Relations, *2006 Parameters*, above n 10, 23.

33 Michael O'Donnell and John O'Brien, Interviews with CPSU National Office Industrial Officers (Barton, Australian Capital Territory, 1998, 2003).

Matters became worse for worker voice following the 2004 election, which gave the Howard government a majority in both houses of Parliament from 1 July 2005. One major legislative change introduced by the Howard government under these circumstances was a more radical version of the *Workplace Relations Act*. The amendments, known as *Work Choices*,[34] were introduced in November 2005 and the majority came into effect in March 2006. These amendments, in many respects, built on policies already road-tested in the APS through the then government's policy parameters for agreement making. *Work Choices* eroded worker voice by making it easier to enter into AWAs, allowing AWAs to override collective bargaining[35] and by legislatively recognising that AWAs could be offered as a condition of employment or promotion.[36] Aside from this individuation, collective bargaining laws were made more restrictive. Importantly for worker voice, certain content, predominantly clauses typically sought by unions, were prohibited from inclusion in workplace agreements.[37] The right to take industrial action was further constrained,[38] notably through the introduction of compulsory secret ballots prior to the taking of such action,[39] and right of entry laws were tightened still further.[40] Employees' rights to unfair dismissal protection were also severely curtailed.[41]

These legislative changes, and the subsequent fragmentation of bargaining across the APS under the Howard Coalition government, required the CPSU to develop grass roots activism that was not evident in the service-wide rounds of bargaining that occurred prior to 1996. From 1996, the union relied heavily on the active support and assistance of workplace union representatives in bargaining, recruitment and grievance handling. The union also centralised a number of functions, ranging from financial management to the provision of services to members through a call centre.

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34 The *Work Choices* legislation significantly amended and renumbered the *Workplace Relations Act*, but kept the title the same: see *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*').

35 For an analysis of AWAs under *Work Choices* see Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 *Australian Journal of Labour Law* 210.

36 *Workplace Relations Act* s 400(6).

37 See *Workplace Relations Act* s 356 and *Workplace Relations Regulations 2006* (Cth) Ch 2 regs 8.5–8.7. On the future for unions under *Work Choices*, see Anthony Forsyth and Carolyn Sutherland, 'From "Unchartered Seas" to "Stormy Waters": How Will Trade Unions Fare under Work Choices?' (2006) 16 *Economic and Labour Relations Review* 215; Glenn Patmore, 'A Voice for Whom? Employee Representation and Labour Legislation in Australia' (2006) 29 *University of New South Wales Law Journal* 8.

38 Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 2008) ch 18.

39 On the *Work Choices*' secret ballot requirements, see Graeme Orr and Suppiah Murugesan, 'Mandatory Secret Ballots Before Employee Industrial Action' (2007) 20 *Australian Journal of Labour Law* 272.

40 Fenwick and Howe, above n 27.

41 See Anna Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' (2006) 16 *Economic and Labour Relations Review* 237.

This approach raised concerns among sections of the union's membership over the potential cost to local level worker voice and activism.[42]

## III The Emergence of Fair Work

One of the first legislative acts of the new Labor government was to phase out AWAs.[43] In February 2008 the government updated the Australian Government Employment Bargaining Framework ('the Bargaining Framework') which, among other things, prohibited the offering of AWAs or other forms of statutory individual agreement to APS employees.[44] APS employees engaged after February 2008 were generally offered employment in accordance with the applicable agency collective agreement. Most SES employees were engaged under determinations made under s 24(1) of the *Public Service Act 1999* (Cth), or on common law contracts. Although the Bargaining Framework specifically permitted SES staff to negotiate single-agency SES agreements, this option has not been seriously pursued.

The Bargaining Framework also encouraged collective bargaining and provided specific mention of the role and rights of union delegates to consult with members within the workplace and to engage in bargaining with management at the agency level.[45] Agency heads were required to respect the role of workplace union representatives and to facilitate their activities in the workplace.[46]

Following an extensive period of consultation,[47] the Commonwealth Parliament passed the *Fair Work Act*. The *Fair Work Act* established a system of industrial relations that emphasised the primacy of collective agreement-making.[48] But these reforms didn't necessarily herald a new golden age for the traditional voice of workers — trade unions. On the face of it, the *Fair Work Act* gives unions little institutional support in bargaining. The old distinction between union and non-union agreements has been abolished. All agreements, other than greenfields agreements, were now to be made between an employer and employees, a majority of whom must

42 John O'Brien and Michael O'Donnell, 'From Workplace Bargaining to Workplace Relations', above n 1, 147.

43 See *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth). For an analysis of this legislation, see Carolyn Sutherland, 'First Steps Forward (with Fairness): A Preliminary Examination of the Transition Legislation' (2008) 21 *Australian Journal of Labour Law* 137.

44 Department of Employment and Workplace Relations ('DEWR'), 'Revision to the Australian Government Employment Bargaining Framework and Supporting Guidance' (February 2008) 10 <http://www.cpsu.org.au> ('*Supporting Guidance 2008*').

45 Ibid 14–15.

46 Ibid 16.

47 On the making of the *Fair Work Act*, see Joo-Cheong Tham, 'Democratic Deliberation of Labour Law: A Preliminary Inquiry into the Making of the *Fair Work Act'* (2009) 22 *Australian Journal of Labour Law* 232.

48 *Fair Work Act* s 3(f).

vote in favour of the agreement before it is made.[49] Trade unions have no specific role in the agreement-making process, unless they are a 'bargaining representative' for a member whose employment will be covered by a proposed agreement.[50] Trade unions no longer have a monopoly as the voice of employees, who could, for instance, be represented by an agent acting for a group of unionised or non-unionised workers.[51]

While the *Fair Work Act* may be drafted in neutral terms, placing unions in the same position as other bargaining representatives, it would be a mistake to conclude that unions have been marginalised, at least in the APS context. For one thing, it is generally trade unions which will have sufficient resources and experience to access some of the new innovations in the *Fair Work Act*, designed to facilitate and encourage collective bargaining. Furthermore, and like its Coalition predecessors, the Labor governments continued to promulgate bargaining parameters with respect to bargaining in the APS.[52] The combined effect of the *Fair Work Act* and the government's own Bargaining Framework has strengthened the position of APS unions in at least four respects — greater union recognition, a requirement to bargain in good faith, the availability of scope orders if bargaining is not proceeding efficiently or fairly, and the ability of parties to bring bargaining disputes before Fair Work Australia (now known as the Fair Work Commission ('FWC').[53] All of these changes played a role, to a greater or lesser degree, in the 2011–12 bargaining round.

The introduction of the *Fair Work Act* has made it very difficult for agencies to resist union involvement in collective bargaining, and has rendered sterile the old disputes concerning whether to negotiate a union or non-union agreement. The *Fair Work Act* requires that a notice of representational rights be given to employees, generally at the commencement of bargaining.[54] This notice, among other things, explains to employees that they may appoint a bargaining representative of their choice, but that if they are union members, the trade union will be taken to be their default bargaining representative unless the employee, in writing, specifically appoints another bargaining representative.[55] So if the CPSU has one member in an agency covered by a proposed agreement, and that member wishes to be represented by the

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49 Ibid ss 181–2.

50 For the definition of bargaining representative, see *Fair Work Act* s 176.

51 An employer is usually its own bargaining representative, but there is nothing to prevent an employer from appointing an agent to represent its interests.

52 The current parameters are set out in the *Australian Public Service Bargaining Framework* contained in Australian Public Service Commission ('APSC'), Australian Government, *Australian Public Service Bargaining Framework: Supporting Guidance* (January 2011) <http://www.apsc.gov.au> ('*Supporting Guidance 2011*').

53 The *Fair Work Amendment Act 2012* (Cth), among other things, changed the name of Fair Work Australia to the Fair Work Commission from 1 January 2013: see sch 9. For ease of reference the acronym 'FWC' will be used, and should be taken as referring also to Fair Work Australia in respect of matters prior to 1 January 2013.

54 *Fair Work Act* ss 173–4.

55 Ibid s 176(1)(b).

CPSU, the union has a seat at the bargaining table, and the employer must recognise it as the bargaining representative of the employee or risk breaching the good faith bargaining ('GFB') obligations.[56]

The APS Bargaining Framework makes it clear that unions must be included in negotiations where a member wants the union to represent his/her interests:

> If employees are union members and the union is entitled to represent the industrial interests of the employees in relation to their work, then agencies will recognise the unions as the bargaining representatives for those employees.[57]

The combined effect of the *Fair Work Act*'s provisions on default bargaining representatives and the APS Bargaining Framework makes it virtually impossible for agencies to adopt the kind of anti-union tactics concerning collective agreement-making seen during the Howard years. Agencies such as the Department of the Prime Minister and Cabinet and Defence Housing Australia, which strongly resisted union collective bargaining in the past, entered into collective agreements in 2010 and 2012.[58]

Likewise, it is not open to agencies to ignore the wishes of their employees and refuse to collectively bargain with their employees by, for instance, insisting that they all sign common law employment contracts. The *Fair Work Act* empowers the FWC to issue a majority support determination ('MSD'), in circumstances where an employer is refusing to collectively bargain and a majority of employees can demonstrate that they wish to do so.[59] Once an MSD has been issued by the FWC, bargaining representatives for a proposed agreement must bargain in good faith,[60] and bargaining orders can be issued if these requirements are breached.[61]

Whilst MSDs have been used by unions in the private sector to compel reluctant employers to bargain,[62] they have not featured in APS bargaining. This is because the Commonwealth is committed to promoting the *Fair Work Act*, and collective bargaining, amongst its own workforce. The APS Bargaining Framework makes

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56 Ibid s 228(1)(f). See also APSC, *Supporting Guidance 2011*, above n 52, [1.4.2].

57 APSC, *Supporting Guidance 2011*, above n 52, [1.4.3].

58 See *Department of the Prime Minister and Cabinet Enterprise Agreement 2010–11*; *Department of the Prime Minister and Cabinet Enterprise Agreement 2011–14*; *Defence Housing Australia Enterprise Agreement 2012–14*. The CPSU strongly supported these provisions as part of the *Fair Work Act* review process — see Community and Public Sector Union, Submission to the Department of Education, Employment and Workplace Relations, *Review of the Fair Work Act,* 7 February 2012.

59 *Fair Work Act* ss 236–7.

60 Ibid s 228.

61 Ibid ss 230–1.

62 Anthony Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1, 33–47.

it clear that agencies must collectively bargain, at least with respect to non-SES employees:

> It is Australian government policy that terms and conditions for non-SES employees be negotiated separately by each agency in an enterprise agreement made under the *Fair Work Act*.[63]

These legislative provisions, backed up by government policy, have ensured that collective bargaining is the dominant method for setting terms and conditions of employment, and that unions are now almost always key participants in collective bargaining negotiations in APS agencies.

The hand of the CPSU has also been strengthened by the new GFB requirements. Section 228(1) of the *Fair Work Act* imposes the following requirements on a bargaining representative for a proposed agreement:

> (a) attending, and participating in, meetings at reasonable times;
>
> (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
>
> (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
>
> (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
>
> (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
>
> (f) recognising and bargaining with the other bargaining representatives for the agreement.

These requirements are qualified by s 228(2), which makes it clear that an employer is not required to make concessions concerning terms to be included in an agreement, or ultimately to reach agreement. If a bargaining representative is concerned that other bargaining representatives are not bargaining in good faith, or that bargaining is not proceeding efficiently or fairly because there are multiple bargaining representatives, an application can be made for a bargaining order,[64] provided that certain procedural requirements are met. Among other things, a bargaining representative must first give notice of its concerns to the other bargaining representatives, give them a reasonable opportunity to respond, and only if the bargaining representative is not satisfied with the responses can a bargaining order be applied for.[65] The FWC may issue a bargaining order if, among other things, it is satisfied that the parties are bargaining voluntarily or an MSD or scope order is in place, and a bargaining representative is breaching the GFB obligations.[66]

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63 APSC, *Supporting Guidance 2011*, above n 52, [1.2.1].

64 *Fair Work Act* s 229.

65 Ibid s 229(4).

66 Ibid s 230.

In the private sector, there has been considerable litigation in relation to the ambit of the GFB requirements, as well as the lawfulness or otherwise of particular bargaining conduct and tactics.[67] In the APS context, the GFB requirements have rarely been litigated,[68] possibly because the government has made it clear that it expects agencies to bargain with bargaining representatives in good faith.[69] Another reason for the lack of litigation may be that the issuing by a bargaining representative of a notice alleging non-compliance with the GFB obligations,[70] as a precursor to an application for a bargaining order may have the effect of positively influencing bargaining conduct.

Nevertheless, the GFB provisions have shaped bargaining conduct in at least three respects. Firstly, the GFB obligations, particularly ss 228(1)(a)–(d), require parties to actively participate in bargaining 'with a genuine … objective or intention of concluding an "enterprise agreement" — if possible.'[71] Whilst the GFB obligations do not require a party to make concessions, or ultimately reach an agreement, bargaining representatives are now required to actively consider and respond, at least in some way, to the proposals of other bargaining representatives. However, the FWC is not permitted to make orders that would require a bargaining representative to make concessions or reach agreement.[72] This obligation to actively participate in bargaining is reinforced by the APS Bargaining Framework, in which the government explicitly mandates that parties must bargain in good faith.

Secondly, the GFB obligations helped shape employer tactics, and union responses, during the initial stages of the 2011–12 APS bargaining round. For instance, decisions of the FWC have made it clear that it is not necessarily a breach of the GFB obligations to put an agreement to ballot in circumstances where an impasse has been reached in negotiations with the relevant unions.[73] Many agencies in the early stages of the 2011–12 bargaining round put initial agreement offers to staff,

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67 Forsyth, above n 62.

68 An exception is *Australian Municipal, Administrative, Clerical and Services Union v Australian Taxation Office* [2011] FWA 5407 (18 August 2011).

69 APSC, *Supporting Guidance 2011*, above n 52 [1.3.15].

70 *Fair Work Act* s 229(4).

71 *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576, 587–8 [34] ('*Endeavour Coal*').

72 Ibid 596–8 [62]–[75]. For an example of a decision and orders made since *Endeavour Coal*, see also *Australian Manufacturing Workers' Union (AMWU) v Cochlear Ltd* [2012] FWA 5374 (3 August 2012).

73 See, eg, *Construction, Forestry, Mining and Energy Union (Mining and Energy Division) v Tahmoor Coal Pty Ltd* (2010) 195 IR 58. In some instances the FWC has held that putting an agreement to ballot is in contravention of the GFB obligations, but these rulings have tended to involve conduct by a bargaining representative which undermines the integrity of the bargaining process: see, eg, *Health Services Union v Victorian Hospitals' Industrial Association* (2012) 22 IR 1; *Australian Manufacturing Workers' Union (AMWU) v Coates Hire Operations Pty Ltd* [2012] FWA 3357 (19 April 2012).

requiring relevant unions to mobilise a 'no' vote where they believed the agreement was substandard.

Thirdly, the CPSU flagged the possibility of using the GFB provisions in circumstances where the Australian Public Service Commission ('APSC') demanded changes to agreements reached between unions and individual agencies.[74] Whilst no litigation resulted, the GFB obligations were used to apply pressure to the government in its role as employer.

A further important innovation for worker voice under the *Fair Work Act* is the availability of scope orders. A bargaining representative can ask the FWC to issue scope orders to resolve disputes about which group, or groups, of employees will be covered by a proposed agreement. A bargaining representative can apply for a scope order if, in its view, bargaining is not proceeding efficiently or fairly because a proposed agreement doesn't cover appropriate employees.[75] The FWC has a broad discretion as to whether or not to issue a scope order. It must be satisfied that the bargaining representative applying for the order is complying with the GFB requirements, that the group of employees to be covered is fairly chosen, that making the order will promote the fair and efficient conduct of bargaining, and that it is reasonable to make the order.[76]

In the APS scope orders will almost always be sought by trade unions, for, as discussed above, it is government policy that agencies negotiate one enterprise agreement to cover their non-SES employees.[77] The use of scope orders by trade unions in the 2011–12 bargaining round was rare. However, one notable example occurred in the newly created Department of Human Services ('DHS'), a super-department combining the former Child Support Agency, Centrelink, Medicare Australia and the Commonwealth Rehabilitation Service. Bargaining in DHS was challenging in part because DHS, in accordance with Australian government policy, wanted to create one umbrella agreement which covered all employees, replacing several pre-existing agreements. One agreement was negotiated, but 10 days before the agreement was to be voted on by employees, the Australian Salaried Medical Officers Federation ('ASMOF'), on behalf of 29 doctors employed by the department, sought to have doctors removed from the scope of the proposed agreement on the basis that they had not been fairly chosen. The doctors were unhappy that entitlements previously available to them, such as salary advancement by way of salary bands, a private motor vehicle or vehicle allowance, mobile phone, airline lounge membership and accommodation at SES standards, were being removed without any compensation. The ASMOF argued that, in forcing the doctors into one agreement, the employees

74 CPSU, *APSC Interference Puts Your SWA Pay Outcome at Risk* (25 November 2011) <http://www.cpsu.org.au/agency/news/26748.html>; CPSU, *SMOS Rejects Exceptional Circumstances and Puts FaHCSIA Bargaining at the Crossroads* (17 January 2012) <http://cpsu.org.au/campaigns/news/27063.html>.

75 *Fair Work Act* s 238(1).

76 Ibid s 238(4).

77 APSC, *Supporting Guidance 2011*, above n 52, [1.2].

had not been fairly chosen because doctors were an organisationally and operationally distinct group of employees, by reason of their qualifications and registration as medical practitioners. Drake SDP upheld these arguments, and excluded the doctors from the DHS agreement.[78]

Given the Australian government's preference for one agreement per agency for non-SES employees, scope orders have strengthened the hand of unions representing vocal minorities in APS workplaces. In the DHS case, the worker voice of the doctors was given expression through a scope order in circumstances where, had scope orders not been available, it almost certainly would have been drowned out through the 'tyranny of the majority over the minority'.[79]

Finally, the FWC may assist a bargaining representative to resolve disputes concerning bargaining by conciliation, or if all bargaining representatives agree, by arbitration.[80] This enables a bargaining representative to seek the assistance of the FWC to resolve disputes during the negotiation of an enterprise agreement. A notable use of this provision occurred early in the 2011–12 bargaining round, when the CPSU sought the FWC's assistance to conciliate disputes concerning proposed agreements with 'up to a dozen' key Commonwealth agencies.[81] One of the CPSU's principal complaints was the role played by the APSC, as the agency responsible for administering the APS Bargaining Framework, in limiting the matters which could be negotiated in proposed agreements. Conciliation was unsuccessful, and as an industrial tactic the use of s 240 didn't achieve the desired result in negotiations with most of the big agencies. But the s 240 process at least enabled workers to bring their concerns over bargaining to an independent tribunal. Shortly after the FWC conciliation, a few agencies such as the Department of Finance and Deregulation and the Department of the Prime Minister and Cabinet concluded agreements.[82] This indicates that the FWC's role may have assisted to progress negotiations in at least some agencies.

The combined effect of the new Australian Government Employment Bargaining Framework and the introduction of the *Fair Work Act* signalled a new and more accommodating approach to both collective bargaining and public sector trade unions. But the *Fair Work Act* still contained some aspects of the Howard government's *Work Choices* laws. For example, the *Work Choices* restrictions on industrial

78 *Australian Salaried Medical Officers Federation v Commonwealth* [2011] FWA 5920 (20 October 2011).

79 *Re ANZ Stadium Casual Employees Agreement 2009* [2010] FWAA 3758 [8].

80 *Fair Work Act* s 240.

81 'FWA Calls in Public Service Commission, as Union Seeks Fix for Impasse', *Workplace Express* (online), 30 May 2011 <http://www.workplaceexpress.com.au> (subscription required).

82 The *Department of the Prime Minister and Cabinet Enterprise Agreement 2011–14* was signed on 23 June 2011, approximately 3 weeks after the FWC conciliation. The *Department of Finance and Deregulation Enterprise Agreement 2011–14* was signed on 8 July 2011, approximately 6 weeks after the FWC conciliation.

action remained in the *Fair Work Act* in substantially similar form.[83] Likewise the *Work Choices* restrictions on union right of entry also remained largely unchanged.[84] The APS Bargaining Framework, however, specifically required agencies to 'apply the right of entry and freedom of association provisions … in a fair and reasonable manner'.[85] The APS Bargaining Framework specifically acknowledged the right of unions to act on behalf of their members and workers more generally, as well as to collectively bargain,[86] and agencies were required to facilitate employee access to unions and other bargaining representatives in the workplace.[87] So whilst aspects of the legislation may have remained in substantially similar form, the APS Bargaining Framework required agencies to take a more accommodating approach towards unions.

## IV The 2011–12 APS Bargaining Round

The 2011–12 bargaining round was the first major round of enterprise bargaining in the APS following the introduction of the *Fair Work Act.* In the lead up to bargaining, the government ensured that all pre-existing agreements had a common expiry date of 30 June 2011.[88] This was originally intended to give the government the opportunity to negotiate one APS-wide agreement to replace the agency–by–agency approach to bargaining evident under the previous Howard government. But with increasing pressures to return the budget to surplus following several years of budget deficits in the aftermath of the Global Financial Crisis, the government abandoned this APS-wide approach in favour of continuing agency-by-agency bargaining, with some common terms and conditions incorporated through the APS Bargaining Framework.

In order to achieve its policy aims of returning the budget to surplus by 2012–13,[89] the government needed to constrain expenditure. As a result the government mandated that all salary increases must be productivity-based, and should be no more than

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83 Shae McCrystal, 'A New Consensus: the Coalition, the ALP and the Regulation of Industrial Action' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 141; Shae McCrystal, 'The *Fair Work Act 2009* (Cth) and the Right to Strike' (2010) 23 *Australian Journal of Labour Law* 3.

84 Fenwick and Howe, above n 27.

85 APSC, *Supporting Guidance 2011*, above n 52, [1.6.1].

86 Ibid [1.6.2].

87 Ibid [1.6.3].

88 APSC, Australian Government, *WR2009/3: Revisions to the Australian Government Employment Bargaining Framework and Supporting Guidance* (2009) <http://apsc-web01.squiz.net/APSC/publications-and-media/current-circulars-and-advices/2009/wr-20093>.

89 The Labor government has since abandoned this goal, and now aims to return the budget to surplus by 2016–17: see Lisa Lynch, *MiniBudget: Govt Announces Budget Surplus in 2016–17; Tax and Super Related Changes*, Thomson Reuters (2 August 2013) <http://sites.thomsonreuters.com.au/tainsight/2013/08/02/govt-economic-statement-budget-surplus-in-2016-17-tax-and-super-related-changes>.

an Average Annualised Wage Increase ('AAWI') of 3 per cent from the nominal expiry date of the current agreement to the nominal expiry date of the proposed agreement.[90] This meant that the government was proposing cuts in real wages for its own employees.

A combination of increased union mobilisation and workplace organisation and a government determined to resist wage demands exceeding 3 per cent, provided the preconditions for a more contested bargaining round in 2011–12 compared to earlier rounds. The enhanced collective bargaining rights under the *Fair Work Act*, a common expiry date of 30 June 2011 and the APS Bargaining Framework's recognition of trade union rights enhanced worker voice. On the other hand, the government's bargaining parameters imposed restrictions on what could be negotiated between individual agencies and their employees. Of particular interest here is the role of the APSC as administrator of the APS Bargaining Framework, and the extent that its involvement diminished worker voice, and ways in which the public sector trade unions sought to respond. We now turn to consider these issues in the context of the 2011–12 bargaining round.

### A *Role of the Australian Public Service Commission*

Immediately prior to the 2011–12 bargaining round, the APSC became responsible for providing advice to agencies throughout the bargaining process on whether their actions and agreements were consistent with the APS Bargaining Framework. This involvement acted to constrain worker voice during the bargaining process. Prior to the commencement of bargaining, an agency was required to prepare a bargaining position which set out its aims for bargaining, and to obtain the agency Minister's approval.[91] The APSC assessed an agency's bargaining position for consistency with the APS Bargaining Framework and recommended terms and conditions. If an agency's bargaining position was consistent, the APSC would sign off on the bargaining position for the Special Minister of State for the Public Service and Integrity ('Special Minister of State').[92] If an agency's proposed bargaining position was inconsistent, the agency was required to seek the approval of the Special Minister of State and set out how it would move toward compliance, or why it couldn't do so.[93] If issues arose during the course of negotiations which could 'substantially alter the outcome of the bargaining process', agencies were required to inform the APSC.[94] In addition, if agencies wished to alter their bargaining position during the course of negotiations, approval needed to be sought from the Special Minister of State.[95]

Prior to a proposed agreement being put to the vote, an agency was required to submit the proposed agreement to the APSC, which assessed it against the APS Bargaining

90 APSC, *Supporting Guidance 2011*, above n 52, [2.1.4].

91 Ibid [1.9.2], [1.11.5].

92 Ibid [1.11.2].

93 Ibid [1.11.3]–[1.11.4].

94 Ibid [1.11.11].

95 Ibid.

Framework.[96] If the proposed enterprise agreement was consistent with both the bargaining position approved by the APSC and the APS Bargaining Framework, the APSC could sign off on behalf of the Special Minister of State.[97] If the proposed enterprise agreement was inconsistent, the APSC was required to advise the agency and to seek the approval of the Special Minister of State.[98]

The APSC was also responsible for ensuring that the government's remuneration policies were implemented. Foremost among these was that remuneration increases must be offset by 'genuine, quantifiable productivity improvements.'[99] Enterprise agreements were not generally permitted to deliver wage outcomes that exceeded 3 per cent per annum; all pay increases must come from existing budgets, and must not involve a redirection of program funding.[100] Agencies were also required to advise the APSC and the relevant agency Minister 'at the earliest possible time' if industrial action was being 'engaged in, threatened, impending, or probable.'[101]

The APSC, in administering the APS Bargaining Framework, diluted worker voice in at least two respects. The APSC ensured that certain matters, such as remuneration increases beyond the government's guidelines, were off limits for negotiation. Secondly, the APSC could intervene at every stage of the bargaining process, to the considerable frustration of many agencies and the CPSU. For example, it was not uncommon during the 2011–12 bargaining round for the CPSU and the relevant agency to reach in-principle agreement, only to have the APSC demand changes before it would sign off on the agreement on behalf of the Special Minister of State. For instance, in November 2011 Safe Work Australia and the CPSU reached an agreement, only to have the APSC refuse to sign off on the deal. While most of the APSC's suggestions were incorporated into the final document, the APSC wanted to exclude executive level employees from the '8 hour break between work days' and to reduce remuneration for some classifications.[102] The CPSU alleged that the actions of the APSC constituted a breach of the GFB requirements[103] and on 6 December a conciliation conference before the FWC was convened. As a result of this conciliation conference, the Special Minister of State approved the agreement.[104]

Another example of the role played by the APSC, this time as adviser to the Special Minister of State, involved the negotiating process for the Department of Families, Housing, Community Services and Indigenous Affairs ('FaHCSIA') agreement. In December 2011 FaHCSIA put a draft agreement and pay offer to its workforce.

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96 Ibid [1.11.6].

97 Ibid [1.11.7].

98 Ibid [1.11.8].

99 Ibid [2.1].

100 Ibid [3.1].

101 Ibid [1.10.3].

102 CPSU, *APSC Interference Puts Your SWA Pay Outcome at Risk*, above n 74.

103 Ibid.

104 CPSU, *Special Minister of State Has Approved Your SWA Agreement* (12 December 2011) <http://www.cpsu.org.au/agency/news/26751.html>.

The CPSU indicated that the offer was unacceptable, with the key sticking points being an 8 per cent pay rise over the life of the agreement (until 30 June 2014), no back pay and a 3 to 5 day reduction in personal leave.[105] Negotiations continued and FaHCSIA and the CPSU ultimately released a joint submission to the Special Minister of State, arguing that 'exceptional circumstances' had caused a delay in bargaining and sought permission to include back pay in the proposed agreement. That request was rejected by the APSC in January 2012.[106] The CPSU alleged that interference by the APSC and the Special Minister of State constituted a breach of the GFB obligations. Agreement was ultimately reached that provided a slightly larger pay increase (9.2 per cent over the life of the proposed agreement), and the retention of 20 days personal leave.[107] The CPSU did not gain back pay for employees, though a 'productivity payment' of $1625 was made to each employee over the life of the agreement.[108] Despite the desire of the parties to include back pay in the agreement, these wishes were overridden by the APSC and the Special Minister of State. In so doing, the APSC and the Special Minister of State diluted the voices of both workers and the individual agencies involved.

### B *Union Responses — Promoting Worker Voice*

The public sector unions responded to these efforts to dilute worker voice by using the *Fair Work Act* to mobilise the membership. This occurred primarily through the organisation of 'no' votes in response to substandard offers by management, and the organisation of 'yes' votes in favour of protected industrial action.

#### 1 *No Votes*

As discussed earlier, all single-enterprise agreements are made when a majority of employees who cast a valid vote vote in favour of the agreement.[109] If management can't attract a majority of votes, the agreement cannot be made.

Early in the 2011–12 bargaining round, it was common for management to test the resolve of employees by putting initial agreement offers to ballot. This then gave the public sector unions an opportunity to organise against the proposed agreement. In all of the big agencies, the union was successful in organising 'no' votes. For instance in the Department of Defence ('Defence') management put forward an agreement, without the consent of relevant unions,[110] containing a 3 per cent per

105 CPSU, *SMOS Rejects Exceptional Circumstances*, above n 74.

106 Ibid.

107 CPSU, *CPSU Members Vote in FaHCSIA* (22 March 2012) <http://www.cpsu.org.au/campaigns/news/27954.html>.

108 Ibid.

109 *Fair Work Act* ss 181–2. Note that the agreement, once made, must still be approved by the FWC: *Fair Work Act* pt 2-4 div 4 sub-div B.

110 According to the CPSU, this was the first time in 12 years that an agreement had been put to the vote without the consent of unions: see CPSU, *Ten Reasons to Vote No … and Negotiate a Better DECA* (9 June 2011) <http://www.cpsu.org.au/campaigns/news/23460.html>.

annum pay offer, along with cuts to other conditions.[111] The CPSU and other unions campaigned for a 'no' vote, mobilising the membership to reject the agreement. Some 72.5 per cent of employees voted 'no', forcing management back to the bargaining table.[112] Negotiations were then deadlocked, and just before Christmas Defence put another offer to employees. The public sector unions campaigned against this offer also, and 61 per cent of employees voted it down.[113] In both instances the 'no' votes forced management to return to the bargaining table. A similar pattern was repeated in key agencies across the APS.[114] This management tactic of putting substandard offers to ballot clearly backfired, as the union was able to use such offers to mobilise its membership and to campaign effectively for improvements to both remuneration and working conditions.

2 *Industrial Action*

Since 1993 trade unions in Australia have been able to take lawful industrial action, known as protected industrial action.[115] From that time the technical restrictions on this capacity for lawful industrial action have increased, and following the introduction of the *Work Choices* regime in 2005 Australia had some of the most restrictive strike laws in the common law world.[116] The *Fair Work Act* has largely retained these laws.

There are a myriad of technical requirements that must be met before employees and their bargaining representative, usually a union, can take industrial action without fear of legal liability.[117] In broad terms, protected industrial action taken by employees, known as employee claim action under the *Fair Work Act*,[118] can only

111 CPSU, *Defence Tables its DECA Offer — And It's Not Pretty* (5 April 2011) <http://www.cpsu.org.au/campaigns/news/22456.html>.

112 CPSU, *Defence to Rush to a Vote Just Before Christmas* (6 December 2011) <http://www.cpsu.org.au/campaigns/news/26658.html>.

113 CPSU, *When Will They Listen? Defence Employees Vote NO Again* (20 December 2011) <http://www.cpsu.org.au/campaigns/news/26801.html>.

114 For instance, in the Department of Human Services, an agency employing 25 per cent of the APS workforce: see CPSU, *Staff Overwhelmingly Reject Human Services Offer* (12 September 2011) <http://www.cpsu.org.au/campaigns/news/25363.html>; and in DIAC, see Department of Immigration and Citizenship, Australian Government, *Annual Report 2010–11* (2011), 289–90 <http://www.immi.gov.au/about/reports/annual/2010-11/>.

115 For a comprehensive discussion of the law relating to industrial action, see Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010). See also Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) chs 22–3.

116 Shae McCrystal, 'Smothering the Right to Strike: Work Choices and Industrial Action' (2006) 19 *Australian Journal of Labour Law* 198.

117 This immunity does not extend to personal injury, property loss or damage, or defamation: *Fair Work Act* s 415. For an overview of the statutory controls on protected industrial action, see Creighton and Stewart, above n 115, ch 23.

118 We focus on employee claim action in this paper, as lock-outs are almost unheard of in the APS context.

be taken in support of permitted claims for a proposed single-enterprise agreement, and only if any previous agreement has passed its nominal expiry date.[119] Before protected action can be taken, the kinds of action must be authorised by a secret ballot of eligible employees.[120] The ballot requirements are technical, but in essence an employee bargaining representative must apply to the FWC for the protected action ballot.[121] The FWC must grant the ballot if, among other things, it is satisfied that the bargaining representative is genuinely trying to reach agreement with the employer.[122] For a ballot to be successful, it must be voted up by 50 per cent of eligible employees who cast a valid vote.[123] If a ballot supports the taking of industrial action, the action must generally be taken within 30 days of the result of the ballot.[124] Once these prescriptive requirements are satisfied, a bargaining representative must generally provide three days' written notice[125] of an intention to take protected industrial action,[126] and only after this notice has expired and other technical requirements are satisfied can the action be taken. These restrictions have made it more difficult for unions to take industrial action. These difficulties are compounded by the fact that under the *Fair Work Act* (and *Work Choices* and the *Workplace Relations Act* before it) employees are not generally permitted to be paid, or to accept payment, for periods during which industrial action is being taken.[127]

Clearly these limits on the capacity to withdraw labour have had a detrimental impact on worker voice. However, what is interesting about the 2011–12 bargaining round is how the public sector unions managed to use these restrictive strike laws in creative ways.

An interesting example of this is the way in which the unions used the secret ballot provisions to mobilise the membership and apply pressure to management. For instance, in the Department of Immigration and Citizenship ('DIAC'), eligible union members were balloted, and some 66.6 per cent or 1416 eligible employees voted, with 1400 valid votes cast. Of these, 1294 voted in favour of 'indefinite or periodic or partial bans or limitations upon the performance of work' covering a myriad of

119 *Fair Work Act* ss 409(1), 417.

120 Ibid s 409(2).

121 Ibid s 437. A ballot can only be applied for if any existing agreement has passed its nominal expiry date, or is within 30 days of doing so (s 438).

122 Ibid s 443.

123 Protected action ballots in the APS are conducted by the Australian Electoral Commission.

124 *Fair Work Act* s 459.

125 A ballot order under s 443 can specify a longer period of notice. This occurred, for instance, in Customs, where the FWC formally ordered the CPSU to give seven working days' notice of any industrial action: see *CPSU, the Community and Public Sector Union v Australian Customs & Border Protection Service* [2011] FWA 5053 (2 August 2011).

126 *Fair Work Act* s 414. The notice must specify the day on which the action will commence, and the nature of the industrial action.

127 Ibid pt 3-3 div 9.

tasks.[128] Similar numbers of employees voted for one and two hour work stoppages, though the numbers did reduce slightly to 1215 for a work stoppage of 24 hours' duration. These numbers in support of industrial action are typical of votes in many agencies across the APS.

Two points can be made. Firstly, the strong numbers provided the unions with significant moral force at the bargaining table. Secondly, support for industrial action softened slightly when employees were asked to stop work for 24 hours or more. This softening in support was highlighted more dramatically in Defence, where the numbers of workers in favour of stoppages of 8 hours or more fell quite sharply as compared to those willing to engage in shorter periods of industrial action. In Defence, 1465 employees voted in favour of indefinite or periodic bans on overtime and 1379 in favour of 1 hour bans.[129] However, these numbers fell to 1232 employees who were in favour of 8 hour stoppages, with 420 employees opposed. We surmise that these trends perhaps reflect the 'no work, no pay' rules, discussed below, and the high levels of personal debt in Australia.

Union tactics concerning industrial action recognised this trend. For instance union members in Defence engaged in a one-minute work stoppage.[130] This meant that Defence was required by law to deduct one minute's pay from the salary of each employee who participated in the industrial action.[131] Defence couldn't ignore this legal requirement, as it faced a maximum penalty of $33 000 if it failed to comply.[132] Individual Defence employees couldn't accept payment as this contravened s 473 of the *Fair Work Act* and left particular employees exposed to civil penalty proceedings.[133] Nor was it open to individual payroll staff to ignore the requirement. The APS Code of Conduct requires APS employees acting in the course of APS employment to 'comply with all applicable Australian laws'.[134] Breach of the Code of Conduct by an employee could result in a sanction ranging from a reprimand

128 Australian Electoral Commission, *Protected Action Ballot: Declaration of Results, CPSU and Commonwealth Government, (Represented and Acting through the Department Of Immigration And Citizenship)*, B2011/3219, 5 September 2011 <http://www.fwc.gov.au/documents/industrialballotsresults/cpsu/cpsu_20113220.pdf>.

129 Australian Electoral Commission, *Protected Action Ballot: Declaration of Results, CPSU and Commonwealth of Australia (Department of Defence)*, B2011/3112, 8 August 2011 <http://www.fwc.gov.au/documents/industrialballotsresults/cpsu/cpsu_20113112.pdf>.

130 Damien O'Donovan (Speech delivered at the Australian Government Solicitor Employment Law Forum, Canberra, 30 November 2011).

131 *Fair Work Act* s 470(1).

132 Ibid ss 539, 546. Note that, from 28 December 2012, the maximum penalty for a contravention of a civil remedy provision has increased from $33 000 to $51 000.

133 Ibid.

134 *Public Service Act 1999* (Cth) s 13(4). This provision was amended by the *Public Service Amendment Act 2013* (Cth), sch 1 item 37, to require APS employees, when acting 'in connection with APS employment', to 'comply with all applicable Australian laws'. This change does not affect the arguments advanced in this article.

to termination of employment.[135] Given these legal requirements, Defence had no alternative but to calculate the time lost for each employee — an administrative nightmare. Industrial action such as that taken in Defence was highly effective — it promoted worker voice, whilst minimising the financial impact on members.

### C *Outcomes*

It was industrially untenable for the CPSU and other public service unions to stand by and accept initial offers which would force their members to take a pay cut. In response to the Labor government's austerity cuts, the CPSU's claim for improved pay and conditions was cleverly targeted initially at politically sensitive agencies. During the bargaining round immigration and refugees were key public policy issues for the government. By targeting their industrial campaign at the DIAC and other border security agencies such as Customs and the Department of Agriculture, Fisheries and Forestry, the CPSU hoped to flow concessions won in these agencies on to other departments.

In September 2011 a breakthrough was achieved in DIAC. The CPSU had negotiated an outcome which didn't result in employees accepting a pay cut in real terms. The DIAC agreement offered three pay rises of 2 per cent per annum and an overall pay increase of approximately 11 per cent. It did this by increasing the top pay increment for each classification by between 4–5 per cent, and by abolishing the bottom increment for each classification.[136] This reworking of job classifications marked the beginning of an innovative approach to overcome the pay restrictions imposed by the APS Bargaining Framework and was widely utilised by other agencies and their employees to finalise acceptable negotiated outcomes.[137]

From the perspective of the CPSU, the outcomes from the bargaining campaign were largely positive when compared to previous rounds under a Coalition government.[138] Union recruitment activities over 2011 resulted in over 8200 new members, a net gain of over 500 members. The union also recruited almost 1000 new workplace delegates and provided training to some 650 workplace activists.[139] There was some progress, albeit limited, on reducing wage dispersion across the APS, with wages in a number of agencies in the bottom 5 per cent enhanced and brought closer to the APS average. The union also increased the activism of its workplace delegates in the bargaining process and enhanced communications with members through workplace meetings, telephone and internet communications, and emails. The union

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135 Ibid s 15(1).

136 CPSU, *Proposed DIAC Pay Offer — Examples and Analysis* (8 September 2011) <http://www.cpsu.org.au/agency/news/25205.html>.

137 'CPSU to Back Customs Deal that might be APS Peace Blueprint', *Workplace Express* (online), 27 October 2011 <http://www.workplaceexpress.com.au> (subscription required).

138 Michael O'Donnell, Interview with CPSU Officials (Barton, Australian Capital Territory, 2011); Michael O'Donnell and Cameron Roles, Interview with CPSU Officials (Barton, Australian Capital Territory, 2012).

139 CPSU, *Annual Financial Report Year Ending 30 June 2010* (3 February 2011, Sydney).

aimed to build on this level of member activism by providing increased resources and training to workplace delegates following the bargaining round.[140]

The ability of public sector unions to minimise cuts to conditions and pay is significant in the context of a concerted attack on collective bargaining rights in North America and substantial cuts to jobs in the United Kingdom. In the United States, public sector collective bargaining came under attack from 2010 onwards as conservative Republican governors introduced legislation to roll back, or even eliminate, collective bargaining, blaming collective bargaining rights for the substantial state budget deficits arising from the recession of 2008 and 2009. At the vanguard of the attack on public sector collective bargaining was the Republican governor in Wisconsin, Scott Walker, whose Wisconsin Budget Repair Bill was ultimately passed following widespread protests by public service employees and public and legislative delaying tactics.[141] In addition, public service unions at the state level across the United States made a range of concessions in the form of wage freezes, and employees were expected to make substantial additional contributions to health insurance and pension plans, in states that included New York, New Jersey, Massachusetts and Ohio as thousands of public service job cuts were being made to resolve state budget deficits.[142] In the United Kingdom, the need to reduce the government's budget deficit by over AUD130 billion was relied upon by the Cameron Coalition government to justify wage freezes and job cuts of between 600 000 and 700 000 public service employees between 2010 and 2016.[143]

The CPSU faces ongoing challenges with an increase in the efficiency dividend leading to more job cuts under Labor,[144] and the threat of a further 12 000 job cuts if a Coalition government is elected in 2013.[145] But compared to developments internationally, workers and public sector unions have maintained their voice and minimised concessions to pay and conditions.

## V Conclusion

The article explores worker voice in the APS under the *Fair Work Act* and under the first major round of APS bargaining under this Act in 2011–12. The primary conclusion is that worker voice under the *Fair Work Act* and associated government

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140 CPSU, *Thanks for a Great 2011 — Looking Forward to 2012* <http://www.cpsu.org.au/blog/26793.html>.

141 Richard Freeman and Eunice Han, 'The War Against Public Sector Collective Bargaining in the US' (2012) 54 *Journal of Industrial Relations* 386, 391.

142 Ibid 398.

143 'Spending Cuts and VAT Rise to Cost 1.6 m Jobs, says CIPD', *BBC News* (online), 2 November 2010 <http://www.bbc.co.uk/news/business-11671009>.

144 From 2014–15 the efficiency dividend imposed on Commonwealth agencies will increase from 1.25 per cent to 2.25 per cent, for three years: see CPSU *Union Slams ALP Plan to Cut 5000 Public Sector Jobs* (2 August 2013) <http://www.cpsu.org.au/news/31747.html>.

145 CPSU, *New Polling Shows Australians Don't Support Abbott's Public Service Cuts* (28 August 2012) <http://www.cpsu.org.au/printversion/29476.html>.

policy has been enhanced when compared to the previous *Workplace Relations Act* and *Work Choices* regime. The *Fair Work Act* and the APS Bargaining Framework protect union recognition and encourage collective bargaining in the APS. However, elements of *Work Choices*, such as tight controls over industrial action, remain and act as a potential constraint on worker voice.

This increased recognition of trade unions and of collective agreement making, together with a tough budgetary environment, created the conditions for worker voice to be mobilised more strongly in the APS than had been the case for many years. APS employees and their unions crafted strategies that enabled them to operate within the laws, whilst putting maximum pressure on management. Workers voted overwhelmingly to reject initial agreement offers from agencies; they also voted in secret ballots to engage in work bans and industrial stoppages, though there was some reluctance to engage in stoppages exceeding 24 or 48 hours. In response, public service unions focused on industrial actions of relatively short duration, such as one minute and one to two hour disputes, that maximised the potential for industrial disruption but that minimised the financial impost on public service workers.

The outcome of these campaigns was that public service unions managed to contain cuts to pay and conditions when compared with developments internationally. Unions adopted a range of innovative industrial strategies, such as negotiating agreements in politically sensitive agencies and then flowing elements of these agreements to other agencies. Creative agreements were also struck in response to the government's policy of wage restraint which changed job and classification structures, preserving real wages for most APS employees. Proposed cuts to conditions of employment were also largely resisted.

Worker voice was also enhanced more generally within APS workplaces. An increased number of workers joined public service unions, were elected to union delegate positions and received training in undertaking their representative roles. In addition, public service unions enhanced their communications and engagement with their membership and workplace delegates.

Worker voice under Labor has faced challenges, however, under the government's austerity cuts and imposition of increased efficiency dividends on APS agencies. This has resulted in increasing job losses across the APS, with the opposition parties threatening more widespread job shedding if elected in 2013. Therefore the enhanced expression of worker voice in the APS following the introduction of the *Fair Work Act* and the APS Bargaining Framework remains vulnerable. If the government's policy towards industrial relations shifts back to emphasising individuation and managerial prerogatives, then worker voice in the APS is likely to come under considerable strain. The challenge for public service unions is to maximise the opportunities the industrial environment under the *Fair Work Act* provides to strengthen the participation and voice of public service workers in workplace decision-making and collective bargaining processes.

*Richard Naughton* and Marilyn J Pittard***

# THE VOICES OF THE LOW PAID AND WORKERS RELIANT ON MINIMUM EMPLOYMENT STANDARDS

## Abstract

This article addresses and critiques whether there is adequate provision for certain workers — low paid workers and those who rely on the basic minimum safety net standards provided in the federal system of workplace regulation — to have a 'voice'. Against the backdrop of historical developments over time in Australia to the present day under the *Fair Work Act 2009* (Cth), it explores the voices of these groups of workers.

## I Introduction

Throughout the history of the Australian industrial system a constant theme has been that there are mechanisms in place to 'protect the weak', whether this is in the form of minimum standards in awards, or the fact that enterprise agreements must satisfy a 'no disadvantage' or 'better off overall test' (BOOT) for workers. Some would say that the system has always existed for this purpose. The role of unions under the compulsory arbitration system (where minimum standards were determined by a statutory tribunal) was also to ensure that there was an equality of bargaining power between employer and employee parties.

This article considers these historical background issues, but also questions whether there is adequate provision for low paid and disadvantaged workers to have a 'voice' under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'). On its face, the *Fair Work Act* expressly guarantees protection to workers in the form of the BOOT,[1] *by* enabling 'low paid' employees to enter the enterprise bargaining arena via multi-employer agreements (in cases where they may have previously experienced difficulty utilizing the enterprise bargaining stream), by setting in place more comprehensive equal pay provisions, and by guaranteeing all employees the benefit of statutory minimum standards through access to the National Employment Standards (NES). Just how do these provisions operate, and do they sufficiently protect the 'voice' of low paid and disadvantaged employees?

The workers the subject of discussion in this article are generally those regarded as low paid who typically receive the minimum prescribed wage and in some cases have little to no bargaining power relative to their employers. It is beyond the scope

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1 The requirement that employees covered by an enterprise agreement are better off overall than if they were covered by the relevant modern award: *Fair Work Act* pt 2-4 div 4 sub-div C.

of this article to provide a precise profile of such workers — over time the composition of this group has changed and the industries in which they are engaged also may change. But the defining characteristics remain as those who cannot command for themselves above minimum safety net wage and/or terms and conditions of work and who would be disadvantaged by a freely functioning, deregulated labour market, whether they are full-time, part-time or casual workers.[2]

## II Traditional Mechanisms to Protect the Weak (or to Guarantee a Form of 'Employee Voice')

Australia's original selection of compulsory arbitration as the mechanism for resolving disputes ensured the system contained a number of unique characteristics: the central role played by a statutory tribunal; the position and status of trade unions as participants in the arbitration process; a concern for the 'public interest' (in that the underlying process and the role played by the statutory tribunal existed for the good of the community); and an ongoing emphasis upon protecting the low paid (or 'the weak').[3]

The adoption of a system of compulsory arbitration fixed in place by the *Conciliation and Arbitration Act 1904* (Cth) was a response to the turbulent industrial events of the 1890s, when both Australia and New Zealand were faced by arguments about employer freedom of contract in major industries. Compulsory arbitration meant the involvement of a third party tribunal to manage the dispute settlement process, and if necessary, to impose an award or determination upon the parties, rather than allow the free-for-all of collective bargaining.[4]

It was assumed that one element of the statutory tribunal's role was 'to protect the weak in the bargaining process by establishing a safety net',[5] and this was aligned to the public interest. Initially, the public interest was associated with strike prevention, but it soon involved fixing a floor of minimum rights. The independent tribunal's role was to protect the weak according to the reference point of the 'public interest' (as soon reflected by the decision in *Ex parte HV McKay*).[6]

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2 Fair Work Australia has grappled with the meaning of 'low paid': *Annual Wage Review 2009–10* (2010) 193 IR 380 [161]–[170].

3 Richard Naughton is currently undertaking research towards a doctoral thesis identifying traditional themes underlying Australian compulsory arbitration. These themes are drawn from that research. See also: John Niland, 'The Light on the Horizon: Essentials of an Enterprise Focus' in Michael Easson and Jeffrey Shaw (eds), *Transforming Industrial Relations* (Pluto Press, 1990), 184–5.

4 Marilyn J Pittard and Richard B Naughton, *Australian Labour Law: Text, Cases and Commentary* (LexisNexis, 5th ed, 2010) ch 7.

5 J Isaac 'Labour Market Regulation: Arbitration and Enterprise Bargaining — Are They Compatible' in M Rimmer and J Isaac, 'Directions in Labour Market Reform' (Working Paper No 27, National Key Centre in Industrial Relations, Monash University, 1993) 19–25.

6 (1907) 2 CAR 1 ('*Harvester*'). In which Higgins J set a 'fair and reasonable' minimum wage for unskilled and skilled workers.

The concept of 'protecting the weak' (and this being in the 'public interest') was always prominent in the language and ideals of arbitration.[7] At the time of introducing the Conciliation and Arbitration Bill in 1904 Alfred Deakin spoke of legislation that offered the prospect of betterment and advancement for the individual, the family, and the class, as well as for the nation as a whole.[8] When reintroducing the Bill on 22 March 1904,[9] Deakin referred to the Conciliation and Arbitration Court's wage-fixing jurisdiction, and appeared to anticipate the subsequent *Harveste*r decision. He spoke of the Court fixing a fair level of wages in accord with the 'general standard of civilization of a country'— the rate should be 'no higher and no lower' than the conditions upon which the Australian government's ideals of 'modern social justice' were based.[10]

There was a relationship between this language and protecting the public interest: the system sought 'to strike a fair balance between the interests of capital and labour'.[11] As a means of protecting the weak, it was necessary to remove the 'might is right' element from the process of dispute resolution'.[12] Observers of the Australian system suggest that the impact of the public interest requirement is 'most often observed in the protection of the economically and industrially weak through the provision of minimum wage standards, and … the operation of an orderly centralized wage fixing process'.[13]

As Deakin may have anticipated, the concept of a basic wage, as resulted from the *Harvester* case,[14] was partly based upon the public interest with employees being paid a 'fair and reasonable' wage as a mechanism to protect the weak. The reference in the decision to this wage was calculated on the basis of 'the normal needs of an average employee regarded as a human being living in a civilized community'.[15]

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7 John Niland, *Collective Bargaining and Compulsory Arbitration in Australia* (New South Wales University Press, 1978) 2.

8 Commonwealth, *Parliamentary Debates,* House of Representatives, 30 July 1903, 2865 (Alfred Deakin).

9 The original Conciliation and Arbitration legislation was withdrawn amid controversy between members of the Barton Protectionist Government concerning the form of the Bill: Greg Patmore, 'The Origins of Federal Industrial Relations Systems: Australia, Canada and the USA' (2009) 51 *Journal of Industrial Relations* 151, 157; Pittard and Naughton, above n 4.

10 This description is similar to the type of language used by Niland: see Niland, above n 7.

11 It was 'the perceived need to protect the interests of the community that provided the foundational justification for the inclusion of s 51(xxxv) in the *Constitution*': J T Ludeke, 'Is Now the Time for Radical Change?' in Don Rawson and Chris Fisher (eds), *Changing Industrial Law* (Croom Helm Australia, 1984) 14, 20.

12 Niland, above n 7, 7. In addition, strikes and lockouts were prohibited under the first *Conciliation and Arbitration Act 1904* (Cth).

13 W B Creighton, W J Ford and R J Mitchell, *Labour Law — Text and Materials* (LawBook, 2nd ed, 1993) [21.5].

14 *Harvester* (1907) 2 CAR 1.

15 An additional payment or margin was available to workers who demonstrated exceptional qualities and special skills.

The 'basic' wage was not confined to the money necessary for the main requisites of life — food, shelter, clothing. It also allowed for something extra 'to come and go on'.[16] It was in the public interest to ensure that 'Australian industrial citizens received sufficient wages to sustain themselves and their families'.[17] In what appears to be an early expression of 'employee voice', Higgins J emphasised that issues of fairness and the rights of employees involved more than 'wages'. Workers were entitled to some say in working conditions; '[w]ages and hours are not everything', he wrote. 'A man wants to feel that he is not a tool, but a human agent finding self-expression in his work'.[18]

As 'the interpreter of the social conscience',[19] the industrial tribunal's role always involved an ongoing link between establishing community standards and protecting the weak.[20] Over time this protection of the weak extended from wages per se, to a range of minimum employment standards (through the development of standard award conditions).

Another underlying feature of the compulsory arbitration system which demonstrates its 'protective' nature was that it was a 'collective' system.[21] Arbitral tribunals favoured a 'single voice' representing the needs of various workers across industry,[22] with unions being able to represent their members to redress the imbalance between parties to the employment relationship and to protect the weak. By this means, unions were legally entitled to act on behalf of their members, and make claims on behalf of all employees, whether they were members or not.[23] Moreover unions which registered under the federal system gained legal status — they could sue and be sued in their own name, and could hold property in their name.

Initially, it seems, the approach of the Commonwealth Court of Conciliation and Arbitration was to reach decisions on a case-by-case manner. After 1920 it shifted from this case-by case approach, to a 'Test-Case' process, where outcomes flowed through

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16 Henry Bournes Higgins, 'A New Province for Law and Order — III' (1920) 34 *Harvard Law Review* 105, 113.

17 Ronald McCallum, 'Citizenship at Work, An Australian Perspective' (Legal Studies Research Paper No 11/17, February 2011).

18 Higgins, above n 16.

19 *Merchant Service Guild Case* (1942) 48 CAR 586, 587 (Kelly J).

20 Marilyn Pittard, 'Reflections on the Commission's Legacy in Legislated Minimum Standards', (2011) 53 *Journal of Industrial Relations* 698.

21 Breen Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24 *Melbourne University Law Review* 839.

22 Andrew Frazer, 'Trade Unions under Compulsory Arbitration and Enterprise Bargaining — A Historical Perspective' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining: Trade Unions and the Law* (Federation Press, 1995) 52, 80.

23 E I Sykes and H J Glasbeek, *Labour Law in Australia* (Butterworths, 1972) 3; Pittard and Naughton, above n 4, chs 7, 15; Marilyn J Pittard, 'A Personality Crisis: The Trade Union Acts, State Registered Unions and Their Legal Status' (1979) 6 *Monash University Law Review* 49.

to Federal awards.[24] For example, in 1920 Higgins J instigated a test case in relation to standard hours of work,[25] and this was followed with similar proceedings in relation to the basic wage.[26] Awards established minimum labour conditions extending beyond wages, to matters such as hours of work, shift rosters, breaks, and allowances. It was a wider range of working conditions than existed in most countries, and by the 1970s contained 60 or more enforceable conditions.[27] This Test Case process has now been described 'as one of the most significant regulatory institutions/processes in Australian social, economic and political history'.[28] There was evolutionary 'development of the core safety net' by the tribunal.[29] Development was 'piecemeal and incremental, tested and explored over a lengthy period of time', arguably ensuring that standards endured.[30] It enabled the award minimum standards to evolve through adversary proceedings involving employers, unions and government, and other interested intervening parties, with the final determination being made by the independent statutory body.[31] It also ensured minimum pay and conditions that could not legally be eroded by agreement of the parties. There were enforcement and compliance mechanisms which sought to ensure that awards were not breached. The Test Case process enabled peak unions to initiate claims which, after going through processes of arbitration and being embedded in a relevant award, would ultimately become a standard in an industry or the economy. Many of the improvements in conditions are attributable to this test case process, as in the case of job security, working hours, and maternity leave.[32]

Throughout this period the role of the tribunal and its task of acting by reference to the public interest always meant that it was engaged in a somewhat more sophisticated role than the mere settlement of industrial disputes.[33] Instead, it had the role

24 David Plowman, 'Employers Associations and Compulsory Arbitration' in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004) 603.

25 *Standard Hours Case* (1921) CAR 1044.

26 *Awards of the Court Binding Upon the Australian Railyways Union and Others — Basic Wage Inquiry 1930* (1930) 30 CAR 2; *Basic Wage Inquiry 1940* (1941) 44 CAR 41; *Basic Wage Inquriy 1949–1950* (1950) 68 CAR 698; *Basic Wage and Standard Hours Inquiry 1952–1953* (1953) 77 CAR 477.

27 Michael Quinlan and Peter Sheldon, 'The Enforcement of Minimum Labour Standards in an Era of Neo-Liberal Globalisation: An Overview' (2011) 22(2) *The Economic and Labour Relations Review* 5, 15.

28 Jill Murray, 'The AIRC's Test Case on Work and Family Provisions: The End of Dynamic Regulatory Change at Federal Level' (2005) 18 *Australian Journal of Labour Law* 325.

29 Pittard, above n 20, 707.

30 Ibid.

31 See also Pittard, above n 20.

32 See, eg, *Termination, Change and Redundancy Case* (1984) 8 IR 34; 9 IR 115; *Maternity Leave Decision* (1979) 218 CAR 120; Pittard, above n 20.

33 Note in particular that typically the jurisdiction of the Commission was limited, in that it was empowered 'to prevent and settle industrial disputes extending beyond the limits of any one State': *Australian Constitution* s 51(xxxv).

and functions of a quasi-economic legislature, because its decisions had far-reaching economic effects.

Certain of our observations are subject to the qualification that during the 1960s and through to 1975, collective bargaining-type settlements at enterprise and industry levels grew alongside arbitrated settlements,[34] and many of these were dominated by standards set by collective bargaining (or 'over-award' bargaining).[35] Notwithstanding this, it is important to bear in mind that arbitration remained at the forefront of the Australian system until the early 1990s.[36]

## III Protecting the Weak under Bargaining Provisions (from 1992–2007)

In our view, the ideal of 'protecting the weak' (and guaranteeing a form of employee voice for all) has continued through to the enterprise bargaining era (from 1992) with requirements concerning the legitimacy of agreements and the 'no disadvantage test' (or the BOOT under the *Fair Work Act*). Further, the low-paid bargaining provisions under the *Fair Work Act* are specifically designed for workers who have not benefitted from the bargaining system. In spite of these arrangements we do make the qualification that various minimum standards (previously existing as award standards) are now fixed as statutory requirements under the *Fair Work Act*. This severely limits the opportunity for the statutory tribunal to consider and review minimum standards by the Test Case mechanism described earlier. Instead the current legislative provisions attract the criticism that the standards may become fixed over time and of increasingly less value to the low paid. The Test Case process is arguably one that better meets the ongoing requirements of the public interest. Having said that, the legislated standards have been informed, and were strongly influenced, by the tribunal test cases.[37]

### A *The Changing Voice: 1992–2005*

With the exception of the Work Choices period 2005–2007, the focus upon procedural safeguards and a minimum standard test ('no disadvantage' test or BOOT) have formed part of Federal bargaining provisions since 1992.[38] At that time the relevant legislation introduced requirements to ensure that agreements did not disadvantage employees when compared with awards and other relevant laws. Where there was

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34 See Mark Bray and Pat Walsh, 'Accord and Discord: The Differing Fates of Corporatism Under Labo(u)r Governments in Australia and New Zealand' (1995) 6(3) *Labour and Industry* 1, 11; Dianne Yerbury and J E Isaac, 'Recent Trends in Collective Bargaining in Australia' (1971) 103 *International Labour Review* 421.

35 J Isaac, above n 5, 20.

36 As late as 1990, 80 per cent of Australian employees had wage rates specified or underpinned by federal awards: Australian Bureau of Statistics, 'Award Coverage', (Statistics, Catalogue No 6315, May 1990), cited in McCallum, above n 17.

37 Pittard, above n 20.

38 This minimum standards test was introduced in the *Industrial Relations Act 1988* (Cth) by the *Industrial Relations Amendment Act 1992* (Cth).

such a reduction the tribunal was required to consider whether the change proposed was contrary to the public interest in relation to the terms and conditions of those employees considered as a whole. The provision was not intended to reduce well established and accepted standards which applied across the community such as maternity leave, standard hours of work, parental leave, minimum rates of pay, and termination change and redundancy provisions.

Looking back, it is the Keating (Labor) government's *Industrial Relations Reform Act 1993* (Cth) ('*IR Reform Act*') that appears to be the nation's most significant piece of industrial legislation in recent decades (even more so, perhaps, than the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*')). It formally set in place an enterprise bargaining system and altered the nature of underlying awards. Parties negotiating enterprise agreements were subject to good faith bargaining obligations.[39] It referred to a new set of legislated minimum employment entitlements, described as a 'safety net' for those bargaining under the legislation. These minimum conditions included minimum wages, termination of employment, equal remuneration for women, parental leave, and family leave.[40] Assuming that agreements made under the system (whether negotiated between an employer and union, or a 'collectivity' of employees without union involvement)[41] determined terms and conditions of employment, there was a major change in the role of the Commission (the independent statutory tribunal).[42] Conditions of employment were now fixed via negotiations between the parties, 'with the tribunal relegated to a more or less marginal supervisory role'.[43] In the case of both agreements made in prevention or settlement of an industrial dispute ('Division 2 agreements') and enterprise flexibility agreements made by corporate employers with their employees ('Division 3 agreements'),[44] it was necessary for the agreement to meet a 'no disadvantage' test.[45] The no disadvantage test was two-fold: the no disadvantage test would not be met if employees suffered a reduction in their entitlements under awards or Commonwealth or state laws and if, in the context of terms and conditions as a whole, 'the Commission [considered] that the reduction is contrary to the public interest'.[46] Notwithstanding the no

39 See, eg, Richard Naughton, 'Bargaining in Good Faith — The Asahi Decision' (1995) 8 *Australian Journal of Labour Law* 165.

40 See *Industrial Relations Reform Act 1993* (Cth) s 150A; arguably these provisions are predecessor provisions to what now appears in the National Employment Standards in the *Fair Work Act.*

41 One aspect of the *IR Reform Act* was that it allowed parties to enter an Enterprise Flexibility Agreement without union involvement ('EFAs'), often known as the non-union bargaining stream. This was a major challenge to the traditional role of unions as the exclusive representative of employees under the Australian industrial system.

42 The article uses the word 'Commission' to collectively refer to the Australian Industrial Relations Commission and its predecessors.

43 Creighton, above n 21.

44 *Industrial Relations Reform Act 1993* (Cth) ss 170MA, 170NA (respectively).

45 Ibid ss 170MC(1)(b), 170NC(1)(d).

46 Ibid ss 170MC(2) (Division 3 agreements), 170NC(2) (Division 2 agreements).

disadvantage test, the Commission was permitted to refuse certification of an agreement that was contrary to the 'public interest'.[47] Arguably, therefore the concept of the public interest was retained under a different guise because of its relationship with the 'no disadvantage' requirement.[48] In addition, the *IR Reform Act* contained various protections for vulnerable employees[49] as the tribunal was required to take account of 'relevant employees' at the time certification was sought. The relevant categories were (i) women; (ii) persons whose first language was not English; and (iii) young persons.[50] The Commission was required to satisfy itself that appropriate steps were taken to consult with employees in these categories about the terms and requirements of the agreement. There are some interesting aspects to this. Although the tribunal's function had changed, it was nevertheless required to perform its traditional role of an independent third party protecting the weak.

Under the Howard (Liberal–National coalition) government, between 1996 and 2007, there was a stronger move towards deregulation of industrial relations, first with the *Workplace Relations Act 1996* (Cth) ('*Workplace Relations Act*') (that existed between 1996 and 2005), and later the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*').[51] The *Workplace Relations Act* continued the shift to an 'enterprise-bargaining culture', but with some important changes. The objects of the legislation emphasized that the 'primary responsibility for determining matters affecting the relationship between employers and employees [rested] with the employer and employees at the workplace or enterprise level'.[52] Presumably, this sought to downplay the role of third parties, such as the tribunal and unions.

The *Workplace Relations Act* restricted awards to 20 specified allowable items (or 'a minimum core of safety net terms and conditions of employment'),[53] and constraints were placed on the Commission's dispute settling functions. The legislation removed the requirement on parties to 'bargain in good faith' (meaning that collective

47 Ibid ss 170MD(1) (except where a single business was involved in Division 2 agreements), 170ND(3).

48 See, eg, Creighton's discussion both in relation to the *IR Reform Act* and the subsequent *Workplace Relations Act* that there was an ongoing perception that it was contrary to the public interest for employees to be deprived of award benefits or entitlements without the guarantee of a 'no disadvantage' test: Creighton, above n 21; Waring and Lewer referred to the no-disadvantage test as 'a symbol of civility in the Australian industrial relations system — a means to convince workers that equity considerations would not be forgotten in the new decentralised system': Peter Waring and John Lewer, 'The No-Disadvantage Test: Failing Workers' (2001) 12 *Labour and Industry* 65, 66.

49 See Creighton, above n 21.

50 *Industrial Relations Reform Act 1993* (Cth) s 170MG; in the case of Division 3 enterprise flexibility agreements: *Industrial Relations Reform Act 1993* (Cth) s 170NG.

51 Pittard and Naughton, above n 4, chs 11–13; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) ch 12; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011).

52 *Workplace Relations Act 1996* (Cth) s 3(b).

53 McCallum, above n 17, 3; see also Pittard and Naughton above n 4, ch 10.

bargaining by employers under the *Workplace Relations Act* became voluntary in nature).[54] The tribunal's jurisdiction to settle labour disputes by making industrial awards was diminished. The Commission's award-making powers were limited to determinations establishing 'a safety net of minimum wage rates and minimum terms and conditions such as ordinary time hours of work, allowances, redundancy pay, and leave arrangements'.[55] The award system remained, but it was regarded as a safety net underpinning bargaining arrangements[56] and there was significant reduction in the industrial matters contained in awards (ie, the 20 allowable award matters). There was less opportunity for the statutory tribunal to fix and review minimum standards having regard to the position of the low paid.

A new pt VIB of the *Workplace Relations Act* dealt with the making of certified agreements, and the 'object' of this part referred to the tribunal's role 'facilitating' the making and certifying of agreements.[57] The legislation allowed for two forms of certified agreement (ie, those made in settlement of industrial disputes or situations,[58] and those made with 'constitutional corporations').[59] The possibility for a corporate employer to make an agreement directly with its employees (without union involvement) first introduced under the *IR Reform Act* was continued. In addition, the *Workplace Relations Act* introduced 'greenfields' agreements that were available in the case of 'start-up' businesses. The requirement that enterprise agreements meet a no disadvantage test was retained under the *Workplace Relations Act*, with this test being administered by the Commission.[60] Although the test remained, it was balanced against the more limited category of allowable award matters, rather than the full content of awards, as was previously the case. Further, agreements were measured against any relevant award or law on a *global basis* to ensure that employees were no worse off *overall*.[61] This suggested there was a significant weakening of the test; in any event, agreements that did not meet the test were able to be certified if this was 'not contrary to the public interest'.[62]

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54 See also Joe Isaac, 'Reforming Australian Industrial Relations — 21st Foenander Lecture' (2007) 49 *Journal of Industrial Relations* 410, 417; Richard Naughton, 'Sailing Into Unchartered Seas: The Role of Unions under the *Workplace Relations Act 1996* (Cth)' (1997) 10 *Australian Journal of Labour Law* 112.

55 McCallum, above n 17, 4.

56 Therese MacDermott, 'Australian Labour Law Reform: The New Paradigm' (1998) 6 *Canadian Labour and Employment Law Journal* 127.

57 *Workplace Relations Act 1996* (Cth) s 170L.

58 Ibid pt VIB div 3.

59 Ibid pt VIB div 2.

60 Ibid ss 170X-170XF.

61 Ibid s 170LT(3); see Marilyn Pittard, 'Collective Employment Relations: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62, 83.

62 See also Richard Mitchell et al, 'What's Going On With the 'No Disadvantage Test': An Analysis of Outcomes and Processes under the *Workplace Relations Act 1996* (Cth)' (2005) 47 *Journal of Industrial Relations* 393.

It appeared that the Howard government's clear intent was 'to move the Australian system away from its collectivist origins, in which there was a strong role for unions and the tribunal, towards a more fragmented and flexible system of individual bargaining between employees and employers'.[63] The device for individualizing the Australian system was the Australian Workplace Agreement ('AWA'), which initially, at least, was required to meet a 'no disadvantage' test (in comparison with the relevant award), and was scrutinised by a statutory authority (although in this case it was the Office of the Employment Advocate ('OEA') instead of the Commission). The *Workplace Relations Act* marked a stepping-away from some of the elements of the Australian system that we identified as protecting the weak.

Throughout the period when the *Workplace Relations Act* operated (1996–2005), the Commission continued to wield powers of conciliation and arbitration, subject to the various limitations imposed by the legislation about what constituted an 'allowable award matter',[64] and it retained powers to determine key terms and conditions of employment including minimum wages.[65]

The *Workplace Relations Act* undermined the role of unions (and their traditional status as the institution with a specific purpose of protecting the weak).[66] In particular, the legislation sought to outlaw preference clauses and closed shop provisions, imposed strict restraints upon union right of entry to workplaces, and implemented a freedom of association regime where the right not to join a union ranked equally alongside the right to join the organisation.[67]

### B *The Enfeebled Voice Under Work Choices*

While the Commission continued to exercise jurisdiction in relation to agreements under the *Workplace Relations Act*, this jurisdiction was totally removed under the highly controversial *Work Choices* legislation.[68] *Work Choices* mounted a steadfast

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63 Nick Wailes and Russell D Landsbury, 'Flexibility vs Collective Bargaining?: Patterns of Australian Industrial Relations Reforms During the 1980s and 1990s' (ACIRRT Working Paper No 49, University of Sydney, 1997) 38–40.

64 Pittard gives an example of this, and also makes the point that there was an express diminution in the Commission's award-making jurisdiction under the *Workplace Relations Act*. Under the *Industrial Relations Act* the Commission was stated to have power of arbitration to prevent and settle disputes 'where necessary'. In contrast, however, the *Workplace Relations Act* referred to arbitration being used 'as a last resort and within limits specified by this Act': Pittard, above n 61, 66.

65 The best known test case conducted by the Commission during this period is possibly the *Parental Leave Case* (1990) 36 IR 1; a further decision made certain extensions to that decision: *Parental Leave Test Case* (2005) 143 IR 245.

66 For discussion see Naughton, above n 54.

67 This would outlaw any preference provisions that may have existed; see also MacDermott, above n 56, 143; see generally Pittard and Naughton, above n 4.

68 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

attack upon the 'ideals' of compulsory arbitration. It also made changes to the award-making process, and imposed further restrictions upon the ability of unions to act as the acknowledged representatives of employees.[69]

Under *Work Choices* it was only necessary for agreements to meet the five elements of the legislated Australian Fair Pay and Conditions Standard, which included a minimum rate of pay; maximum ordinary hours of work; annual leave; sick leave; and parental leave;[70] plus certain required protected award conditions. Having said this, it was possible for employee parties to 'trade off' these so-called protected award standards by express agreement but not the legislated standards. These 'protected' standards (such as penalty rates, overtime pay, rest breaks, and annual leave loading)[71] were matters previously developed by an independent tribunal in the *Harvester* tradition of protecting the weak. Under *Work Choices*, the Commission's role in developing minimum standards was removed by legislative sleight of hand. The voice of unions in agitating for a change in conditions was limited to their involvement in the making of collective agreements. Just how effective their voice may have been depended on the strength of the unions in the industry and the relative bargaining strength of employer and employee.

Under *Work Choices*, the Commission no longer had a supervisory jurisdiction over collective agreements. Instead, these agreements were simply lodged with the OEA (which later became the Workplace Authority), and took effect from the date of lodgement.[72] *Work Choices* significantly diminished the role of the statutory tribunal — it was no longer possible for the industrial parties 'to seek the compulsory arbitration of industrial disputes',[73] which meant the abolition of the 'arbitral side' of the industrial relations system. It had a consequent reduction in the voice of unions in bringing such matters to the central umpire.

Significantly, the Commission had no award-making power outside the award rationalisation process and the content of awards was now further reduced to 13 minimum

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69 Other important aspects of Work Choices were, of course, the limitations imposed on unfair dismissal rights (which appeared on their face to demonstrably challenge the underlying issue of 'protecting the weak', or an emphasis of the legislation upon 'fairness').

70 For some discussion of the Australian Fair Pay and Conditions Standard and its relation to previous award minima see Joo-Cheong Tham, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123, 144–5.

71 See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 354. This provision was repealed by the Rudd–Gillard Government in 2008.

72 The lack of pre-approval 'vetting' led Forsyth and Sutherland to observe that there were serious concerns 'about the absence of meaningful protection of employees' interests': Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183.

73 Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 84.

standards.[74] The Commission's role 'facilitating' the agreement-making process, or conciliating or mediating a workplace dispute, was removed. In relation to bargaining, the Commission's powers were essentially limited to granting protected action ballot orders with respect to strike action taken during the course of bargaining.

Individual agreements ('AWAs') were elevated in status and became the dominant form of industrial instrument, prevailing over not only awards but collective agreements. Certainly individual low paid employees would have feeble voices, if heard at all, in negotiating AWAs.

The effect of these changes meant that the tribunal, trade unions and collective bargaining were 'marginalised'. The diminished significance of awards and diminished role of trade unions meant those elements of the compulsory arbitration system that gave a voice to the low paid were downgraded.[75] In conjunction with the removal of virtually all protections against unfair dismissal, this impact was even greater for the weaker and disadvantaged employees except those fortunate enough to be employed by large employers.[76] The fear of losing their jobs also meant the loss of voice by the weaker and more vulnerable employees to complain about unfairness at work or even to attempt to negotiate better conditions.[77]

*Work Choices* appeared to envisage that awards would disappear before too long. No new awards could be made and once an agreement was in place, an award would effectively have no more relevance to the parties. On the agreement's termination, it was not the entire award that would 'revive', but only the so-called 'protected' conditions (which then applied to an individual's employment together with the Australian Fair Pay and Conditions Standard).[78] The Commission's powers to revise minimum wages on a regular basis were handed to the Australian Fair Pay Commission ('AFPC'), thus it was this newly appointed statutory body that fixed minimum wages instead of the Commission. It appeared to envisage a new type of wage-fixing far removed from the traditional emphasis upon 'wages being "fair

74 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 539; Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35 *Industrial Law Journal* 343, 344; see also Colin Fenwick, 'How Low Can You Go? Minimum Conditions Under Australia's New Labour Laws' (2006) 16 *Economic and Labour Relations Review* 85, 90–1.

75 Forsyth and Sutherland, above n 72, 197.

76 See Marilyn Pittard, 'Back to the Future: Unjust Termination of Employment under the Work Choices Legislation' (2006) 19 *Australian Journal of Labour Law* 225; Marilyn Pittard, 'Fairness in Dismissal: A Devalued Right' in Julian Teicher, Rob Lambert and Anne O'Rourke (eds), *WorkChoices: The New Industrial Relations Agenda* (Pearson Education, 2006) 74–90.

77 Regarding impact of *Work Choices* on job security see David Peetz, 'Assessing the Impact of WorkChoices One Year On: Report to Department of Innovation, Industry and Regional Development' (19 March 2007).

78 Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 *Australian Journal of Labour Law* 210.

and reasonable" and supporting a decent standard of living'.[79] Instead, the AFPC's deliberations in wage-setting were expressly to promote 'the economic prosperity of the people of Australia'; and to this end it was required to consider issues such as 'the capacity of the unemployed and low paid to obtain and remain in employment', 'employment and competitiveness across the economy' and 'a safety net for the low paid'.[80]

Another aspect of *Work Choices* (which to be fair had evolved from earlier legislative developments) was implementation of the Australian Fair Pay and Conditions Standard as statutory minima. This again raised the question of 'legislated standards' being imposed in the employment area, rather than the use of what might be termed 'arbitrated' standards (including the test case mechanism) that were responsive 'to the voice and needs of the industrial parties, government and community'.[81] As we have seen, the former standards were developed by an independent tribunal in the *Harvester* tradition of protecting the weak. Even though the Australian Fair Pay and Conditions Standard was derived from the standards set by the Commission in the test cases,[82] the Commission's primary role of developing minimum standards was removed. Over time there had been a transition from a system of collective labour relations that existed at the commencement of the 1990s to the concept of legislated standards that were focussed on the individual.[83] Did these 'universal standards' allow for 'dynamic regulatory change', or change that was responsive to the voice and needs of individual employees?[84]

## IV Protecting the Weak under the Fair Work Act

There has now been a dramatic reversal from the position under the *Workplace Relations Act* and *Work Choices*. The objects of the *Fair Work Act* insist that the purpose of the legislation is to provide 'a balanced framework for cooperative and productive workplace relations … by achieving productivity and fairness through an emphasis on enterprise-level collective bargaining objectives and clear rules governing industrial action'.[85] In fact, the objects provisions contain a politically-charged statement referring to the maintenance of a guaranteed safety net of minimum wages and conditions that 'can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace system'.[86]

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79 Rosemary Owens, 'Working Precariously: The Safety Net After Work Choices' (2006) 19 *Australian Journal of Labour Law* 161.

80 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 7J.

81 Owens, above n 79.

82 Pittard, above n 19.

83 Owens, above n 79.

84 Ibid.

85 *Fair Work Act* s 3(f).

86 Ibid s 3(c).

Although the legislation is primarily focussed upon bargaining, the *Fair Work Act* reinforces some of the Australian system's traditional emphasis upon concern for the weak (or low paid): it reinstates power to the statutory tribunal, refers to the 'public interest' throughout its provisions, and gives considerably more influence and authority to unions. In our view the strongest indications of this decision by government to revert to a position allowing for more emphasis upon 'employee voice' are the strengthening of the position of unions at the workplace, the requirements for approval of agreements (including BOOT) that are exercised by the statutory tribunal, and the process enabling low paid employees to enter the bargaining stream. Moreover, it is not insignificant for the rights of vulnerable workers, as well as workers more generally, that there are increased protections against dismissal and unfair treatment at work under the general protections in pt 3-1 of the *Fair Work Act* and that the unfair dismissal protections previously lost under *Work Choices* are restored.

### A *Agreement Making under the Fair Work Act*

The emphasis of the *Fair Work Act* is on collective bargaining. This has been described as a 're-regulation' of the bargaining provisions,[87] and the provisions have been described as marking a return to the collectivist principles that underlay the traditional Australian system.[88] It is evident that unions will more than likely be bargaining representatives for the purpose of negotiating agreements,[89] and can activate statutory support mechanisms that may lead to the imposition of arbitrated outcomes upon 'recalcitrant employers'. Further, only trade unions and employers can be a party to a greenfields agreement.[90]

The provisions refer to the Fair Work Commission ('FWC'), previously Fair Work Australia, facilitating good faith bargaining by making bargaining orders, dealing with disputes where bargaining representatives request assistance, and ensuring that applications for approval of enterprise agreements are processed 'without delay'.[91] It is evident that the statutory tribunal is once more at the center of this bargaining procedure.

The legislation refers to a number of pre-approval requirements which include employers having to take all reasonable steps to ensure that employees who will be covered by the agreement are given access to a copy of the agreement (and any materials incorporated by reference into the agreement) seven days before it

87 Rae Cooper, 'The "New" Industrial Relations and International Economic Crisis: Australia in 2009' (2010) 52 *Journal of Industrial Relations* 261, 262.

88 Ibid.

89 Rae Cooper and Bradon Ellem, 'Fair Work and the Re-Regulation of Collective Bargaining' (2009) 22 *Australian Journal of Labour Law* 284. It may be possible for individual employers to nominate their own BR, but this is unlikely. The relevant union is the bargaining representative unless the employee nominates their own representative: *Fair Work Act* s 174(3).

90 *Fair Work Act* s 172(2)(b); Cooper and Ellem, above n 89, 295.

91 *Fair Work Act* s 171(b)(i)–(iii).

is subject to a vote of employees.[92] An employer must take all reasonable steps to ensure that the terms and effect of the agreement are explained to employees, taking into account the particular circumstances and needs of those employees.[93] Importantly, FWC believes that its role deciding whether approval requirements have been satisfied requires it to take account of its role facilitating the making of agreements.[94]

Agreements must not contravene those *Fair Work Act* provisions concerning the interaction of agreements and NES,[95] and must satisfy the obligation that they pass the BOOT.[96] The BOOT replaces the 'no disadvantage test' that has now applied at different stages as the applicable approval test since 1992, except during the Work Choices period. The test builds a 'safety net' mechanism into the bargaining system, and seeks to ensure that the 'weak' are protected. As Creighton has noted, it also builds a public interest element into the statutory approval process.[97] The BOOT requires FWC to be satisfied that, at the time approval of the agreement is sought,[98] each award-covered employee and prospective award covered employee to be covered by the agreement 'would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee'.[99] The legislation has built in requirements about when an employer must advise employees of their representation rights.[100] The relevant notice must tell employees that their bargaining representative may represent them in negotiations towards an agreement.[101] The individual employee may appoint any person as the bargaining representative, but if they are a member of a union and do not appoint another person to act as their bargaining representative, the relevant union becomes bargaining representative by default.[102]

92 Ibid s 180(2)-(6). In other versions of the legislation, there were similar procedural steps prior to agreement approval.

93 Ibid s 180(5).

94 Having said this, the following decision of FWA suggests that the statutory requirements are to be considered in 'a practical, non-technical manner': *McDonalds's Australia Pty Ltd v Shop Distributive and Allied Employees' Association* [2010] FWAFB 4602 (21 July 2010). Aside from these provisions, the tribunal has no discretion to approve an enterprise agreement if the mandatory pre-approval requirements have not been met: [2010] FWAFB 4602 (21 July 2010) [13].

95 *Fair Work Act* ss 55, 186(2)(c).

96 Ibid s 186(2)(d).

97 Creighton, above n 21, 862.

98 Ibid s 193, as to the 'test time', and the accompanying definition in s 193(6).

99 Ibid s 193(1); FWC is entitled to assume that the BOOT requirements are satisfied if a particular employee is a member of a class, and the test is generally satisfied when applied to that class: *Fair Work Act* s 193(7).

100 This might be, for example, when an employer has agreed to bargain or initiates bargaining, or a majority support determination (an indication of majority support for bargaining from employees) comes into operation: *Fair Work Act* s 173(2).

101 *Fair Work Act* s 174(2).

102 This is the union that is entitled to represent the industrial interests of the employee in relation to work to be performed under the agreement: *Fair Work Act* s 174(3).

An employer can no longer refuse to participate in collective negotiations as was the case under the Work Choices model, and unions are granted a significant role in the bargaining process. The *Fair Work Act* has been described as a 'compulsory bargaining system', in contrast with the 'voluntary bargaining system' that existed between 1994 and 2009.

Bargaining representatives engaged in the bargaining negotiations are subject to what the legislation terms 'good faith bargaining requirements' from the notification time.[103] These good faith bargaining requirements include attending and participating in meetings, disclosing relevant information, responding to proposals, and refraining from capricious and unfair conduct that undermines freedom of association and collective bargaining.[104] The ongoing bargaining activities are supervised by FWC and 'there is capacity for the regulator to intervene and make orders compelling behaviour on bargaining parties at different stages in the bargaining process'.[105] The 'facilitative' role invested in FWC is a significant change from the provisions under the *Work Choices* legislation, where the Commission had few formal powers to resolve bargaining disputes.[106]

FWC now operates in a similar way to the (pre-*Work Choices*) Commission.[107] The tribunal has a more important role reviewing agreements than was the case in the *Work Choices* period, and it has been invested with a range of powers to *facilitate good faith bargaining, and the making of agreements*. These functions restore the significant role of the statutory industrial tribunal in the federal industrial system.[108] In fact FWC has a broad range of powers, except for making awards in settlement of *industrial disputes*. It may deal with bargaining disputes in many cases at the request of just one party.[109] It has power to make, renew and vary modern awards; to supervise the bargaining process, including industrial action; and resolve unfair dismissal claims.

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103 *Fair Work Act* s 230(2).

104 Ibid s 228(1); see, for detailed discussion of the application of the good faith bargaining provisions, Anthony Forsyth, '"Exit Stage Left", Now "Centre Stage": Collective Bargaining under Work Choices' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work — The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

105 Cooper, above n 87, 267.

106 Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 34; Richard Naughton, 'The Role of Fair Work Australia in Facilitating Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012).

107 Stewart, above n 106, 14.

108 Jill Murray, 'Labour Standards, Safety Nets and Minimum Conditions' (2008) 18(2) *Economic and Labour Relations Review* 43; see also John Buchanan, 'Labour Market Efficiency and Fairness: Agreements and the Independent Resolution of Difference' (2008) 18(2) *Economic and Labour Relations Review* 85.

109 Creighton and Stewart, above n 51, 129.

Unlike the circumstances imposed on the Commission under *Work Choices*, FWC has increased powers of arbitration (or to issue a workplace determination), particularly in the case of industrial action causing harm to the national economy, or to the parties involved[110] and in the case of 'low paid workers' who have previously been excluded from the enterprise bargaining stream, or had difficulty achieving enterprise outcomes.

The *Fair Work Act* is regarded as a strengthening of the safety net and an attempt to undo changes fixed in place by *Work Choices*. Consequently, the legislation is an example of the 'protecting of the weak' element of the traditional compulsory arbitration system. It is the NES together with modern awards that comprise the new safety net, with the NES stated to be 'a proper safety net of legislated conditions'.[111] The NES include certain additions to the Australian Fair Pay and Conditions Standards floor of rights that existed under the *Work Choices* legislation. These are: the right to request flexible working arrangements, the right to extend parental leave by periods of up to 12 months, community service leave, notice of termination and redundancy pay entitlements, and the provision of an information statement on rights and entitlements. Of these, it is the right to request flexible working hours and the ability to 'cash-out' certain forms of leave that are new benefits.[112]

The new-style awards are no longer the outcome of an adversary process. Modern award making is a 'top down process', where a Full Bench of FWC is given the task of developing an award framework, which together with the NES constitutes a safety net of terms and conditions.[113]

In spite of these comments and the different delivery mechanism for minimum standards under the *Fair Work Act*, the 'safety net' requirements signify the ongoing importance of 'protecting the weak' under the Australian industrial system. Another aspect of the *Fair Work Act* is that it establishes the Minimum Wages Panel (comprising certain of its members) that is required to establish a safety net of 'fair minimum wages', having regard to various matters that comprise the 'Minimum Wages Objective'; these include 'promoting social inclusion through increased work participation', and 'relative living standards and the needs of the low paid'.[114] The role played by the Minimum Wages Panel and its considerations in performing that role differ markedly from those of the AFPC under *Work Choices*.

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110 *Fair Work Act* pt 3-3 div 6; see also, an order stopping industrial action at Qantas: *Application by Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 (31 October 2011).

111 Australian Labour Party, *Australian Labor Party National Platform and Constitution* (2007), cited in Jill Murray and Rosemary Owens, 'The Safety Net: Labour Standards in the New Era' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work, The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 40.

112 Some of these NES were already in previous legislation — they have been gathered together, though, in the bundle of legislated standards called NES: see also Pittard, above n 20.

113 Modern awards cannot generally exclude the NES, although they may contain terms that are ancillary or incidental to the NES: *Fair Work Act* s 55.

114 *Fair Work Act* s 284.

### B *Practical Steps to Protect the 'Voice' of Vulnerable Employees*

Under the 'Equal Pay' provisions appearing in pt 2-7 of the *Fair Work Act*, FWC has power to make an order 'for work of equal or comparable value'.[115] The provisions have now been utilised in a case maintained by the Australian Services Union and four other unions in the social, community and disability services sector, where the tribunal found that work undertaken by social and community workers was undervalued under the new provisions.[116]

The low-paid bargaining provisions in pt 2-4 div 9 of the *Fair Work Act* raise the prospect of multi-employer or industry-wide bargaining in certain low-paid sectors.[117] Arguably, at least, these provisions enable workers who have traditionally been deprived of the benefits of enterprise bargaining to enter the enterprise bargaining stream.[118] In some circumstances these provisions may also invest FWC with general powers of arbitration in relation to classes of low paid employee.

The underlying elements of compulsory arbitration are relevant in these requirements. A low-paid authorisation (or special low-paid workplace determination) is available to a low-paid employee,[119] the orders are made by FWC, with any application typically being made at the instigation of a union party,[120] and FWC's ability to make such an order depends on it being satisfied that it is in the public interest to make an authorisation or subsequent determination (having regard to matters such as the history of bargaining in the industry and the relative strength of the parties).[121] The provisions are an exception to the general expectation that collective bargaining under the *Fair Work Act* takes place at enterprise level.[122]

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115 Ibid s 302; the reference to work of equal or comparable value is stated to mean 'equal remuneration for men and women workers for work of equal or comparable value': *Fair Work Act* s 302(2).

116 *Equal Remuneration Case* [2011] FWAFB 2700 (16 May 2011); *Equal Remuneration Case* [2012] FWAFB 1000 (1 February 2012).

117 *Fair Work Act* s 241(b).

118 Ibid s 241(d).

119 Perhaps oddly, the provisions do not contain a definition of what is meant by 'low paid'. The Explanatory Memorandum accompanying the legislation refers to classes of employees eg 'certain employees in community services sector and cleaning and child care industries': Explanatory Memorandum, Fair Work Bill 2008 (Cth) [992]; in the *Aged Care Case* [2010] FWAFB 4000 (3 June 2010) the FWA Full Bench suggested that it refers to employees 'paid at around the award rate of pay, and at the lower classification levels': at [237].

120 *Fair Work Act* s 242.

121 Ibid ss 243(1)(b), 262(5).

122 See *Fair Work Act* ss 3(f), 171(a); an 'enterprise' is defined as 'a business, activity, project or undertaking': *Fair Work Act* s 12. The other exception to the legislative requirement concerning enterprise-level bargaining arises in the cases of two or more employers making a multi-enterprise agreement: *Fair Work Act* s 186(2)(b).

FWC's involvement is a two-step process. In cases where a low paid authorisation is granted the provisions enable FWC to 'facilitate' the making of a 'multi-enterprise' agreement covering two or more employers.[123] If bargaining towards such an agreement subsequently breaks down it is possible for FWC to then impose a workplace determination upon parties in specified circumstances (which may mean imposing an 'agreement' or determination which applies across an industry). On its face, the process appears to be a form of 'compulsory arbitration', allowing for 'pattern bargaining' claims, otherwise outside the scheme of the *Fair Work Act*.

Notwithstanding the legislature's best intentions it is arguable that the complex requirements of the low-paid bargaining 'scheme' mean that it is too difficult for parties to reach a satisfactory 'outcome'. In the *Aged Care* case[124] (presently the only case where an authorisation has been obtained), a Full Bench of Fair Work Australia ('FWA'), as it was then still called, excluded employees covered by existing enterprise agreements from future bargaining under the provisions (even though the legislation allowed FWA to grant an authorisation that covers employees who faced 'substantial difficulty bargaining at the enterprise level').[125] It is not limited to cases where employees have never been covered by an enterprise agreement.

To date, a special low-paid workplace determination has not been issued. For such a determination to be made the FWC Full Bench must be satisfied that bargaining representatives are 'genuinely unable to reach agreement on the terms that should be included in the agreement'; that 'there is no reasonable prospect of agreement being reached'; and that it is in the public interest for the determination to be made (ie, for there to be an arbitrated outcome imposed on the parties).[126] FWC must also consider whether making the determination will promote future bargaining for enterprise agreements to cover the employers and employees, and enhances productivity and efficiency in the enterprises. Further, it must have regard to the interests of employers and employees to be covered by the determination, 'including ensuring that the employers are able to remain competitive'.[127] Even though the provisions are extremely complex in nature,[128] they nevertheless reconsider some of the underlying features of the Australian compulsory arbitration system, and provide an example of legislators being willing to take account of 'employee voice'.

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123 Under these FWC powers of facilitation the tribunal has power to direct a third party with substantial control over the employees' terms and conditions of employment to attend conferences: *Fair Work Act* ss 246(2), (3).

124 *Aged Care Case* [2010] FWAFB 4000 (3 June 2010) [237].

125 *Fair Work Act* s 243(2)(a).

126 Ibid s 262(2), (5). While a consent low-paid workplace determination may only be made by a Full Bench of FWC, there is no requirement that the workplace determination is in the public interest.

127 *Fair Work Act* s 275(b).

128 Richard Naughton, 'The Low Paid Bargaining Scheme — An Interesting Idea, But Can it Work?' (2011) 22 *Australian Journal of Labour Law* 214.

## V Legislated Standards versus Awards: Parliament as Legislature versus The Tribunal as Setter of Standards

The NES mechanism in the *Fair Work Act* embodies, inter alia, the previous Australian Fair Pay and Conditions Standards (without wages) and in turn the standards hark back to their derivations in the Test Cases of the Commission as we have discussed. The Commission's legacy, then, is the standards it set which are now enshrined in the NES — but how can these standards be changed? Have the unions now a weakened voice? Have the interests of the vulnerable workers and low paid now been relegated to reliance on the statutory minima for which they have virtually no voice or mechanism to effect, or initiate change?

Change must now be effected through amendment to the legislation. For the stronger groups the statutory minima have less meaning because they can negotiate for a shorter working week through the bargaining process; for better parental leave conditions; for rights to flexible work, rather than simply the rights to request flexible work. The government of the day may have evidence that changes are needed and consequently initiate a bill to enact the amendments to the NES. A private member's bill is another option. Lobbying of governments and members of parliament by unions and employers may bring about change. Other relevant bodies may also agitate for change. But there is no systemic or enshrined right to seek and request such change, let alone ensure that it actually occurs. Consultation may be discretionary so that unions may, or may not, be consulted about the need for legislative changes. The freedom of unions to make claims for changes in standard conditions through the Test Case process has been eroded dramatically by the switch to the legislated conditions. Of course, unions then had to make the case for change, but the opportunity existed to enable that case to be made: there was a process and their voices could be heard.

This lacuna for reviewing legislated standards can be contrasted to the current process for reviewing awards. FWC has been conferred with the responsibility for reviewing all modern award terms every four years, except in the case of wages which must be reviewed annually.

The body charged with the responsibility for fixing minimum standards has also changed. Tribunal members offered a wide range of relevant diverse expertise and backgrounds, from economics to industrial relations, and brought that expertise to bear on evaluating and testing out the submissions made about the proposed changes in standard working conditions. Parliament has other strengths — generally parliamentarians come from truly diverse backgrounds and may be heavily reliant on departmental advice or a working party to make recommendations for change. Such a process, though, does not guarantee the weak or vulnerable groups of workers a voice. Perhaps individually, or collectively through their unions, the case could be put to governments or working groups, but it is not a requirement of the legislature that there be such consultation. At worst, the decisions may be made on political considerations and/or reflect the wishes of government to be re-elected.

Pressures, too, may exist for diminution of the basic legislated conditions through overseas trade and other global considerations that go beyond the interests of the employees. Placing the agenda for effecting change well and truly in the political arena is fraught with hazards which were not typically present when the tribunal acted independently of government, on the one hand, and the political environment, on the other hand, to make the change for cogent and articulated reasons which were published and disseminated in the public domain.

## VI Conclusion

Historically, various mechanisms or processes have existed to protect the weak (or low paid). This was essentially part of the rationale for the establishment of a compulsory arbitration system, continuing for the duration of the traditional system. The weak arguably received greater protection and enjoyed greater opportunity for their voices to be heard as the federal system developed in the tradition of the *Harvester* case and the test case mechanism for determining minimum standards.

The guaranteed level of protection or granting of 'employee voice' for low paid and vulnerable workers was typified by the role of the Commission (the independent statutory tribunal) in fixing minimum standards by reference to the 'public interest'. That background continued, even when Australia adopted a bargaining system, because agreements were required to meet a range of minimum standards reviewed by an independent statutory tribunal, and this was regarded as being in the nature of a default public interest test. The only apparent challenge to this argument is the *Work Choices* period (an apparent aberration) — when the role of the statutory tribunal reviewing agreements and fixing minimum standards was marginalised and job security was largely non-existent — and consequently the voices of these workers were considerably weakened.

The provisions of the *Fair Work Act* appear on their face to provide considerable protection and support for the vulnerable and low paid (and thereby ensure that these workers are guaranteed a 'voice' under the current legislation). There are, of course, criticisms which could be, and have been, made of the content of the minimum standards, and how adequate those protections are. However, generally the award system, the legislated standards, the BOOT, unfair dismissal protection and a dedicated low paid bargaining stream confer a stronger voice to the weaker workers, returning to similar protection which existed prior to *Work Choices*. Our main concern, nevertheless, is that minimum standards in the NES are now fixed by statute, which has the undesirable consequence that these 'entitlements' may stagnate and are not subject to regular review — and thus may not be as effective as minimum standards developed under the previous Test Case process.

*The Hon Michael Kirby AC CMG**

# MARRIAGE EQUALITY: WHAT SEXUAL MINORITIES CAN LEARN FROM GENDER EQUALITY**


## Abstract

Dame Roma Mitchell, graduate and later Chancellor of the University of Adelaide, achieved many firsts in her life. These are described in the opening biographical note which demonstrates how she became a potent symbol of gender equality in the law in Australia. The author examines the still evolving story of marriage equality in Australia and the world and the lessons that advocates of this change can draw from the earlier movement for equality of women. He describes the divided decision of the New Zealand Court of Appeal in *Quilter* (1998), and the challenge this presented to the traditional approach to 'marriage'. He then identifies a series of statutory and judicial moves which have resulted, in less than 20 years, in expanding the availability of marriage to non-heterosexual couples in many jurisdictions of differing legal traditions. This list also includes instances where courts have rejected the concept. The author proceeds to catalogue medical research that suggests significant health benefits deriving from access to marriage status. He addresses the supposed justifications for denying this civic right to sexual minorities. Among the lessons that they can learn from the earlier feminist movement for reform are the need for role models, theoreticians, political supporters, international principles, cultural and social change agents and bipartisan support in politics. The article concludes that marriage equality represents a further frontier of fundamental human rights and legal equality upon which Dame Roma Mitchell's life can inspire and guide the present generation.


## I Roma Mitchell Remembered

We should remember, and take encouragement from, the life of Dame Roma Mitchell. She was a remarkable Australian and a leader in the cause for women's equality, including in the law.

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* Justice of the High Court of Australia (1996–2009); Australian Human Rights Medal (1991); President of the International Commission of Jurists (1995–98); Laureate of the UNESCO Prize for Human Rights Education (1998); Gruber Justice Prize (2010); Chair of the Commission of Inquiry of the United Nations Council on Human Rights on the Democratic People's Republic of Korea (2013–14).

** This is an edited version of Michael Kirby, 'Marriage Equality: What Sexual Minorities Can Learn from Gender Equality' (Speech delivered as the Dame Roma Mitchell Memorial Address, Law Institute of Victoria, Melbourne, Victoria, 2 March 2012).

The Hon Dame Roma Mitchell AC DBE CVO QC
Dame Roma Mitchell 1998 by Jessica Hromas
Type C Photograph
Collection: National Portrait Gallery, Canberra
Gift of the Hammond Care Group 1999

She was born in 1913 and educated in Roman Catholic schools in Adelaide. She was admitted to the Bar in 1934. In 1962, she was appointed Queen's Counsel, the first woman to receive that commission in Australia. This was the beginning of a string of firsts.

In 1965, she was appointed a Judge of the Supreme Court of South Australia, another first. In the 1970s, she chaired the Criminal Law Reform Committee of South Australia. This was where I first met her in 1975, when I was appointed inaugural Chairman of the Australian Law Reform Commission.

In 1981 she was appointed chair of the Commonwealth Human Rights Commission, a post she held until 1987. By 1983 she had retired from judicial office. However, in 1985 she was elected Chancellor of the University of Adelaide, another first for women. In 1991 she was appointed by the Queen as Governor of South Australia, still another first. She held that post until 1996, long enough to welcome me to Adelaide as a Justice of the High Court of Australia.

Most contemporary Australian lawyers, female and male, will not have known Dame Roma personally. I had that privilege. She was strong and assertive, with a formidable mind and a heart sensitive to the rights of women and of minorities. She received all the civil honours then available, including creation as a Dame Commander of the Order of the British Empire in 1982, and Commander of the Royal Victorian Order, a personal gift from the Queen conferred on her in 2000 when she was mortally ill.

When I visited Adelaide on the circuits of the High Court, I always requested to be accommodated in the chambers in a building adjoining the old Supreme Court in Victoria Square, which had been occupied by Dame Roma in her lifetime. By then, they were the chambers of Justice Margaret Nyland. On the wall, in pride of place, were two striking black and white photographs of Dame Roma: as a barrister and a judge. I refused the more senior chambers in the inner sanctum of the courthouse, to be in the room that she had inhabited. Somehow, I felt that the 'vibes' (which everyone knows are so important in decision making in the High Court) would reach me in that room. And so they did.

When Dame Roma died, it was a great compliment to me that I received from her executor a photograph of us both taken in younger days, which he said she had kept on display at her home. It is therefore a special pleasure for me to be the first man to deliver this lecture. We must all learn from her life and works and try to emulate her practical contributions to building a more just and equal society, under the rule of law.

## II Same-Sex Unions

I recently published a small book, *A Private Life*.[1] This provides a number of biographical sketches, although it stops short of deserving the title of an autobiography.[2] The

1 Michael Kirby (Allen & Unwin, 2011).

2 Ibid ix.

fourth chapter of the book is named for my partner of 43 years, Johan van Vloten.[3] It tells how we met and how we have stayed together ever since. The relationship was almost shipwrecked in the first minutes by my opening gambit (concerning the Nazi leader von Ribbentrop). It has never been formalised by marriage, or in any other way. But it is rock solid and a great blessing in my life, and in the lives of my family. Anyone who would deny or impede another human being having a loving, supportive, intimate companion on the journey through life is not a kind person.

In recent years, Johan and I have discussed whether, were marriage available to us, we would take the plunge.[4] Because our relationship has been tested in the furnace of life, including on a few nasty occasions, we have not hitherto felt the need for a formal ceremony to tell the world about our relationship. To that extent, I can approach the issue of marriage equality with a degree of dispassion. Both of us are strongly of the view that the legal status of marriage should be available to those men and women who qualify for it. As a legal status, established by federal legislation in Australia, it should not be denied or unavailable to a category of people because of their gender or sexual orientation.

As time goes on, we feel an increasing inclination to embrace the status of marriage ourselves when it becomes available, if only to express our recognition of those who have been struggling so hard to achieve that end. Most of the support is now found, as it should be, amongst heterosexual Australians. Increasingly, they feel uncomfortable living in a secular society where a legal status is denied to some of their fellow citizens because of a sexual orientation different from the majority. No reform on this topic can be achieved without the support of the heterosexual majority. Most homosexuals themselves derived, as I did, from a happy heterosexual marriage and family, with most of their acquaintances, colleagues and friends also in that category. I have found that straight friends are increasingly supportive of marriage equality in Australia.

Seemingly fearful of this trend, in 2004 during the Howard Government, the Federal Parliament enacted amendments to the *Marriage Act*, incorporating the express exclusion of marriage for same-sex couples and forbidding recognition in Australia of any such marriages occurring overseas.[5] Initially, these amendments were supported and upheld in this country, both by the Coalition parties and by the federal Labor governments led by Kevin Rudd and Julia Gillard. However, late in 2011 the federal platform of the Australian Labor Party was changed to include a commitment to marriage equality. Proposals to that end, and suggestions for a conscience vote, were quickly placed before the Federal Parliament. They have not yet been enacted; however the proponents are determined and have not given up. So it is timely to consider this issue in a context that honours an important champion of law reform, human rights and equality in Australia, Roma Mitchell.

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3 Ibid 65 ff.

4 M D Kirby, *Through the World's Eye* (Federation Press, 2000) ch 6.

5 *Marriage Act 1961* (Cth), as amended by the *Marriage (Amendment) Act 2004* (Cth), inserting the definition of 'marriage' in s 4 and inserting s 88EA.

Because this occasion is substantially one of lawyers, and not a political rally, it is appropriate to approach the subject from the standpoint of the legal and judicial developments that have occurred in recent years, relevant to the attainment of marriage equality around the world.

## III Early Decisions

From a legal perspective, the belief that marriage was available only to men and women in an opposite sex union was simply assumed, at least in the countries of the common law. So much was held in 1866 in the English decision of *Hyde v Hyde*.[6] At that time, such a stance was unremarkable because the criminal law outlawed sexual relationships between two men. It did so in a heavily punitive way, a situation that still obtains in most of the countries that derived their legal systems from British colonial masters.[7]

With the advent of substantial scientific research revealing that variations in sexual orientation and gender identity are not wilful antisocial 'lifestyles' but an unremarkable variation in nature (probably in most cases genetic), moves arose in Britain, Australia, and other jurisdictions to repeal the criminal sanctions, and otherwise to delete the legal discrimination against same-sex attracted individuals.[8] Once it became evident that legal disadvantages against sexual minorities should be repealed, the question was starkly presented as to whether their stable sexual and personal relationships, akin to marriage, should receive official and legal recognition. Whatever objections might exist to legal equality in this regard, on the part of some religious institutions and religious believers, the question was posed whether a secular society could justify such a differentiation. Was it not also a form of discrimination that should be repealed and replaced by equality, as had happened in relation to the criminal law and other laws concerning the rights and obligations of members of the sexual minorities?[9]

It was in this spirit that, in 1996, a lesbian couple in New Zealand claimed an entitlement to be married. Their claim was denied by a district marriage registrar, resulting in proceedings before the courts of New Zealand, and ultimately in the Court of Appeal.[10]

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6 (1866) LR 1 P & D 130; [1866] All ER Rep 175, 177 (Wilde JO).

7 Commonwealth Secretariat, Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform* (London, 2011). See the note in M D Kirby, 'Eminent Persons Group Reports to CHOGM' (2012) 86 *Australian Law Journal* 79.

8 These moves arose following the Wolfenden Report. See Kirby, above n 1, 25 ff.

9 See, eg, *Same Sex Relationships (Equal Treatment of Commonwealth Laws — General Law Reform) Act 2008* (Cth).

10 *Quilter v The Attorney General (NZ)* [1998] 1 NZLR 523 ('*Quilter*'). In 1993 in Hawaii, the State's highest court had held that limiting marriage to opposite sex couples violated the *Hawaii Constitution*: *Baehr v Lewin*, 852 P 2d 44 (Haw, 1993). However, this decision prompted a change to the *Hawaii Constitution* and enactment of the federal *Defense of Marriage Act*, 1 USC § 7, 28 USC § 1738C (1996).

The proceedings raised two questions. The first was whether, by interpreting the law in a non-discriminatory way, the gender neutral language of the *Marriage Act 1955* (NZ) could be read as applicable to the applicant couple. As in many of the following cases, the lead was taken by women. The applicants relied for their arguments upon principles and techniques developed earlier by the women's movement. They noted that, in many jurisdictions, the gender neutral word 'person' in legal profession statutes, had been interpreted as excluding women, so that female law graduates could not be admitted as legal practitioners.[11] Surely the law had learnt from its earlier errors. However, the Court of Appeal unanimously concluded that it was not possible, even using the *New Zealand Bill of Rights Act 1990* (NZ), to give a new interpretation to the *Marriage Act*, different from that which had previously assumed that marriage was limited to heterosexual (opposite-sex) couples.

The *New Zealand Bill of Rights Act* was the source of subsequent provisions of the *Human Rights Act 1998* (UK) and human rights legislation adopted in two jurisdictions of Australia, notably the Victorian *Charter of Human Rights and Responsibilities Act 2006*,[12] and the *Human Rights Act 2004* of the Australian Capital Territory.[13] Under such legislation, it remained for the Court to decide a second question, namely whether in denying marriage to a same-sex couple, the *Marriage Act* imposed impermissible discrimination on them. If so, the duty of the Court was to draw the discriminatory provision to the attention of Parliament, so as to afford it the opportunity to remedy the discrimination by modification of the law, if it so decided.

Upon this second question, the New Zealand Court of Appeal divided. The majority (Richardson P, Gault, Keith and Tipping JJ) held that there was no discrimination in denying legislative equality in marriage to same-sex couples as to heterosexuals. However, a powerful dissenting opinion on this question was written by Thomas J. He concluded that:

> as a matter of law the exclusion of gay and lesbian couples from the status of marriage is discriminatory and contrary to s 19 of the Bill of Rights. They are denied the right to marry the person of their choice in accordance with their sexual orientation.[14]

When I read *Quilter*, not long after its delivery, I confess to thinking that the majority of the Court of Appeal had reached the right conclusion. Transfixed by my past understanding of the legal definition of marriage that had previously prevailed, I did not ask the deeper questions explored by Thomas J. At that stage, I was nearing the thirtieth anniversary of my relationship with my partner. Yet the legal mental blinkers prevented my seeing what seemed to be clear to Justice Thomas. Time has vindicated

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11 *Re Goodell* 39 Wisc 232 (Wis, 1875) (Ryan CJ). For Australian cases, see Julian Disney et al, *Lawyers* (Lawbook, 1977) 185–6.

12 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

13 *Human Rights Act 2004* (ACT).

14 [1998] 1 NZLR 523, 528.

his analysis. My own was probably just another instance of my paradoxical legal conservatism, which is always a professional hazard for lawyers.[15]

*Quilter* was an early case. Yet soon the law began to change in many jurisdictions in the matter of the availability of marriage to sexual minorities. In the 1990s the Netherlands became the first country to enact a law 'opening up' marriage for same-sex couples. This initiative was quickly followed by similar legislation in Belgium, all the countries of Scandinavia, Canada, Spain, Portugal, South Africa, Argentina, 11 states of the United States, and the federal district in Mexico.

The story of this legal change is an interesting illustration of the way in which, in the law, an idea whose time has come quite quickly propels the forces of reform into action. Legislators and judges learn from each other once the new concept is propounded: presenting its rational arguments to the evaluation of unprejudiced minds.

## IV The Arc Bends to Justice

The story of the remarkable achievements of law reform in this regard, in little more than a decade, is told in another new book published by the International Commission of Jurists ('ICJ') in Geneva, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*.[16] The book is the more surprising to me because in the 1980s, as a Commissioner of the ICJ and later as President, I served on the Executive Committee and sought to persuade my colleagues to include issues of HIV status and sexual orientation on the human rights agenda of the organisation.

As I disclose, in the foreword written to the ICJ's book, my attempts in this regard were resisted by a distinguished human rights lawyer from a developing country. He declared that his country had no homosexuals. Their conduct was condemned by lawyers and religious leaders alike and completely alien to the local culture. Nonetheless, the ICJ agreed to my proposal and added the human rights issues of sexual orientation and HIV status to the Commission's programme. The new book is a product of ongoing research by the ICJ and by other international human rights bodies in this area. It demonstrates how international human rights jurisprudence can beneficially affect the thinking of lawyers everywhere, on issues of race, gender, sexual orientation and other common grounds of legal discrimination.

The cases collected by the ICJ include a chapter on 'Marriage'. That chapter draws attention to art 16 of the *Universal Declaration of Human Rights* which provides that 'men and women … have the right to marry and to found a family'.[17] A similar

15 A J Brown, *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011) 371 ff. In April 2013, a Bill to amend the *Marriage Act 1955* (NZ) was passed by a vote of 77 to 44 in the unicameral New Zealand Parliament, and became the *Marriage (Definition of Marriage) Act 2013* (NZ). It comes into effect on 19 August 2013.

16 International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (2011).

17 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 16.

provision appears in art 23 of the *International Covenant on Civil and Political Rights*.[18] Differentiation in the texts between the rights of 'persons' and the rights of 'men and women' has been invoked to justify confining marriage to heterosexual unions.[19] However, over the past 10 years, closer analysis of the nature, purpose, incidents, benefits and essential legal characteristics of 'marriage' has produced many court decisions in many lands. Increasingly they have upheld the principle of marriage equality both for opposite sex and same-sex couples.

The decisions upholding this conclusion and explained in the ICJ collection include:

(1) Canada, Ontario: *Halpern et al v Attorney-General of Canada* (Court of Appeal, 10 June 2003);[20]

(2) South Africa: *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* (Constitutional Court of South Africa, 1 December 2005);[21]

(3) Israel: *Ben-Ari v Director of Population Administration* (Supreme Court of Israel, 21 November 2006);[22]

(4) Iowa, USA: *Varnum v Brien* (Supreme Court of Iowa, 3 April 2009).[23] After the announcement of this decision, the Chief Justice and two Judges of the Supreme Court of Iowa were removed from office by popular vote, inferentially as a punishment for their judicial decision;[24]

(5) Portugal: *Acordio No 359/2009* (Constitutional Tribunal of Portugal, 2009 and 2010);[25]

(6) Argentina: *Freyre Elejandro v GCVA* (Administrative Tribunal of the Federal Capital, November 2009).[26] Following this decision and whilst an appeal was before the Constitutional Court, the Parliament of Argentina enacted marriage equality;

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18 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23.

19 United Nations, Human Rights Committee, *Views: Communication No 902/1999*, UN Doc A/57/40 (17 July 2002) [8.2] ('*Joslin v New Zealand*'). See also *Schalk v Austria* (European Court of Human Rights, Application No 30141/04, 24 June 2010) [56]–[63].

20 (2003) 65 OR (3d) 161.

21 2006 (1) SA 524 (Constitutional Court).

22 See International Commission of Jurists, above n 16, 354.

23 763 NW 2d 862 (Iowa, 2009).

24 M D Kirby, 'Judicial Independence: The United States Election Systems and Judicial Removals in Iowa' (2013) 36 *Australian Bar Review* 270.

25 See International Commission of Jurists, above n 16, 363.

26 Ibid 365.

(7) California, USA: *Perry v Schwarzenegger* (United States District Court, 4 August 2010).[27] This decision upheld a challenge to the validity of Proposition 8, a purported constitutional amendment of the State of California, which was held invalid as a violation of due process and the equal protection clause under the 14th Amendment to the United States Constitution. In February 2012, on appeal to the US Court of Appeals for the 9th Circuit, the first instance decision was upheld by the majority.[28] This decision has been appealed to the Supreme Court of the United States of America, and stands for judgment at the time of writing; and

(8) Mexico: *Accion de Inconstitucionalidad 2/2010* (Supreme Court of Justice, 10 August 2010).[29] This decision rejected a challenge to marriage equality as adopted in the Federal District Court, concluding that it was compatible with the constitutional provisions which protected marriage and the family in Mexico.

The collection assembled by the ICJ also includes a small number of cases where the judicial decision has gone against the arguments of equality, privacy and marriage rights, and rejected constitutional and other claims to same-sex marriage:

(1) Ireland: *Zappone and Gilligan v Revenue Commissioners* (High Court, 14 December 2006).[30] This case involved a refusal by the Irish revenue commissioners to allow tax allowances as a 'married couple' to a same-sex couple. The court relied on art 41 of the *Irish Constitution*, which mandated the State 'to guard with special care the institution of Marriage'. However, the court urged amelioration of the difficulties of same-sex couples by legislation. An appeal to the Supreme Court of Ireland was lodged, but in June 2012 the appellants withdrew the appeal and began a fresh challenge to the definition of 'marriage' in the High Court;

(2) Russia: In the *Marriage Case No 331-1252* (Moscow City Court, 21 January 2010).[31] The Court here upheld the refusal of the registration of a same-sex marriage under Russian legislation relating to marriage. It held that, although there was ambiguity in the *Family Code*, this did not provide grounds for concluding that same-sex couples were permitted to marry in the Russian Federation; and

(3) Italy: *Sentenza 28/2010* (Constitutional Court of Italy, 14 April 2010):[32] Although the Trento Court of Appeal in Italy had upheld the right of same-sex couples to be married, on the basis of the changes in society and social mores that showed that traditional family was no longer the only valid one, the Constitutional Court rejected this judicial reinterpretation. It held that the wider availability of marriage had not been contemplated when the enacted law was adopted.

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27 704 F Supp 2d 921 (ND Cal, 2010).

28 *Perry v Brown*, 671 F 3d 1052 (9th Cir, 2012).

29 See International Commission of Jurists, above n 16, 376.

30 [2008] 2 IR 417.

31 See International Commission of Jurists, above n 16, 369.

32 Ibid 370.

It must be accepted, in these and other cases,[33] that differing judicial opinions have been offered in the past decade. Nonetheless, the substantial tendency, evident in the foregoing cases, is in favour of the principle of marriage equality.

To the argument that 'marriage' has traditionally been reserved to heterosexual unions, many courts have pointed out that some 'traditions' need reconsideration in changing times, such as the earlier tradition (and in some jurisdictions law) forbidding or discouraging inter-racial marriages.[34] There have been many 'traditions' affecting women which have been changed by judicial and legislative decisions. These include the now shocking decisions that excluded women from classification as 'persons' who might be admitted to practise as lawyers,[35] as well as the strong and widespread resistance to demands of women to vote in parliamentary elections in respect of which New Zealand and Australia were foremost in reforming their laws and assuring all adult nationals full franchise equality.[36]

To the argument that marriage is limited to heterosexuals for the benefit of children, it is pointed out that many heterosexual marriages have no children. Some same-sex marriages today involve the nurturing of children by using scientific techniques available irrespective of sexuality. The Duchess of Alba, in Spain, recently re-married at the age of 85. No one questioned her right to do so because the blessing of children was unlikely to be fulfilled in her case.

To the contention that children must have a male and female parent, the plain fact is that this is no longer universally so. And no objective and accepted evidence has demonstrated that, if love and care are present, the children of same-sex unions are in any way harmed.

To the suggestion that a sexual minority is seeking to redefine 'marriage', the courts have pointed out that redefinition of legal rights are commonly a feature of changing times. The rights of Aboriginals, of Asian migrants, and of homosexuals themselves constitute Australian cases in point.

## V The Physical and Mental Advantages of Marriage

To adapt the words of President Obama, the arc of the law bends towards justice. Marriage tends to be beneficial for the individuals who chose its status. It is an affirmation of relationships before society. Such relationships are generally to the advantage of their participants and of society itself. They involve very substantial health benefits; as well as civic benefits in terms of the mutual support and protection

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33 Such as the important decision of the Massachusetts Supreme Judicial Court in *Goodridge v Department of Public Health*, 798 N E 2d 941 (Mass, 2003).

34 See, eg, *Loving v Virgina*, 388 US 1 (1967).

35 See, eg, *Re Goodell*, 39 Wisc 232 (Wis, 1875) (Ryan CJ). Cf Daphne Kok, *Women Lawyers in Australia* (Lawasia, 1975) 4.

36 See, eg, the *Australian Constitution* s 30, which provided the basis for the right of women to vote in Australian federal elections as equal franchise spread to the States.

provided to individuals within marriage. This is why the American Medical Association, in a policy statement, updated in 2011, resolved:

> Our American Medical Association:
>
> (1) recognizes that denying civil marriage based on sexual orientation is discriminatory and imposes harmful stigma on gay and lesbian individuals and couples and their families;
>
> (2) recognizes that exclusions from civil marriage contributes to healthcare disparities affecting same-sex households;
>
> (3) will work to reduce healthcare disparities amongst members of same-sex households including minor children; and
>
> (4) will support measures providing same-sex households with the same rights and privileges to healthcare, health insurance and survivor benefits, as afforded opposite-sex households.[37]

There have been similar resolutions by the American Psychiatric Association (2005); the American Academy of Pediatrics (2006); the American College of Obstetricians and Gynecologists (2009); the American Psychological Association (2011); the American Psychological Society (2011); and various state health associations and other bodies. In 2011, the *British Journal of Psychiatry* concluded:

> This study corroborates international findings that people of non-heterosexual orientation report elevated levels of mental health problems and service usage, and it lends further support to the suggestion that perceived discrimination may act as a social stressor in the genesis of mental health problems in this population.[38]

## VI Marriage in a Secular Polity

Against such findings, repeatedly reaffirmed overseas and in Australia, the issue is starkly presented. A large part of the opposition to same-sex marriage is expressed by religious bodies and individuals, expressing their views by reference to their religious doctrines. However, in a secular society, such doctrines ought not to be imposed by the civilian laws. Religious bodies could be exempted from an obligation to perform weddings to which they object. Such an exemption already exists in s 47 of the Australian *Marriage Act 1961* (Cth). Given the steadily declining numbers of Australians who identify with religions and who regularly attend religious observance, and given the fact that only about one third of marriages today in Australia are solemnised in a religious ceremony, the imposition of such religious views about the meaning of 'marriage' upon everyone in society ought not

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37 American Medical Association, *Healthcare Disparities in Same-Sex Partner Households* (Policy No H-65.973, American Medical Association, 2011) <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.page>.

38 Apu Chakraborty et al, 'Mental Health of the Non-Heterosexual Population of England' (2011) 198(2) *British Journal of Psychiatry* 143, 143.

to be accepted by the Federal Parliament. If it is not actually unconstitutional, it is certainly difficult to reconcile with the underlying premise that motivated the inclusion of s 116 in the *Australian Constitution* reflecting its essentially secular character. In such circumstances, the central question is not whether same-sex couples have justified a 'redefinition' of marriage. It is whether, in the face of requests for equal access to a legal status provided by a law of the Federal Parliament, the denial of its availability to couples on the grounds of their gender or sexual orientation can be justified any longer.

As in the case of reforms to the laws sought by women, the longer one reflects upon the refusal of equality in the matter of marriage to same-sex couples, the more one is inclined to the opinion that opponents are simply prejudiced, discriminatory, formalistic, and unkind. They have realised that there are gays and lesbians out there, but they approach their claims to legal equality with misgiving, dogmatic reluctance, and distaste. They think that fellow citizens in the sexual minorities should be permanently treated as second class and that equality for them is not really appropriate or, as I was told by a Minister in the matter of my own pension rights at an earlier stage of the journey, 'not a priority'. Anyone with familiarity of the struggle for legal equality in relation to women's rights will be familiar with these attitudes. Many of them today are felt and voiced by the opponents of change.

## VII Lessons from Gender Equality

So what are the lessons that we can draw for the proposal for marriage equality from the earlier moves in the law to repair the discrimination against women? Like members of the sexual minorities, women earlier challenged patriarchal, traditional, and sometimes religious prejudice. They have questioned the strictly binary classification of the human species. They confronted biological and social realities in a way that some people find threatening and unacceptable.

These questions were running through my mind when I was preparing a foreword to the fourth edition of yet another text, *Law in Context,*[39] written by Stephen Bottomley and Simon Bronitt. This text includes illuminating chapters on racial and gender discrimination.[40] The authors point out that among the early proponents in English law for the removal of discrimination against women was John Stuart Mill. It was Mill, following Jeremy Bentham, who questioned aspects of the English law that preserved injustice towards women in a way that could not be rationally justified.

Bentham was one of the very few writers of the early 19th century who raised serious doubts about the criminalisation of homosexuals. From these early critics arose first the move to secure the separate property rights of married women,[41] followed by female suffrage and reform of the law of marriage in the 19th century, and secondly

39 Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012).

40 Ibid 68 ff.

41 See *Garcia v National Australia Bank* (1998) 194 CLR 395, 422–3 [66].

moves to remove the criminal sanctions on homosexuals. Both reform movements were based upon a liberal philosophy concerning the role of the state in relation to the individual. In the 20th century, the demands for the removal of the remaining discriminatory laws against women have given rise to feminist legal theory. This presents in various categories, including liberal feminism, radical feminism, cultural feminism, and socialist–Marxist feminism.[42] Nowadays, there is a similar growth of critical analysis of the law from the standpoint of sexual orientation, giving rise to so called 'queer' legal theory: a word deliberately chosen with the aim of disempowering opponents of change by assuming control of their insulting language.

Where are the avenues in which the demands for full equality on the part of sexual minorities can profit from the experience of the women's movement that went before? I would include the following:

- *Role models and examples*: Just as in the removal of gender discrimination, so in the case of sexual orientation it is essential to find those who will stand out, as Dame Roma Mitchell did. It needs those who will put their heads above the parapet and become the first in various categories of the law. Nowadays, it is much less remarkable to find leaders of the legal profession appointed to judicial office who are openly homosexual. So far, we have not had a transgender judge. However, New Zealand can boast a transgender member of parliament, which is the more surprising given the electoral necessities of democracy. Removing the stereotypes, including in the law, was essential for women's equality, dignity, and equal opportunity in the legal profession. The participation of women who demonstrated their full capacity to perform at the very highest level, as Dame Roma did, undermines the mythology of stereotypes. It makes it easier for those who follow.

- *Theoreticians*: Just as feminist legal theory can boast distinguished international and local theoreticians, who present telling critiques of many aspects of substantive law and its institutions, so it must be with sexuality. There are such writers in the law, however they are relatively few so far, at least in Australia. Necessarily, their writings will be controversial at first and, like Justice Thomas (a heterosexual man), often in advance of group thinking, even amongst those most affected. In Australia, one can mention the leadership of Dennis Altman of La Trobe University,[43] whom I knew in the 1960s when we were both participants in student politics. He has shown remarkable courage and insight in his writings and analysis. And in the law, important scholars such as Jenny Millbank and Chris Ronalds are undoubted leaders, equally at home on questions of gender and sexuality discrimination.[44] There are many others.

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42 Bottomley and Bronitt, above n 39, 70.

43 Dennis Altman, *Homosexual: Oppression and Liberation* (Angus & Robertson, 1972).

44 See Chris Ronalds, 'Discrimination' in Ian Freckleton and Hugh Selby (eds), *Appealing to the Future — Michael Kirby and His Legacy* (LawBook, 2009) 329 ff.

- *Political leaders*: There is also a need for political leaders to emerge so as to disempower opposition in the legislature, where it persists, and to confront discriminatory attitudes and discomfitures in the places where laws are made. Women in high political office are now much more common. At the time of writing women occupy the posts of Australia's Head of State, Governor-General, Prime Minister and Federal Ministers, State Premiers and many other leaders, three Justices of the High Court, a Federal Chief Justice, State Chief Justice and three State Presidents of the Court of Appeal.

  Nevertheless, openly gay political leaders in Australia are few and far between. Don Dunstan, the high achieving Premier of South Australia, was at least bisexual, but not openly so, essentially to the end of his life. Neal Blewett, whose outstanding work as Federal Minister for Health, when HIV/AIDS appeared, notched up one of the great political achievements of the 20th century. Bob Brown, as then leader of the Australian Greens Party, was and remains open and comfortable about his sexuality. So was Senator Brian Greig of the Australian Democrats, and so is Senator Penny Wong of the Australian Labor Party. Yet, so far, this has been a comparatively rare event in any of the major political groupings. The absence of a clearly visible representation of sexual minorities in our legislatures is of itself a curiosity. It suggests that elected members of parliament, like professional footballers, are usually unwilling to identify themselves openly, for fear of a professional, media, or popular backlash. The big reforms affecting gender and sexual orientation must come from elected parliaments, not the judiciary in Australia. This is why openness and identification on the part of the members of the legislature is especially important.

- *International moves*: The local developments to tackle discrimination on the grounds of sex were stimulated, supported, and underpinned by international movements for reform and ultimately treaties. Most especially, the *Convention for the Elimination of all Forms of Discrimination Against Women*,[45] when ratified by Australia, provided a strong criterion of law against which to measure Australian developments.[46]

  So far there is no equivalent international treaty that specifically and comprehensively addresses discrimination against, and the inequalities faced by, sexual minorities. The path towards such a treaty has been started, including by the ICJ itself. The ICJ was instrumental in promoting and advancing a global expression of sexuality rights in the form of the *Yogyakarta Principles*.[47] Although these

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45 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

46 Bottomley and Bronitt, above n 39, 96. See also Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (Lexis Nexis, 2009); Margaret Thornton, 'The Public/Private Dichotomy' (1991) 18(4) *Journal of Law and Society* 448, cited in Bottomley and Bronitt, above n 39, 99.

47 International Commission of Jurists ('ICJ'), *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007).

are a long way from translation into binding international law, they do provide a framework and state a series of immediate goals. The heads of several United Nations agencies, from the Secretary-General down, have spoken out strongly against discrimination against sexual minorities, stigma, and the laws of 80 countries that still criminalise sexual minorities. Sadly, the moves to secure international recognition of their basic rights are contested by religious leaders and representatives, including the Holy See and the International Islamic Conference. To the opponents I would recommend another book, also with a foreword by me, examining the scriptural bases of religious condemnation of homosexuals: Nigel Wright (ed), *Five Uneasy Pieces: Essays on Scripture and Sexuality*.[48] It is a book that reveals the same controversies of interpretation in theology as we know in the law, in relation to the interpretation of contested legal texts.

- *Cultural and social change agents*: As with the demand for full equality for women, there needs to be a popularisation of cultural change and understanding. It can begin in the humblest possible way, through soap operas on television and the provision of equal voices in the mass media. I have always thought that the inclusion in the 1970s television drama *Number 96* of the homosexual character Don Finlayson (portrayed by actor Joe Hasham, a heterosexual man) had a greater impact than hundreds of learned articles and lectures. As with life as lived by women, popular culture and social networks can bring images, insights and visions of injustice to a mass audience. There is a need for these messages, illustrating the injustices in the present boundaries of gender and sexuality.

- *Science and health*: As in the case of women's health, so also in the case of sexual minorities. There are serious deprivations and injustices which the law needs to address. My participation in the United Nations Development Programme's Global Commission on HIV and the Law taught me that that law can play a useful role in reducing the toll of HIV, including amongst sexual minorities. But it can also play a negative role in increasing stigma, diminishing the availability of essential drugs and impeding the reception of messages, essential to an effective response to the spread of HIV. The increasing evidence of violence against homosexuals and transsexuals demands a proper response from a just national and international legal order. So does the increasing realisation of the toll which the current state of the law inflicts upon young people, including in Australia, resulting in youth depression, drug dependence and suicide.[49]

- *Coming out*: In the case of gender, it is commonly impossible for a woman to successfully disguise her gender; although some cases do exist. Not so with sexual minorities. Many, even in relatively enlightened Australia, still do so. Many judges of my acquaintance fail, or refuse, to identify their sexual orientation or

48 N Wright (ed), *Five Uneasy Pieces: Essays on Scripture and Sexuality* (ATF Theology, 2012).

49 Global Commission on HIV and the Law, *HIV and the Law: Rights, Risks and Health* (2012) 44–53. See also National Centre in HIV Social Research, *Impact of Alcohol and Drug Use in Diagnosis and Management of Depression in Gay Men Attending General Practice* (2011).

to acknowledge it publicly, whilst being quite happy to do so in private. In my book, *A Private Life*, I recount the example of a judge who strongly cautioned me against being open about my sexual orientation and my relationship with Johan, although it had long been a 'non-secret', after AIDS came along and we became involved in responding to the epidemic then falling heavily in Australia upon gay men. The judge warned me that we would eventually pay a price if we were open about our sexuality. When Senator Bill Heffernan made his speech in the Senate, the judge said that he had 'told you so'. To this day, he is not open about his sexual orientation.[50] It is hard for me to believe that openness could now harm the judge personally or professionally. Why does he go on with his 'secret' life? Yet he is not alone. If only all the members of the sexual minorities in Australia stood up, the whole shabby enterprise of pretending would be over. One can hardly blame heterosexual people for holding discriminatory attitudes when secrecy is evident in the conduct of some of the highest and most respected public office holders, professionals, sports people, and business leaders in Australia who still go along with the policy of secrecy. This is where sexual orientation is different and special. Bound up in openness, and comfort within one's own skin, is acceptance and a perception of normality. But this will not happen until pretending is no more. Then honesty, scientific truth, and rationality will rule the world.

- *Bipartisanship*: To a substantial extent, reforms such as those achieved concerning women in Australia have happened because of bipartisan political support. Governments formed from both major political groupings in Australia have been resolute in the appointment of women judges, and the removal of specific statutory sources of legal discrimination. The issue of marriage availability to same-sex attracted couples ought to be one of those issues that are exempt from party political divisions. As the debates of the Australian Labor Party concerning the ALP national platform show, differences exist in most political parties, often based on religious affiliation and tradition or social attitudes and personal experience. There is no inherent reason why those who are politically conservative should necessarily oppose legislation for marriage equality. On the contrary, upon one view, encouraging couples in stable long-term relationships to marry may be seen as a proper modern policy objective of right of centre political groupings. It is harmonious with notions of social stability and individual inter-dependence. This point was made by the British Prime Minister, the Rt Hon David Cameron, at the Conservative Party Conference in England in 2011. Relevantly, he said that his party was 'consulting on legalising gay marriage'.[51] And he explained:

> to anyone who has reservations, I say: Yes, it's about equality, but it's also about something else: Commitment. Conservatives believe in the ties that bind us; that

50 Kirby, above n 1, 185 ff. For a description of the Heffernan events, see A J Brown, above n 15, 338 ff.

51 David Cameron, 'Conservative Party Conference (Leader's Speech)' (Speech delivered at the Conservative Party Conference, Manchester Central Convention Complex, 5 October 2011) <http://www.totalpolitics.com/speeches/conservative/conservative-party-conference-leaders-speeches/260902/david-camerons-speech-to-conservative-party-conference.thtml>.

> society is stronger when we make vows to each other and support each other. So I don't support gay marriage despite being a Conservative. I support gay marriage because I am a Conservative.[52]

One must hope that a similar attitude will eventually emerge in Australia. And that all parliamentarians will enjoy, and exercise, the freedom to give effect to that view if they truly hold it. Not to keep it closeted and secret, like some dark shameful error or moral blemish, to be hidden from the light of truth and rationality. There has been too much of that attitude, for too long. I know, because for years that was the place in which the earlier laws confined me.

## VIII A Further Frontier of Equality

If Dame Roma Mitchell were alive today, with the knowledge and awareness of this generation, I believe that she would agree with these opinions. I hope that those who hear and read them will do so. I have addressed a further frontier of fundamental human rights and legal equality. There are, of course, powerful adversaries to change. Sadly, many of them are found in religious communities, unenlightened because of the present formalism of their leaders unwilling to let go old beliefs that cannot now stand with objective science, rationality, and lived experience. Change will come in Australia, including in the matter of marriage equality. And when it does, we will look back on the present state of the law that expressly enshrines inequality in the Australian federal statute book (as we now do on the old criminal laws against sexual minorities) with embarrassment, shame, and ultimately astonishment.

52 Ibid.

*John V Orth**

# 'THE RELEASE OF ENERGY': REFLECTIONS ON A LEGAL HISTORY TROPE**

ABSTRACT

Historians of American law, particularly of American law in the nineteenth century, often summarise its development with the phrase 'the release of energy'. This paper traces the prevalence of that trope and compares it with AV Dicey's influential periodisation of English legal history. In Dicey's uncomplicated view, Tory repression yielded to the logic of Liberal Benthamism, which swept away statutory 'restraints on individual liberty', until at last Socialism subordinated the individual to the state. If energy could be released in nineteenth century England by the repeal of statutes, in contemporary America, its release required an ill-assorted pairing of laissez-faire judicial doctrines with legislation that subsidised desired behavior. The story was further complicated in America by federalism, which contributed to competition among states for the most attractive (from one point of view or another) set of legal rules, derogatively known as 'the race to the bottom'. Of course, 'the release energy' can equally describe legislative programs less likely to appeal to Victorian values, as illustrated by the permissive culture of modern-day Las Vegas, the product of the repeal of restrictive social legislation.

> Few discoveries are more irritating than
> those which expose the pedigree of ideas.
> — Lord Acton***

Historians of American law, particularly of American law in the nineteenth century, often summarise its development with the phrase 'the release of energy'. Bernard Schwartz in his mammoth volume, *Main Currents in American Legal Thought* (1993), proclaims that 'individualism, fostered by the

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*** John Emerich Edward Dalberg-Acton, 'Sir Erskine May's Democracy in Europe' in John Emerich Edward Dalberg-Acton, *The History of Freedom and Other Essays* (John Neville Figgis and Reginald Vere Laurence eds, Macmillan, 1907) 61, 62.

power to make contracts freely, supplied the motive force for the needed mobilization and release of energy'.[1] Lawrence Friedman in his path-breaking *History of American Law* (1973) describes the first half of the nineteenth century as 'a period of promotion of enterprise, of the release of creative energy; government, reflecting its powerful constituencies, wanted business and the economy to grow; where this required subsidy or intervention, no overriding theory held government back'.[2] Turning to the second half of the nineteenth century, Kermit Hall in *The Magic Mirror: Law in American History* (1989) describes a federal policy of promoting 'the release of individual creative economic energy by placing the nation's natural wealth at the people's disposal',[3] while in the states 'the release of creative economic energy that characterized state economic policy in the [pre-Civil War] years grew stronger after Appomattox'.[4]

The provenance of this trope may be traced to Willard Hurst, the dean of American legal historians, whose essay on the subject, appropriately titled 'The Release of Energy', leads off his foundational study, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956). The first 'working principle' of American law in the period, according to Hurst, was that 'the legal order should protect and promote the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression'.[5] 'Not the jealous limitation of the power of the state', Hurst reiterates a few paragraphs later, 'but the release of individual creative energy was the dominant value'.[6]

A V Dicey had earlier said much the same thing about the history of English law in the nineteenth century. In his influential *Lectures on the Relation Between Law and Public Opinion*, delivered at Harvard in 1898 and published in 1905, he too had described a dynamic of repression and release.[7] In Dicey's uncomplicated

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1 Bernard Schwartz, *Main Currents in American Legal Thought* (Carolina Academic Press, 1993) 193; see also at 22–3 ('The challenge of the untamed continent required a release of Americans' innate capacities; the way to such release was to be a conception of property that catered to enlightened self-interest').

2 Lawrence M Friedman, *A History of American Law* (Simon & Schuster, 1973) 157.

3 Kermit L Hall, *The Magic Mirror: Law in American History* (Oxford University Press, 1989) 192; see also at 206 (The *Sherman Antitrust Act of 1890*, ch 647, 26 Stat 209 was 'at odds with the promotional role (the release of creative economic energy) that Congress was pursuing elsewhere'.).

4 Ibid 192.

5 James Willard Hurst, *Law and the Conditions of Freedom: In the Nineteenth-Century United States* (University of Wisconsin Press, 1956) 6. Friedman expressly acknowledges Hurst as the source of the phrase in the second edition of his book: Lawrence M Friedman, *History of American Law* (Simon & Schuster, 2nd ed, 1985) 177.

6 Hurst, above n 5, 7.

7 A copy of A V Dicey's syllabus for the Harvard lectures, delivered in October 1898, entitled 'Development of English Law During the Nineteenth Century in Connection With the Course of Public Opinion', is preserved in the collection of the Harvard Law Library ('Syllabus'). The lectures eventuated, first, in the publication of an article

view, nineteenth century English legal history could be divided into 'three periods, during each of which a different current or stream of opinion was predominant, and in the main governed the development of the law'.[8] Tory repression, with which the century opened, eventually yielded to the logic of Liberal Benthamism, which 'swept away restraints on individual energy',[9] until at last Collectivism subordinated the individual to the state. Whatever else may be true of his legacy, Dicey's periodisation left a permanent mark on English history, not just legal history.[10] Even Friedrich Hayek in *The Road to Serfdom* (1944) got in the game: 'We had before [World War II] once again reached a stage where it is more important to clear away the obstacles with which human folly has encumbered our path and to release the creative energy of individuals than to devise further machinery for "guiding" and "directing" them'.[11] And the conservative historian Andrew Roberts recently made the claim that 'capitalism, when allied with the right to own secure property and the rule of law, has unleashed the energy and ingenuity of Mankind' and 'forms the basis of the English-speaking peoples' present global hegemony'.[12]

Born in 1835, after the close of the period of repression, Dicey looked back on the first phase of nineteenth century English law with the detachment characteristic of a succeeding generation. As to the second and third epochs, which he lived through, Dicey was less objective. Bentham, as Dicey understood him, was his intellectual hero, and individualism was for Dicey, as for many of his contemporary middle-class Liberals, the summum bonum. The Benthamite project, as it came to be implemented by the master's disciples, consisted primarily of a legislative agenda,[13] as was to be expected from the followers of a man who contemptuously dismissed 'judge-made law' as law made 'on the same principle as a man makes laws for his dog — he waits till the dog has done something he does not like and then punishes him for it'.[14]

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in the *Harvard Law Review*, A V Dicey, 'The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century' (1903) 17 *Harvard Law Review* 511, then in the book, A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (Macmillan, 1905). A second edition of the book appeared in 1914, unchanged and with the same pagination, but with a lengthy and significant introduction.

8 Dicey, *Law and Public Opinion*, above n 7, 62.

9 Ibid 64.

10 See, eg, Morris Ginsberg (ed), *Law and Opinion in England in the Twentieth Century* (Stevens, 1959); Samuel H Beer, *British Politics in the Collectivist Age* (Knopf, 1965).

11 F A Hayek, *The Road to Serfdom* (Routledge & Kegan Paul, 1944) 261.

12 Andrew Roberts, *A History of the English-Speaking Peoples Since 1900* (Phoenix Press, 2007) 39.

13 See S E Finer, 'The Transmission of Benthamite Ideas 1820–50' in Gillian Sutherland (ed), *Studies in the Growth of Nineteenth-Century Government* (Routledge & Kegan Paul, 1972) 13.

14 John Bowring (ed), *Works of Jeremy Bentham* (William Tait, 1843) vol 5, 235–6. Even John Austin, one of the master's most loyal followers, thought he carried his contempt for judicial legislation too far: 'I by no means disapprove of what Mr Bentham had

As a man, if not as a scholar, Dicey regretted the trajectory of legal history that he described in his lectures. Having risen from torpor and repression to energetic individualism, English law was now fast declining into collectivism. From his vantage point at the end of the nineteenth century, Dicey looked back with longing at the Age of Bentham, which coincided with his own coming of age and maturity, as the Golden Age of English law. As he freely admitted, he borrowed the image of the liberating force of Benthamism from a now forgotten legal scholar, Sir Roland Knyvet Wilson, whose *History of Modern English Law* had appeared in 1875.[15] Wilson in turn had attributed it to Sir Henry Maine.[16] Dicey's only original contribution to the tripartite scheme that he made famous was his identification of the dawning Age of Collectivism.

The turning points in Dicey's history are marked by statutes; in fact, by statutes concerning what was the central issue in English society and economy in the nineteenth century, the position and power of labor. The repeal in 1824 and 1825 of the Combination Acts, which outlawed trade unions, marked the beginning of the transition to Benthamism.[17] At Harvard, Dicey apparently described the obscure *Molestation of Workmen Act 1859*, which somewhat liberalised the law concerning strikes and picketing, as the morning star of collectivism,[18] although by the time he prepared his lectures for the press in 1905, he chose the more credible date of 1870, the eve of major legislation on labor organisations: the *Trade Union Act 1871*, the *Conspiracy and Protection of Property Act 1875*, and the *Employers and Workmen Act 1875*.[19]

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chosen to call by the disrespectful, and therefore, as I conceive, injudicious, name of judge-made law'. John Austin, *The Province of Jurisprudence Determined* (H L A Hart ed, Weidenfeld & Nicolson, 1954) 190–1.

15 A V Dicey, *Law and Public Opinion*, above n 7, ix (Preface to the First Edition); Sir Roland Knyvet Wilson, *History of Modern English Law* (Rivingtons, 1875).

16 Wilson chose as the epigraph of his book a sentence from Maine's contemporary *Lectures on the Early History of Institutions* (J Murray, 1875) 397: 'I do not know a single law-reform effected since Bentham's day which cannot be traced to his influence'. But Maine had long claimed that it was Bentham who had opened the floodgates; 'Bentham made the good of the community take precedence of every other object, and thus gave escape to a current which had long been trying to find its way outwards': Sir Henry Sumner Maine, *Ancient Law* (J Murray, 1861) 46.

17 *Combination of Workmen Act 1824*, 5 Geo 4, c 95; *Combinations of Workmen Act 1825*, 6 Geo 4, c 129. See John V Orth, 'The British Trade Union Acts of 1824 and 1825: Dicey and the Relation Between Law and Opinion' (1976) 5 *Anglo American Law Review* 131.

18 22 Vict, c 34. Dicey, Syllabus 4 (dating the third period, 'the period of legislation of trade combinations', 1859–75). On the 1859 Act, see John V Orth, 'English Law and Striking Workmen: The Molestation of Workmen Act, 1859' (1981) 2 *Journal of Legal History* 238.

19 *Trade Union Act 1871*, 34 & 35 Vict, c 31; *Conspiracy and Protection of Property Act 1875*, 38 & 39 Vict, c 86; *Employers and Workmen Act 1875*, 38 & 39 Vict, c 90. See John V Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721–1906* (Oxford University Press, 1991) 136–52.

Ironically, what so impressed and inspired Dicey about the Benthamite legislative program was not the social engineering of the New Poor Law,[20] but the removal of 'every kind of oppression' on the expression of 'individual energy'.[21] The image is of a pent-up force released by the repeal of repressive legislation. Certainly the fifty years following 1825 witnessed an extraordinary burst of parliamentary activity, and just as certainly the same years saw exceptional development — political, social, and economic. Not only were the Combination Acts repealed, restraints on Catholics removed,[22] the franchise broadened,[23] and the Corn Laws repealed,[24] but legislation also encouraged the private ordering of the economy. The mid-century Companies Acts extended the opportunity to create limited liability companies.[25] 'In the name of freedom of contract', Dicey continued, 'the crimes of forestalling and regrating and of usury ceased to exist; in 1846 and 1849 the Navigation Laws were repealed'.[26] Dicey implied that law, specifically statute law, and more specifically statutes of repeal, caused the dramatic advance of English society, that all this could not have happened if parliament had not been awakened from its Tory stupor, stung into action by Benthamite gadflies.

In America the story is more complicated. If in nineteenth century England energy could be released by repealing statutes, in contemporary America its release, as we have seen, required an ill-assorted combination of creative judicial decisions and legislation offering subsidies of one sort or another. Even as English courts, increasingly aware of the implications of parliamentary supremacy, were becoming reluctant to make new law, American courts were embarking on a remarkable period of judicial creativity, developing new doctrines of tort and property, and engrafting (to use Justice Story's metaphor) a modern commercial law on the old stock of the common law.[27] Massachusetts Chief Justice Lemuel Shaw's decision in *Farwell v Boston & Worcester Railroad* (1842) relieved railroads, then a new and untested means of transportation, of the costs of industrial accidents if the cause could be attributed to the fault of a 'fellow servant'.[28] New York's Court of Appeals in an influential decision curtailed manufacturers' tort liability by refusing to allow an

20 *Poor Law Amendment Act 1834*, 4 & 5 Wm 4, c 76.

21 Dicey, *Law and Public Opinion*, above n 7, 217.

22 *Roman Catholic Relief Act 1829*, 10 Geo 4, c 7.

23 *Reform Act 1832*, 2 Will 4, c 45.

24 *Importation Act 1846*, 9 & 10 Vict, c 22.

25 *Joint Stock Companies Act 1856*, 19 & 20 Vict, c 47; *An Act to Amend the Joint Stock Companies Act 1856*, 20 & 21 Vict, c 14; *Companies Act 1868*, 25 & 26 Vict, c 89.

26 Dicey, *Law and Public Opinion*, above n 7, 190 (footnotes omitted). See *Forestalling, Regrating, Etc, Act 1844*, 7 & 8 Vict, c 24; *An Act to Repeal the Laws Relating to Usury and to the Enrolment of Annuities 1854*, 17 & 18 Vict, c 90; *Navigation Act 1849*, 12 & 13 Vict, c 29.

27 Joseph Story, 'Growth of the Commercial Law' in William W Story (ed), *Miscellaneous Writings of Joseph Story* (Little, Brown & Co, 1852) 269, 272.

28 45 Mass (4 Metc) 49 (1842).

action by an injured consumer in the absence of privity of contract.[29] Property, once conceived in patrimonial and static terms, came to be seen as a dynamic asset to be exploited, leading to pro-productive rules favoring prior appropriation of water and fugitive minerals such as oil and natural gas, the refusal to recognise easements for light and air, and the abandonment of traditional restraints in the law of waste. The list is not complete — and probably never will be if, as Morton Horwitz maintains, 'Willard Hurst's famous phrase' can equally describe judicial action or 'judicial refusal to act'.[30]

The awesome power of judicial review gave American judges an unusual opportunity to sweep away restraints. In *Gibbons v Ogden* (1824), 'the Steamboat Case', the Marshall Court struck down a state-created monopoly,[31] and in the celebrated *Charles River Bridge Case* (1837), the Taney Court cabined the rights of vested property in order to keep open the opportunity for technological advancement, a vivid illustration of the power of 'creative destruction'.[32] But the most dramatic judicial intervention, of course, was the discovery in the Due Process Clause of a constitutional guarantee of freedom of contract.[33] Yet, even as American courts were constitutionalising 'Mr Herbert Spencer's *Social Statics*' — to borrow Oliver Wendell Holmes' famous conceit[34] — American legislatures were enthusiastically intervening in the market with give-aways to business in the form of public property, exemptions from taxation, or guarantees of loans. Huge incentives were offered and vast improvements undertaken. English legislation released energy by freeing it, American legislation by paying for it.

The American story is further complicated by the federal system, which permitted competition among states for the most attractive (from one point of view or another) set of legal rules. In the late nineteenth century, New Jersey and Delaware ran a 'race to the bottom' for the privilege of chartering corporations — and winning the associated economic benefits.[35] Corporate energy may be released by removing government regulations — not all of them a bad idea. And sweeping away restraints

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29 *Thomas v Winchester*, 6 NY 397 (1852).

30 Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press, 1977) xv.

31 22 US 1 (9 Wheat) 1 (1824).

32 *Proprietors of Charles River Bridge v Proprietors of Warren Bridge*, 36 US (11 Pet) 420 (1837). See generally Stanley I Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (Lippincott, 1971).

33 See John V Orth, *Due Process of Law: A Brief History* (University Press of Kansas, 2003) 58–66.

34 *Lochner v New York*, 198 US 45, 75 (1905) (Holmes J, dissenting).

35 In 2011 it was estimated that '900,000 businesses are incorporated in Delaware, including half of all publicly traded companies and 63 percent of the Fortune 500 [list of top 500 US closely held and public corporations compiled by *Fortune Magazine*]. Franchise taxes contribute 21 percent of the states revenue': Rita Farrell, 'At Top of Delaware Chancery Court, Adherence to Tradition', *New York Times* (New York), 7 July 2011, B4.

on individual energy, the hallmark of Benthamism according to Dicey, can equally describe legislative programs unlikely to appeal to Victorian values. It can describe, for example, Nevada in the twentieth century as aptly as England in the Age of Reform. With permissive divorce laws, relaxed marriage requirements, legalised gambling, and the option in most counties to permit prostitution, Nevada has energetically exploited its law-making, or rather its law-repealing, advantages.[36] No one can visit Las Vegas today without sensing a certain 'release of energy'.

* * *

In our increasingly globalised economy it is conventional wisdom that legal arrangements can help or hinder, perhaps even prevent, social and economic development. The emphasis now is not particularly on statutes, either of adoption or repeal. While the modern agenda does include sweeping away restraints and is critical of subsidies or other interventions in the market, the release of energy (although it is not usually called that) is more often said to depend upon the establishment of 'the rule of law' — a concept, incidentally, for which Dicey is commonly given credit, although he borrowed it from the distinguished Australian jurist W E Hearn.[37] Rather than insist on the adoption of specific rules, either by legislators or judges, business today is more likely to insist that impartial courts, capable of rendering effective judgments and applying stable rules concerning contracts and property, create the most favorable conditions for economic development.[38] Indeed, if the Coase Theorem is to be believed, 'in the absence of transaction costs, it does not matter what the law is'.[39]

This is not the place to enter into a discussion of developmental economics — nor am I the person to do so — but I will venture to say that I find the 'release of energy' to be an unhelpful trope in legal history. As the American story makes plain, energy can be released by repealing statutes or by adopting them. It can be released by legislatures or by courts. It can be released by changing the law or by leaving it unchanged. To the extent that it means 'the power to make contracts freely', it may be no more than a polite expression for laissez-faire. To the extent that it

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36 See Lawrence M Friedman, *American Law* (Simon & Schuster, 1984) 131–2. For other examples of jurisdictional competition in the development of the law, see John V Orth, *Reappraisals in the Law of Property* (Ashgate Publishing, 2010) 95–104.

37 See H W Arndt, 'The Origins of Dicey's Concept of the "Rule of Law"' (1957) 31 *Australian Law Journal* 117, 123. Dicey admitted that Hearn 'would be universally recognized among us as one of the most distinguished and ingenious exponents of the mysteries of the English constitution, had it not been for the fact that he made his fame as a professor, not in any of the seats of learning in the United Kingdom, but in the University of Melbourne'. (!) A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillian & Co, 7th ed, 1908) 19–20.

38 See, eg, John V Orth, 'Exporting the Rule of Law' (1998) 24 *North Carolina Journal of International Law and Commercial Regulation* 71.

39 R H Coase, *The Firm, The Market, and The Law* (University of Chicago Press, 1988) 14.

means 'placing the nation's natural wealth at the people's disposal', it may be simply a euphemism for Gilded Age corporate giveaways. Nor can the political content of the phrase be ignored. Dicey wore his politics on his sleeve. If it were not obvious from the first edition of *Law and Public Opinion* in 1905, he made his preference for classical liberalism unmistakable in the second edition in 1914 — really the first edition reprinted with a lengthy new introduction. Government should be 'cheap', he said; its proper role, to encourage 'individual energy'.[40] Dicey had an agenda. Modern professional historians may simply be repeating the phrase out of habit. It is time to recognise it for what it is, a dated slogan rather than a useful summary.

40 A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (Macmillan, 2nd ed, 1914) lxxxvi; cf at lxxi: '[T]he dogma of *laissez faire* has commended itself, and does commend itself to hundreds of Englishmen, and for very obvious reasons. It has stimulated energy of action'.

*Greg Taylor**

# THE EARLY LIFE OF MR JUSTICE BOOTHBY


## Abstract

Mr Justice Benjamin Boothby occupied the post of Second Judge in the Supreme Court of South Australia from 1853 to 1867. He may have been the most unsuitable appointment to the Bench in South Australia's history, and lacked almost every quality necessary for the role. After years of controversy, he was dismissed in 1867, the only judge ever to suffer that fate in South Australia's history. It was his eccentric interpretation of the law that provoked the enactment of the *Colonial Laws Validity Act 1865*, 28 & 29 Vict, and thus he was an important figure in the legal history of the whole British Empire. But very little indeed is known of his colourful early life before his arrival in South Australia aged 50. This article fills that gap.


## I Introduction

Much has been written about Benjamin Boothby's disastrous period as a Justice of the Supreme Court of South Australia from 1853 to 1867, which culminated in his dismissal both for evasion of Imperial legislation passed specifically to deal with him, and for repeatedly questioning the legitimacy of the appointments of and otherwise insulting his colleagues on the Bench;[1] little indeed has been known about his life and career before his arrival in Adelaide. The entry for Boothby J in the *Australian Dictionary of Biography* does not merely summarise what is known about his early life; it virtually exhausts our present state of knowledge by stating that the judge was

> born on 5 February 1803 at Doncaster, Yorkshire, England, the eldest of four sons of Benjamin Boothby, iron-founder, and his wife Elizabeth, *née* Lightowler. In 1823 the family moved to Nottingham where he was engaged with his father

* Honorary Professor, University of Marburg, Germany; Associate Professor, Monash University. The author wishes to thank Bill Callaghan (of Alnwick and Melbourne); Guy Holborn (the Librarian of Lincoln's Inn); James Butler and the staff of the Library of the Supreme Court of Victoria; and Margaret Priwer of the Law Library of the University of Adelaide for their assistance during the research for this article. Thanks are also due to Lee Kersten and the anonymous reviewers for their comments, but all errors and opinions remain the author's own.

1 The main sources are Ralph M Hague, *History of the Law in South Australia, 1837–1867* (Barr Smith Press, 2005) ch 5 ('*History*'); R M Hague, *The Judicial Career of Benjamin Boothby* (unpublished, 1992) ('*Boothby*'); A J Hannan, 'Mr Justice Boothby' (1957) 58 *Proceedings of the Royal Geographical Society of Australasia: South Australian Branch* 72; Peter Howell, 'Constitutional and Political Development, 1857–1890' in Dean Jaensch (ed), *Flinders History of South Australia: Political History* (Wakefield Press, 1986) 139; John M Williams, 'Justice Boothby: A Disaster that Happened' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 21.

> in manufacturing pursuits. In May 1827 Benjamin married Maria Bradbury Robinson. In the 1830s he helped Thomas Wilde (later Lord Truro), younger brother of Sir John Wylde, in his electoral campaigns and won repute for his 'great skill in electioneering tactics'. Influenced by Wilde, Boothby decided to study law despite his age and large family. At Gray's Inn he read in his patron's chambers and was called to the Bar in 1841. He then joined the Northern Circuit, was appointed a Revising Barrister for the West Riding of Yorkshire in 1845 and became Recorder of Pontefract in 1849. His career at the Bar had no special marks of distinction. In 1842 he produced *A Synopsis of the Law Relating to Indictable Offences*, which bore witness to his industrious interest in his new profession and ran to a second edition in 1854. In 1844 he had issued a pamphlet, *Law Courts Not the Remedy for the Defects of the Law*.[2]

As far as it goes, this is all correct, with the exception that the pamphlet was actually called ***Local*** *Courts Not the Remedy for the Defects of the Law*.[3] But what was Boothby doing in the period of nearly 40 years between his birth in 1803 and the beginning of his law studies in the late 1830s? There are major omissions from the biographical sketch just quoted.[4] Among the highlights of Boothby's early life were long years in the scarcely prestigious occupation of running an iron foundry as business partner of his father; the disgrace of bankruptcy in 1837; and, perhaps most remarkably of all, serious and prolonged involvement in extreme, radical politics as part of the Chartist movement, including a spell as councillor on the Nottingham City Council, before he took up with Sir Thomas Wilde.

At the end of this article, we shall still be left with a mystery: namely, why Boothby changed his opinions and outlook on life so greatly between the mid-1830s, when he was a radical Chartist, and the mid-1850s, when he was already becoming known for outspokenly conservative opinions. Swings from the extreme left to the extreme right are scarcely unheard of as people age, but this one is remarkable both because of the identity of the swinger and because his swing was so complete. But whatever the explanation for it may be, at the end of this article we shall be at least much better informed about the early life of this strange man and controversial judge.

Boothby, of course, had every interest in suppressing most of his past on his arrival in South Australia — especially the bankruptcy bit: in the Victorian era bankruptcy

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2 Alex C Castles, *Boothby, Benjamin (1803–1868)* (2006) Australian Dictionary of Biography <http://adb.anu.edu.au/biography/boothby-benjamin-3025>.

3 Benjamin Boothby, *Local Courts Not the Remedy for Defects of the Law* (Saunders and Benning, 1844) ('*Local Courts*') (emphasis added).

4 Admittedly the task of filling in the gaps was made slightly easier by electronic searching aids, but even before they existed a small degree of effort in looking at the sources would have indicated that there was enough to justify looking further. Needless to say, this article was not written without some good old-fashioned slaving away over microfilms and books in traditional libraries. The author wishes to thank Monash University, which provided the opportunity to conduct that research. Nevertheless, the time available and the steady progress of digitisation make it possible that further refinements to the story told here will one day be found.

was seen generally as decidedly a moral matter involving a lack of self-reliance and thrift and a failure to live honestly within one's own means.[5] He succeeded in this endeavour to an extraordinary extent. Even when his death in 1868 was noticed in England, his obituaries might have led one to assume that he had done nothing all his life except lawyering.[6] The same might be said of his entry in the Colonial Office List,[7] although it may have been supplied by himself. It is likely that the Colonial Secretary who chose Boothby, the Duke of Newcastle — who was the subject of a string-pulling campaign by Boothby's friends when the vacancy arose on the death of Crawford J — also knew nothing of Boothby's previous financial disgrace.[8]

A friend of Boothby's from his time in Nottingham as a foundry proprietor, a period which ended with Boothby's bankruptcy, wrote to the newspaper at the time of his appointment to inform South Australians about the character of the judge selected for them by the Colonial Office; he too knew nothing of bankruptcy, or if he did chose the path of tact:

> Benjamin Boothby, Esq, is a gentleman whom I have known for thirty years, and a more dauntless advocate for high and liberal principles never pleaded for them. He is a stern defender of truth and impartial justice, and a man of no ordinary capacity, coupled with an amiable disposition. He is a dissenter of the Independent denomination.[9]

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5 V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt and Company Winding-Up in Nineteenth-Century England* (Clarendon Press, 1995) 67 ff. Of course there were exceptions, as people in the past, like those today, were not of one monolithic opinion about everything. Moreover, a sea change on this front was shortly afterwards to occur in New South Wales, independently of developments in England: John Gava, 'The Revolution in Bankruptcy Law in Colonial New South Wales' in M Ellinghaus, A Bradbrook and A Duggan (eds), *The Emergence of Australian Law* (Butterworths, 1989) 210.

6 South Australian newspapers are about as informative as the *Australian Dictionary of Biography* just quoted. The English newspapers, if they noticed the event, merely recorded the fact of his death when the news reached England with some brief mention of his legal career. See, eg, *Doncaster Chronicle*, 21 August 1868, 8; *Doncaster, Nottingham and Lincoln Gazette*, 14 August 1868, 8; *York Herald*, 15 August 1868, 8. Legal journals did no more: (1868) 26(3) *Law Magazine and Review: A Quarterly Review of Jurisprudence* 191; (1868) 45 *Law Times* 372; (1868) 13 *Solicitors' Journal* 76.

7 The Colonial Office List was the official list of those engaged in Her Majesty's Colonial Service. The edition for 1867 starts the story of Boothby's life with his admission to the Bar in 1841.

8 Hannan, above n 1, 73.

9 *Register*, 24 May 1853, 3. The author of this testimonial was one J B Mather, an engineer from Nottingham who had arrived in the colony at the end of 1848: *Register*, 27 January 1849, 4; 28 April 1869, 6; 22 July 1870, 2. For its part, on his arrival in Adelaide in 1853 the *Adelaide Times*, 30 August 1853, 2, informed its readers that Boothby J had been 'selected for his legal acquirements, his judicial ability and his moral worth'. If the last-mentioned concept included solvency, they were sadly mistaken.

This vaunted amiability seemed to disappear in South Australia. It may also be mentioned here that another one of the adjustments made by Boothby affected his religious denomination: he was indeed considerably involved in the Dissenting milieu in England[10] and in the heady days of the first Reform Act had even taken a leading role in a petition for disestablishment of the Church of England,[11] but his burial service in Adelaide was conducted by the colonial offshoot of that same Church.[12]

## II Childhood and Family

Benjamin Boothby's father was also named Benjamin; he married Elizabeth Lightowler on 5 September 1799; his occupation was listed as mercer.[13] On 7 April 1800, the partnership between Benjamin Boothby and Joseph Boothby, of Doncaster, trading as woollen- and linen-drapers, mercers and haberdashers under the name of Messrs Boothby, was dissolved by mutual consent;[14] presumably it had subsisted at the time of the marriage a few months earlier. Joseph Boothby appears to have been the cousin of Benjamin the elder; he died in July 1806.[15]

Benjamin Boothby the elder, the father of the judge, next turns up in written records in June 1805, when the partnership between him and John and Ebenezer Smith, as joint executors of one Joseph Fletcher Smith, was also dissolved.[16] Joseph Fletcher Smith was a master cutler who is said to have died aged 44 of an 'excessive love of good eating and drinking and a too great dislike for employment'[17] on 30 December 1804. He had married Maria Boothby,[18] the elder Benjamin's sister, which is no doubt why the latter was asked to become his executor. Sheffield is 20 miles or so from Doncaster, but as it took only six months to wind up the affairs of the deceased,

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10 Margaret Howitt (ed), *Mary Howitt: An Autobiography* (William Isbister, 1889) vol 1, 240, writing in the first half of the 1830s, describes him as 'anti-Church to the core' (by which of course the established Church is meant). As late as 1852, Boothby was a co-founder and leading member of the short-lived pan-Protestant Milton Hall and Club: *Manchester Examiner and Times*, 25 September 1852, 4; *Bradford Observer*, 21 October 1852, 8. See also *Adelaide Times*, 30 August 1853, 2.

11 See the unpublished autobiography of William Howitt, State Library of Victoria, MS 545, 457, for the full story.

12 *Register*, 24 June 1868, 2.

13 Ancestry.com, *Ancestry Library Edition* <http://ancestrylibrary.proquest.com/> (search of database). For the alleged pedigree of the Boothbys from the 12th century, see Boothby, 'The Family of Boothby' in Philip M Robinson and A Leslie Spence, *The Robinson Family of Bolsover and Chesterfield* (Robinson & Sons, 1937) ch 6 ('*Robinson Family*'); Hague, *History*, above n 1, 399.

14 *London Gazette*, 18 January 1801, 872.

15 Philip Moffat Robinson, *The Smiths of Chesterfield: A History of the Griffin Foundry, Brampton, 1775–1833* (Robinson & Sons and Thomas Brayshaw, 1957), 73 ('*Smiths*').

16 *London Gazette*, 22 March 1806, 381.

17 A family diary is thus reproduced in Robinson, *Smiths*, above n 15, 7.

18 Ibid 6, 32.

Benjamin Boothby the elder did not move to Sheffield in order to do his bit but rather took what was in those pre-railway days a fairly long journey from Doncaster to Sheffield as need arose. By this stage he had become a father; his wife had given birth to the younger Benjamin Boothby, the future judge, on 5 February 1803. The father was about 27 years old.[19]

The business in Sheffield was the elder Benjamin's introduction to working with hard metals instead of soft fabrics, for which he seems to have acquired a taste. Benjamin appears to have remained in Doncaster and continued in business there until 1815.[20] In late 1814, however, another one of the Smiths having just died, the Boothby family, including an almost teenage future judge, received an offer to join their firm. This time they did abandon Yorkshire and moved in early 1815 12 miles south to north-eastern Derbyshire — the town of Chesterfield. The elder Benjamin Boothby joined the Smiths' business (which bore the name Ebenezer Smith & Co) with 6 of 45 shares in their iron foundry in Derbyshire.[21] The concern was one of the largest in the Midlands and was said to have manufactured cannon balls used at Waterloo; more prosaic products included kitchen ranges and stoves.[22]

The elder Boothby received an annual income of £560 from his interest in the business, but, in the first sign of the difficulties with reconciling income and expenditure which afflicted both him and his son, drew more than £130 a year above his partnership income from the business' income; when he left it, on 2 September 1823,[23] he owed the partnership £1261.[24] It is not surprising that the partnership did not last a decade if one of the partners was so liberal in his withdrawals from the business. It must also be said that, at this time, £560 was by no means starvation wages: many clerks, messengers and similarly stationed persons managed on double-digit yearly salaries, and, to take another example that is close at hand, Sir John Jeffcott (who was, admittedly, desperate for income of any sort) received £500 per annum as the inaugural judge of South Australia from 1836.

Although he had moved to Chesterfield, Boothby *père* continued to have some sort of an interest in an iron foundry and agricultural machine factory in Doncaster which was called Sinkinson, Pearson & Co; the partnership was dissolved by consent on 31 May 1822.[25] This firm had made its name through the manufacture of an ingenious machine which was capable of cutting straw, grinding barley and malt, crushing oats and performing several other similar functions.[26] In 1822, he registered, under his

19 When he died on 22 November 1840, his age was given as 65: Islington Death Registrations, 1840 Fourth Quarter, vol III, 157. See also below n 116.

20 Robinson, *Smiths*, above n 15, 33, 73.

21 There was also, it seems, a branch at Manchester: *London Gazette*, 10 July 1819, 1204.

22 Robinson and Spence, *Robinson Family*, above n 13, 50.

23 *London Gazette*, 27 December 1823, 2167.

24 Robinson, *Smiths*, above n 15, 32 ff.

25 *London Gazette*, 4 June 1822, 940.

26 John Bigland, *The Beauties of England and Wales* (Harris, 1812) vol XVI, 853 ff.

Chesterfield address, a patent 'for an improved method of manufacturing cannon-shot, by which a superior shot is produced in the solidity and smoothness of its external surface'.[27]

It was in Chesterfield that the younger Benjamin Boothby spent his teenage years and grew to adulthood. Although education was not then compulsory, it is likely that he attended some sort of school somewhere in the town, but there is no information I know of about his studies. On finishing school, no doubt he was put to work in the partnership as the eldest son and heir. He first emerged on to the public stage aged 19, when he was made secretary and collector of subscriptions for a committee which also included his father and was concerned with the building of a new Dissenting chapel in Chesterfield in 1822.[28]

When they were expelled from the partnership in Chesterfield in 1823, the son was approaching his 21st birthday. The elder Benjamin, now aged almost 50 and no doubt still determining the family's direction in life although he now had a young adult son, decided upon a move further south again — by about 25 miles, to Nottingham. There, he bought the Rutland Foundry,[29] in which he involved his son as a business partner and which was to lead both of them into bankruptcy in 1837.

## III Bankruptcy in Nottingham

For some of their time in Nottingham, the two Benjamin Boothbys, father and son, were in partnership with another relation by marriage, one William Bacon Rawson. It cannot be determined when the younger Benjamin was taken into the business as a partner, but it was certainly before Rawson's death in 1830, by which time the future judge was already 27.[30] The occasion may have been either his 21st birthday in 1824 or his marriage in 1827 to Miss Maria Bradbury Robinson. One who knew the new Mrs Boothby personally as a friend described her as 'a most excellent wife and mother … much occupied with her family'.[31] Her family also was connected with the drapery trade,[32] but the two had doubtless met through the Dissenting chapel which both families attended; their families were on friendly terms.[33] Until their bankruptcy in 1837 father and son carried on the Rutland Foundry in Nottingham together. As well as running the foundry, the Boothbys tried their hand at cotton

27 'New Patents Sealed in 1822' (1822) 4 *London Journal of Arts and Sciences* 221–2.

28 Robinson and Spence, *Robinson Family*, above n 13, 292, 294.

29 He cannot have started it, as the *Leeds Mercury*, 18 November 1837, 1 indicates that it was then 30 years old.

30 *London Gazette*, 25 January 1831, 151; Robinson, *Smiths*, above n 15, 90. *London Gazette*, 21 March 1837, 789 indicates that Rawson's personal representatives made claims on the Boothbys' land as late as 1837. It cannot be said how serious those claims were.

31 Howitt, above n 10, 241.

32 Trevor I Williams, *Robert Robinson, Chemist Extraordinary* (Clarendon Press, 1990) 26 ff.

33 Robinson and Spence, *Robinson Family*, above n 13, 49.

thread manufacturing.[34] The notice consequent upon Rawson's death in 1830 has them as 'iron-founders, cotton-doublers and lace manufacturers'.[35]

The Rutland Foundry was clearly a major institution in Nottingham, and the Boothbys will have been men of significance in the town's commercial life. One Annie Gilbert (1828–1908) published her *Recollections of Old Nottingham*[36] towards the end of her life, in which she mentions that the Rutland Foundry 'was the oldest and largest in the town: the premises occupied nearly the whole of Granby Street [now gone], and turned the corner into St James's Street'.[37] She also recalled the controversy leading up to the passing of the Reform Bill of 1832. An angry mob threatened to burn down the Rutland Foundry, believing it to belong to none other than the Duke of Newcastle, whose nearby castle in Nottingham had just been destroyed by them. A word from Mrs Gilbert's father, she recounts, saved the Rutland Foundry.[38] Shortly after the passage of the Reform Bill, a celebratory dinner occurred in the Boothbys' foundry after a parade through the town.

This Duke was the father of the fifth Duke, who was to become the Colonial Secretary who appointed Boothby to the South Australian Bench. While they were nearly neighbours at this stage of Boothby's life, it is not known whether Boothby ever met the future fifth (or any other) Duke, who was often away at Eton, University or in politics after Boothby arrived in Nottingham. The two men were furthermore separated by obvious barriers of class and religious denomination, although not so much by political views once each had reconciled himself, in the second half of the 1830s, to Whiggism — the Duke arriving at that point from a conservative, and Boothby from a Radical point of departure. It is therefore not likely that they knew one another personally, and when Boothby was appointed to the Bench in 1853 he relied on contacts to lobby the Duke; he did not do so in person.[39]

A further description of the Rutland Foundry's size and extent may be found in the notice of the sale of the business after the bankruptcy.[40] It is described as a 'valuable

34 See *Pigot and Co's National Commercial Directory for 1828–9* (J Pigot & Co, 1829).

35 *London Gazette*, 25 January 1831, 151.

36 Annie Gilbert, *Recollections of Old Nottingham* (H B Saxton, 2nd ed, 1904).

37 Ibid 45.

38 Ibid 42 ff.

39 See University of Nottingham Manuscripts and Special Collections, Ne C 10128: this is the only reference to Boothby in the Duke's papers. Hague, *Boothby*, above n 1, 2 declares them neighbours and friends. They were neighbours in a manner of speaking, but they were not friends. As well as the points mentioned in the text, it is of note that Boothby is not mentioned in John Martineau, *The Life of Henry Pelham, Fifth Duke of Newcastle, 1811–1864* (J Murray, 1908) nor in F Darrell Munsell, *The Unfortunate Duke: Henry Pelham, Fifth Duke of Newcastle 1811–1864* (University of Missouri Press, 1985). Pelham Street Carlton, on which the University of Melbourne's Law School building stands, is thought to commemorate the fifth Duke, as Pelham was one of his Christian names.

40 *Leeds Mercury*, 18 November 1837, 1.

and extensive iron foundry, … stove grate and fender and kitchen-range manufactory' together with stock-in-trade such as one would expect in a business of that type; a clue to the reasons behind the bankruptcy is given by the information that the plant for manufacturing stove grates, fenders, hot-air stoves and kitchen ranges had been fitted out within the preceding 10 years 'at immense cost'. It had yielded, over the preceding seven years, an average return (presumably turnover rather than profit) of £300 to £400 per week. An earlier notice for sale by auction under a mortgagee's power of sale — this auction must have been at least partly unsuccessful — adds that the property comprised an area of 1796 square yards (about 42 yards squared) and that the cotton-doubling business was now being carried on by Messrs Thackeray & Son; they had leased some of the land from the Boothbys.[41]

The precise causes of the bankruptcy which overtook the business in late 1836 or early 1837 cannot be known with certainty, but it is possible to make an educated guess: as we have already seen, the elder Boothby had something of a tendency to pay himself more than he had earned; there was also the investment in expanding the business just referred to, financed by perhaps over-ambitious borrowing on a mortgage. Furthermore, the elder Benjamin Boothby was now over 60, and probably feeling his age, for he died of dropsy, aged 65, on 22 November 1840;[42] no doubt his increasing age and infirmity made it progressively more difficult for him to contribute to running the business. Finally, the business must also have suffered from the younger Boothby's extensive involvement in politics, of which more under the next heading. There was also, it seems, a credit contraction in England in late 1836[43] which may have been the straw that broke the camel's back, but if it had any effect at all it can have been no more than the last straw given that the bankruptcy occurred so early in 1837.

The first official indication of the bankruptcy of both Boothbys is found in a *London Gazette* notice of 31 January 1837,[44] which was repeated in the local press under the bold heading 'Boothbys' bankruptcy'.[45] There followed a melancholy procession of notices of creditors' meetings and so on; the younger Boothby was discharged from bankruptcy by certificate in April 1838, but the final dividend was not paid until 1841, and the last details were not settled until 1854 — the year after the *London Gazette*[46] had carried another notice about Boothby, namely the information that he had been appointed a judge at Adelaide. The family were compelled to leave their home in March 1838. Later, it was said that at this time the elder Boothby was 'greatly

41 *London Gazette*, 21 March 1837, 789.

42 See Islington Death Registrations, above n 19.

43 Murray N Rothbard, *The Mystery of Banking* (Ludwig von Mises Institute, 2nd ed, 2008) 210.

44 Ibid 242.

45 *Nottingham Review*, 3 February 1837, 1, and again in the summary of bankrupts from the *London Gazette*, 31 January 1837, 4.

46 21 March 1837, 789 ff; 21 March 1837, 794; 5 May 1837, 1171; 17 October 1837, 2652; 30 March 1838, 806; 14 December 1838, 2901; 8 October 1841, 2488; 25 February 1853, 604 (appointment as judge); 18 August 1854, 2590.

esteemed among the Congregationalists, of which he was a liberal member';[47] the move will at least have taken him away from people who knew of and might have reacted badly to his financial disgrace.

A thought should, however, also be spared for his and his son's creditors, for the dividend from the younger Benjamin's estate for them was precisely zero; from the father's estate it was 8 d in the pound, but from the partnership's estate only 1¼ d was paid.[48] It must have taken considerable effort to manage affairs as badly as the younger Benjamin did and to leave exactly nothing for one's creditors. They would have been entitled to be rather angry that he had allowed matters to degenerate so badly.

No doubt the said Benjamin Boothby the younger should have learnt lessons from this grotesque failure; but his future financial dealings suggest that he did not. Even after his appointment to the Bench, he continued to leave a trail of bad investments and unpaid debts behind him. His continued precarious financial position on appointment to the Bench is indicated by his demand for his full salary from the day of his appointment in England, including the several months during which he was unavailable for work because he was on the ship out. It was well understood at the time that full pay started only upon arrival, and his request was therefore refused.[49]

On 28 December 1857, which by coincidence was the 21st anniversary of the establishment of South Australia, one John Harrison of the Norfolk Works, Sheffield, wrote to the Colonial Office about an unpaid debt owed to him by Mr Justice Boothby. The latter had been introduced to him in 1853 by the Chief Constable of Sheffield with a reference to his imminent departure for South Australia as one of Her Majesty's judges for that Province. As a result, and having regard to a reference from a gentleman in the town, Harrison had allowed Boothby to buy at wholesale prices and to give a cheque for £97/17/– for the goods — which bounced. Boothby had paid only £50 of this debt since, and Harrison sought the assistance of the Colonial Office in the recovery of the remainder. Its officials concluded that all they could do about this embarrassing problem was to send the letter to the Governor in Adelaide with a request to bring it to the attention of the judge.[50] The Governor did bring it to Boothby's attention, but it is noticeable that the official records in South Australia[51] do not show the name of the addressee of the Governor's letter passing on the correspondence. Presumably the matter was considered so sensitive and embarrassing that the letter to Boothby was written and copied by the clerks without his name, and only the Governor knew of the identity of the letter's addressee. It may be hoped that Harrison's extraordinary step resulted in Boothby J's at last doing the

47 *Adelaide Times*, 30 August 1853, 2.

48 Robinson, *Smiths*, above n 15, 79 ff.

49 State Archives of South Australia, GRG 1/21/1/171; GRG 24/4/27/102; GRG 24/6/1853/3466; Hague, *History*, above n 1, 225.

50 CO 13/96/511–514 (AJCP 797). Except for an acknowledgement by Harrison (CO 13/98/186 (AJCP 799)), there is (to the end of 1859) nothing further on this in the records of the Colonial Office.

51 State Archives of South Australia, GRG 2/40/2/96.

decent thing and making arrangements for his debt to be paid, as there is no further correspondence either in London or in Adelaide on the matter. However, that may not be so: in Adelaide also during his tenure of judicial office, his chronic and severe inability to live within his means continued. By the mid-1860s his judicial salary, far above the average wage, did not cover payments on his debt, and his bank refused further loans.[52]

Despite his disgraceful and complete bankruptcy in 1837, Boothby, once he had begun to practise the law in 1841, appears to have found enough spare money — not (as far as is known) to repay his earlier creditors in an honourable fashion, but to make various investments: there are records of his investing £3750 in the Eastern Union and Norwich Railway (No 2) by 1845.[53] He also took up 10 shares in the Ipswich Paper Mills at about the same time,[54] and probably had other investments of which no public record remains. He joined the provisional committee of the Bradford, Manchester & Liverpool Direct Railway,[55] taking up shares; but, as was stated at a meeting of the shareholders in January 1846, he had defaulted on his promise to pay for them. One Mr Wagstaff promised 'that Mr Boothby was going to pay',[56] but one hopes that no-one held their breath.

Despite his large family, Boothby J's judicial salary would have been quite sufficient for his needs had he avoided not just excessive expenditure compared to income in general, but also shonky investments. In the 1860s Boothby J's name, together with his Honour's position as a Justice of the Supreme Court of South Australia, again appeared in the newspapers in conjunction with two failed companies, the National Assurance and Investment Association and the State Fire Insurance Company.

The London *Standard*[57] referred to the former company as a fraud without parallel when it collapsed in November 1861 owing about £65 000. Mr Justice Boothby, as he had by then become, was a director of it, a signatory to its deed of settlement and in debt to the company to the tune of £280 — for what, it is not stated, but it does not appear to have been shares.[58] Litigation was required in the case of both companies in order to untangle the mess, although Boothby J's luck held again and he was not mentioned in the reported judgments.[59] Despite these and no doubt other entanglements, Boothby J died with a net worth of around £5000,[60] so there must have been

52 John McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial, 1800–1900* (University of Toronto Press, 2011) 198 ff, 204 ff.

53 House of Commons Parliamentary Papers (1845) vol XL, 16, 150.

54 House of Commons Parliamentary Papers (1845) vol XLVII, 101.

55 *Bradford Observer*, 23 October 1845, 1.

56 *Bradford Observer*, 15 January 1846, 6.

57 25 November 1861, 4.

58 *Times*, 25 November 1861, 4; *Daily News*, 25 November 1861, 3.

59 *Re National Insurance and Investment Association* (1862) 4 De G F & J 78; 45 ER 1112; *Re State Fire Insurance Company* (1863) 1 De G J & S 634; 46 ER 251.

60 *Morning Post*, 14 November 1868, 5.

some successful investments as well; but then again, a large proportion of that value will have been made up by fixed investments, such as his house and land.[61]

Boothby J's luck did, however, run out eventually. Given the numerous and intimate contacts between Australia and England at the time, not to mention the attention he had drawn to himself and the enemies he had made,[62] this was inevitable. There is one reference in South Australia that I know of to his financial difficulties: in 1866, as the end of his judicial wrecking career finally drew near, a member of Parliament mentioned that he had seen the name of Benjamin Boothby listed in the English newspapers as an outlawed debtor[63] and asked whether it was the same man as their judge.[64] If it was Boothby J, he had again failed to pay his debts and neglected to answer Court proceedings brought against him to recover them in England, resulting in a formal declaration of outlawry. Searches in England have not produced a definite answer to the question asked by the member of Parliament,[65] but the surviving records are incomplete. The answer may however still be found in reading between the lines of a speech by one of the judge's few remaining defenders in 1866: '[s]upposing Mr Justice Boothby had been outlawed in that way', said John Baker MLC, 'he was not the only man in the colony who had been in that position'.[66] In another source which also purports to give a verbatim version of the same speech Mr Baker is quoted as referring bluntly to 'the fact of his Honour's outlawry'.[67]

It is impossible not to wonder whether the judicial post in South Australia offered Boothby J not merely a secure income (although he repeatedly complained of its inadequacy), but also an asylum from the demands of English creditors — almost as good as a second bankruptcy in enabling him to start again with a clean slate. 'τὸγὰρτὴνφροντίδ' ἔξωτῶνκακῶνοἰκεῖνγλυκύ',[68] he might have found himself saying from the relative safety of Adelaide, if his education extended far enough to enable him to say it.

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61 The records of the General Registry Office — for obvious reasons, no attempt was made to search those of the Lands Titles Office — do not suggest that Boothby was a big landowner; his only holdings were in the vicinity of his house, and were subject, inevitably, to several mortgages. Perhaps the most interesting of these was that to R R Torrens (GRO 268/160), but as the representative of the Savings Bank of South Australia.

62 This distinguishes Boothby J from (Sir John) Jeffcott J, who was also not a model of solvency but had made many fewer enemies during his short time in the colony.

63 It may be found in the *Morning Chronicle*, 22 February 1856, 8; 21 March 1856, 8.

64 The speech is quoted in greater detail not in the official report of debates, but in the *Advertiser*, 27 June 1866, 3.

65 Boothby's name does not appear in any of the records of the Public Record Office on outlawry from this period (CP 38/5; CP 40/4057–4062; E 18/10; E 173/5; KB 140/8), but there is no reason to suppose the newspaper reports cited in above n 63 to be wrong.

66 *Advertiser*, 4 July 1866, 2.

67 *Register*, 4 July 1866, 2.

68 *Oedipus Rex*, lines 1389 ff ('it is sweet that our thoughts dwell beyond evils').

## IV Politics

Boothby's politics were always left-wing while he was in England: he started off as a radical Chartist, but joined the Whigs before his departure.

In the pre-Reform Act days, which extended until Boothby was almost 30 years old, agitation naturally concentrated on the progress of the Reform Bill. A general history of Nottingham's political life reports:

> On March 1st [1830], a 'private meeting' was held to discuss the formation of a Nottingham Political Union to work for 'effectual reform'. It was to be a union between 'the middle and lower classes of the people of this town'. But things worked out badly at first. When its first general meeting was held on July 5th, its committee had to report only slow progress. On their own confession they were men of 'no decisive character in Nottingham — influential only in their zealous adherence to the cause of reform'. This was probably an over-modest assessment. Of the four people who filled the offices of secretary and treasurer in the Union, three were men of some social standing, and two of them in positions of unrivalled influence. Richard Sutton had taken over the ['Nottingham] Review' on his father's death in 1829, Robert Goodacre was the founder of the Standard Hill Academy, the most important private school in Nottingham, strongly patronised by the business community, whilst Benjamin Boothby was an iron merchant and iron-founder, running the largest firm of its kind in Nottingham, the premises of which occupied almost the whole of Granby Street.[69]

Admittedly this source, unlike almost all others still to be cited,[70] does not state expressly whether it was the younger or the elder Benjamin Boothby who was involved, but all the other sources still to be quoted suggest strongly that it was the younger, the future judge; at all events, even if it was the elder it may be said with certainty that he and his son's views certainly coincided on these issues at this point. As we have seen, the Boothbys' iron works were the scene of rejoicing in Nottingham on the passage of the Reform Act. The programme ('address') of the Nottingham Political Union, modelled on the Birmingham Political Union's, was published in April 1830 in various newspapers[71] and was a fairly standard pro-Reform manifesto; the Union's last appearance in the newspapers appears to have been in August 1833[72] — its work had, after all, been largely accomplished in the previous year.

Boothby the younger, as a convinced Dissenter, also became a leading member of the disestablishmentarian movement in Nottingham. His name was one of the four subjoined to an 'Appeal of the Nottingham Dissenters to the Dissenters of England

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69 Malcolm I Thomis, *Politics and Society in Nottingham 1785–1835* (Basil Blackwell, 1969) 223 ff.

70 But like the equally unforthcoming *Nottingham Review and General Advertiser for the Midland Counties*, 9 July 1830, 1, which contains the 'no decisive' quotation.

71 See, eg, *Examiner*, 11 April 1830.

72 *Cobbett's Weekly Political Register*, 21 August 1833.

on the Necessity of Earnestness and Union at the Present Crisis' in 1834,[73] and he was one of the leaders of the charge against compulsory church tithes.[74] The 'Appeal' is too long to quote here, but it reeked above all of a young man's impatience at the argument that the time was not yet ripe for change; but it cannot be known now how much of it was the 31-year-old Boothby's work and how much his co-authors'. In the following decade, after his admission to the Bar, Boothby became legal counsel to the newly formed British Anti-State-Church Association, later called the Society for the Liberation of Religion from State Patronage and Control, and gave them legal advice (which swiftly proved to be impractical) on the best method of setting up their branches to avoid liability under the statutes passed to quell disaffection during the French Revolution.[75]

Boothby the younger was not satisfied with the great Reform Act. As early as 1834, he was in the public eye again as one of the leaders of the charge in Nottingham for further reforms beyond those granted in 1832, such as manhood suffrage, the reduction of the period between parliamentary elections and the secret ballot. Radicalism was giving way to Chartism.[76] As far as issues of day-to-day policy were concerned, he attacked the brutal system of military discipline and called for reform of the poor law. His principal personal target was the local Whig member of Parliament, Sir John Cam Hobhouse, whose fame will live for evermore as it was he who coined the phrase 'His Majesty's Opposition'; but local Radicals of his day such as Boothby accused him of half-heartedness and insincerity on their favoured issues of the day — especially having regard to the contrast between his words before he accepted office in Lord Melbourne's government and the conduct of the government, which did not stand for complete and radical reform on topics such as military discipline.

In this period, politics in Nottingham were notoriously violent and corrupt.[77] The public record shows that Boothby entered into the political life of Nottingham with a ferocity that surprised even its seasoned observers; it does not, of course, show whether he participated in the corruption.

In July 1834 Hobhouse first stood for Nottingham at a by-election, which he won, but not before beating off a challenge to him by a Norfolk barrister named William Eagle, who stood for the Radicals. Benjamin Boothby the younger was one of Eagle's chief local supporters. It was Boothby who introduced the out-of-towner to

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73 *Nottingham Review and General Advertiser for the Midland Counties*, 21 February 1834, 4 (stating that it was signed by B Boothby the younger: at 3); *Morning Chronicle*, 10 March 1834, 1 ('*Appeal of the Nottingham Dissenters*').

74 Derek Fraser, *Urban Politics in Victorian England: The Structure of Politics in Victorian Cities* (Leicester University Press, 1976) 47.

75 William H Mackintosh, *Disestablishment and Liberation: The Movement for the Separation of the Anglican Church from State Control* (Epworth Press, London 1972) 31.

76 Thomis, above n 69, 154.

77 Ibid 240 ff; Robert E Zegger, *John Cam Hobhouse: A Political Life, 1819–1852* (University of Missouri Press, 1973), 197–9, 211 ff.

local meetings,[78] and it was to him that the Irish radical Daniel O'Connell addressed a letter in support of Eagle, which indicates that Boothby and O'Connell had been in touch for longer than the surviving correspondence shows. (Their contact may have begun when Boothby joined a committee designed to aid the starving Irish wandering through Nottingham.)[79]

> To Benjamin Boothby, Jr
>
> You did me the great honour to consult with me previous to the last election on the subject of the fitness of Lord Duncannon to represent your town [Nottingham]. I hope, therefore, you will not deem me presumptuous if I initiate — as the Americans say — the correspondence on the present occasion. The fact really is that we are now in a much more critical situation than we were at the former election. The Whigs have been such cruel *drags* on the wheels of rational improvement that many of their Cabinet have been compelled to yield to and fly before the force of public opinion, repressed as it has been by a multitude of causes. But the remnant of that Cabinet want sufficient energy to meet the national exigencies or to give that substantial relief which would alleviate public distress and secure the enjoyment of popular rights against the perpetual spirit of invasion of a worthless aristocracy for whom alone these courtiers have hitherto been governed.
>
> At such a moment it is the duty of every honest Radical reformer who is equally desirous to prevent any approach to a social revolution, as to carry into practical effect salutary changes and needful improvements in the political system, to come forward and send to Parliament men who are totally free from the bias of personal party and determined to do their duty to their country and to the cause of civil and religious liberty, fearlessly, perseveringly and disinterestedly.
>
> Will you allow me to say that if the town of Nottingham wants just such a person, you can easily find him in Mr Eagle the barrister who I believe intends to offer himself on the approaching vacancy. His information, his talents, and above all his political integrity render him the fittest man I can think of to represent any honest and manly constituency.[80]

Boothby also attended Hobhouse's election meetings, which thanks to disturbances by his Radical allies degenerated into something little short of mass brawls and riots. According to the *Times*,[81] Boothby was 'an independent and respectable man of the Radical party, who is strenuously exerting himself to bring Mr Eagle in, and who was present for the purpose of putting some questions for explanation to Sir John'. At the

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78 *Times*, 23 July 1834, 6; *Morning Chronicle*, 23 July 1834.

79 Mary Howitt Walker, *Come Wind, Come Weather: A Biography of Alfred Howitt* (Melbourne University Press, 1971) 10 ff.

80 Maurice R O'Connell (ed), *Correspondence of Daniel O'Connell* (Blackwater Press, 1972) vol 5, 153 ff (emphasis in original). Boothby also was prominent at a meeting addressed by O'Connell in 1836: *Times*, 6 April 1836, 3.

81 24 July 1834, 6.

meetings Boothby called for calm and a fair hearing for Sir John — but to no avail. According to the report, addressing his own followers who were responsible for the uproar 'Mr Boothby exclaimed, "I repeat that your conduct is most disgraceful and disheartening and grievous to those who wish well to the cause"', whereupon Sir John paid a tribute to Boothby's 'honourable conduct'. But it was to no avail: the meeting had to be abandoned and Sir John was spirited out through a side door.

Before the secret ballot, the practice was for nominations to be received and an initial poll conducted at a public meeting, and on seconding Eagle's nomination, to a room packed with his supporters, Boothby made a rabble-rousing speech, tearing at the character of Sir John and ensuring maximum audience participation. Perhaps it is not surprising that such speeches led to disorder, even if the speaker disclaimed any desire to bring it about and scolded those who did:

> The present, he would say, was the time for the men of Nottingham to prove whether they would have a sham or an honest representative. (Hear, hear.) He craved their indulgence while he stated to them his reasons for pursuing his present line of conduct on this occasion. They had before them the first Lord Commissioner of Woods and Forests [Hobhouse] (tremendous howling from the body of the meeting), who, in his address to the electors, stated that he had come forward at the request of a body of the electors. (Much roaring, and cries of, 'Oh! oh!') He (Mr Boothby) would ask the right hon. gentleman who those electors were (hear, hear) and he would pause a moment for a reply. (Cheers from Mr Boothby's friends) They had no reply: but as the Americans say [this phrase appears to have been fashionable in Radical circles at this time], 'we can give a pretty good guess'. (Laughter) He would put it to the noble-minded men of Nottingham (the men of Nottingham themselves laughed heartily at this compliment, as if they thought that it was all sham to apply it to them) — he would put it to them whether it was decent that they should be humbled to submit to the dictation of the gentlemen in Downing Street, or to their agents here? (Much groaning and uproar) This was precisely the conduct of the former government, in the case of rotten Gatton and Old Sarum. (Loud cheering) But was Nottingham to be made a rotten Gatton of for the Whigs? (Hear, hear, cries of 'no' and cheers) Would the men of Nottingham submit to conduct such as this? (No, no) Certain gentlemen were favourable to such, and showed by their pursuit of it that they were entirely reckless as to the character of the men whom they brought forward; but they might draw the stretching string too tight, and they had done so on the present occasion, in selecting the man who, of all others, had been guilty of the greatest political apostasy that any public man was guilty of up to the present day. (Loud uproar in the body of the meeting) He repeated the charge, 'guilty of the greatest political apostasy' (a voice, 'Don't cry over it') — a charge which he (Mr Boothby) should be ashamed to bring were he not able to make it good. (Cries of 'That's right, Boothby'.) They could not forget the man who, when he first came forward for Westminster, stood forward to the character and profession of a thorough-paced Reformer ('hear, hear', and much confusion and hissing). Oh (the 'Oh' was so long that it produced bursts of laughter), the right hon gentleman indulged largely on that day in his abuse of the contemptible Whigs, with whom he now shared office. (Roaring, bellowing,

> yelling and all manner of derisionary [*sic*] noises) The contemptible Whigs! The contemptible Whigs! The contemptible Whigs! — Mr Boothby repeated, with great emphasis, which again set the 'howl' in motion.[82]

And so on and so forth. At one stage later in this oration, Sir John objected to being charged with 'shameless impudence' by Boothby, who thereupon altered his charge to the scarcely less offensive 'shameless apostasy'.

At this meeting also, Sir John found it impossible to obtain a hearing, and a poll was arranged. The *Times* commented in an editorial on the extreme violence of this campaign: 'a fury almost unparalleled in English elections' and 'not rational, nor just, nor even human'.[83] Hobhouse circulated a written response to Boothby's accusations of substance, such as that he had voted for a larger standing army, while complaining of Boothby's 'language too indecent even for electioneering controversies'. Another Benjamin Boothby — the future judge's father, it seems — wrote to the *Times* asking the editor to state that it was Benjamin Boothby *junior* who was the maker of the speeches on that occasion, and that the writer of the letter did not share his political views, but would rather support Hobhouse.[84]

The election did not proceed as planned for the Radicals, for on the closing of the poll Hobhouse was more than 1000 votes ahead and was duly elected. Eagle, in responding at the declaration of the poll, proposed three cheers 'for Mr Benjamin Boothby and the other gentlemen who so strenuously and kindly supported him in the contest'; Boothby, for his part, was 'frequently cheered'[85] and at the end of Eagle's speech 'was very loudly called for'[86] from the crowd.

A new election in Nottingham was soon required, as Parliament was dissolved in the dying days of 1834 following Lord Melbourne's dismissal. Hobhouse made another speech to the assembled multitude on the hustings, after which Hobhouse was no doubt appalled to see that

> Mr Benjamin Boothby, jun, rose in the body of the meeting, and, standing upon the top of a barrier which had been erected on one side of the room to secure an entrance to the hustings, was proceeding to address the electors, when he was loudly cheered, and the noise for some time prevented him from being heard; when silence was obtained, he was invited to take his place on the hustings. Having succeeded in pushing through the crowd,[87]

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82 *Times*, 25 July 1834, 5, with the addition of the note about the long 'Oh' producing bursts of laughter from *Nottingham and Newark Mercury*, 26 July 1834, 236; similar, *Nottingham Review and General Advertiser for the Midland Counties*, 25 July 1834, 2.

83 *Times*, 25 July 1834, 4.

84 *Times*, 26 July 1834, 4.

85 *Morning Chronicle*, 28 July 1834, 2; similar *Doncaster, Nottingham and Lincoln Gazette*, 1 August 1834, 4.

86 *Nottingham Review and General Advertiser for the Midland Counties*, 25 July 1834, 2.

87 *Nottingham Review and General Advertiser for the Midland Counties*, 9 January 1835, 1.

he unburdened himself of another rabble-rousing speech, urging his hearers to 'put down Toryism' and providing a list of the evil acts and omissions of the late government such as passing Irish coercion, not abolishing military flogging, not introducing the secret ballot, not shortening the life of Parliament, not extending the franchise and above all failing to reform the poor laws to provide an adequate income for all. However, strife had cooled somewhat by this stage, as the Radicals under Danny O'Connell had reached an agreement with the Whigs, and Boothby's speech was just moderate enough to reflect that also.

By this time Boothby may well have been thinking of a political career for himself, and it does nothing to weaken that supposition to find that he was elected to the Nottingham Town Council in 1835, following the great reform of local government effected by the *Municipal Corporations Act 1835*, 5 & 6 Will 4.[88] In the run-up to the election he published a long (two-column) manifesto of his political opinions in which his main point was opposition to a paid magistracy removable at the pleasure of the Crown, which he thought a danger to the liberties of the people, as well as to a professional police force for Nottingham such as had just been set up for London, which he opposed for the same reason.[89] It was, perhaps, the first sign of his later conservatism, but proceeding still from a radical standpoint: here he argued that the needs of the modern world should not be accommodated, and that the greatest degree of freedom was to be maintained by sticking to the old ways and spurning professionalism. A similar argument was to occur to him in defending the grand jury in South Australia a quarter of a century later. However, in his manifesto he also mentioned the need for complete religious equality, but in mild terms (a sensible move, given that Anglican votes were just as valuable); the need for all council votes and proceedings to be published; and the need for the elected councillors to be 'the fast and sure friends of Freedom [sic]'.

For his pains, conservatives abused him as the 'officious self-appointed leader of the Radical faction, advertising himself as the promoter of party strife';[90] but despite or because of this character assessment he did very well, coming second in Park Ward with 234 votes. This was just below the top-placed candidate who received 236 votes, and Boothby was one of five elected from that ward.[91] The newspapers of the time make it clear, however, that there was a left-wing 'ticket' on which Boothby was placed,[92] and it is no coincidence that the top four candidates uniformly received upwards of 220 votes each.

88 Thomas Bailey, *Annals of Nottinghamshire: History of the County of Nottingham, including the Borough* (Simpkin Marshall, 1855) vol 4, 394.

89 *Nottingham Review*, 6 November 1835, 1.

90 *Nottingham Journal*, 27 November 1835, 2; also quoted in *Nottingham Review*, 11 December 1835, 3 (recording also that Boothby had survived an objection to his nomination, apparently based on his not being on the rate book).

91 *Nottingham and Newark Mercury*, 2 January 1836, 4; *Nottingham Journal*, 1 January 1836, 3.

92 *Nottingham Review*, 25 December 1835, 3.

Nothing, perhaps, could be more hazardous than an assessment of a dead man's psychology by a non-expert based on a single comment in a newspaper report; but the comment quoted in the last paragraph, not to mention some of the facts already mentioned about Boothby's participation in public meetings and the like, does seem to suggest that others had noticed a propensity in the subject to push his own barrow, even a vainglorious need to be at the centre of attention. This was certainly a characteristic of his judicial career in South Australia also. And the characteristics of officiousness and promoting strife can be identified as applicable to his life in South Australia without hesitation.

The biography of William Howitt, another council member, records the following of Boothby's council service:

> Struggling against languorous Whigs as well as stiff-necked Tories required more effort than [William] Howitt wished to give to local politics. Of his one ally, Benjamin Boothby, he wrote to Bakewell, 'Boothby is a good fellow, but he is a good-natured fellow, and melts down'.[93]

That must be the voice of the hardest of the hard liners: others might be accused of failing to stand up for what they believed in; such an accusation could rarely if ever be levelled at Boothby, either in his English or his South Australian incarnations.

Howitt and Boothby had met as a result of the publication by the former of a work entitled *Popular History of Priestcraft*, 'a standard work for plebeian advocates of church disestablishment';[94] they became firm friends.[95] Howitt records Boothby's 'well-founded disbelief in Whig honesty' and adds that he possessed 'the spirit which looked rather at public benefit than private', but was often away from Nottingham on business.[96] They were co-signatories of the 'Appeal of the Nottingham Dissenters' of 1834 mentioned earlier. Together, Howitt moved and Boothby seconded the election of the Mayor of Nottingham for the year 1836. At the inaugural meeting of the newly reformed council, Boothby also expressed the view that aldermen should be chosen from among elected councillors only, for the possibility of appointing them

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93 John Rylands Library, Manchester, Eng MS 353 (109); Carl Ray Woodring, *Victorian Samplers: William and Mary Howitt* (University of Kansas Press, 1952) 51 (emphasis in original). Bakewell was a dissenting minister: unpublished autobiography of William Howitt, State Library of Victoria, MS 545, 456. William Howitt's son went on to fame in Australia, and married one of Boothby J's daughters, whose illness had brought about the friendship in the first place: Walker, above n 79, 10. He has an entry in the *Australian Dictionary of Biography*, above n 2.

94 Peter Mandler, *Howitt, William (1792–1879)* (2004) Oxford Dictionary of National Biography <http://www.oxforddnb.com/view/article/13998>.

95 William Howitt, *Land, Labour and Gold: or, Two Years in Victoria* (Lowden, 1972) 449; unpublished autobiography of William Howitt, State Library of Victoria, MS 545, 404 ('*Unpublished Autobiography*'). The *Unpublished Autobiography* is first mentioned in above n 11.

96 Howitt, *Unpublished Autobiography*, above n 95, 405, 493.

from outside the elected members 'had been introduced by the wily and specious [Lord] Lyndhurst, to perpetuate in corporations the sort of irresponsible power that is enjoyed by the House of Lords'.[97]

The mayor's name was Thomas Wakefield, and through him Boothby may have learnt of the plans to set up South Australia which came to fruition at the end of that year[98] — and also that even a history of financial ruin would not prevent a man,[99] if he worked hard and were lucky, from becoming a respected lawyer. Wakefield had nominated Sir John Hobhouse at the Nottingham election of July 1834,[100] and the fact that Boothby was willing to second his nomination as mayor was a further sign that party divisions were becoming less pronounced on the left.

As Boothby's business spiralled towards bankruptcy in January 1837, he was appointed a charity trustee for Nottingham borough, no doubt with his councillor's hat on.[101] This appointment appears to have survived his bankruptcy,[102] but under s 52 of the Act of 1835 he lost his seat as a councillor on becoming a bankrupt.[103] No doubt to the relief of Sir John Hobhouse, Boothby also stayed away from the hustings at the election of July 1837 consequent upon the death of King William IV.[104]

After his bankruptcy Boothby disappeared from political life for a couple of years, but by the end of 1839 there is a single reference to him in the *Derby Mercury*[105] which both indicates a change of political allegiance and also is the first known reference to his association with the Whig member for Newark, Solicitor-General, future Lord Chancellor and all-round Boothby patron extraordinaire Sir Thomas

97 *Nottingham Journal*, 1 January 1836, 2; 8 January 1836, 4; *Nottingham and Newark Mercury*, 2 January 1836, 5; *Nottingham Review*, 1 January 1836, 3.

98 See also Howitt, *Unpublished Autobiography*, above n 95, 479. I have not been able to discover what, if any, connexion existed between Thomas Wakefield and Edward Gibbon Wakefield. Thomas is not mentioned in Philip Temple, *A Sort of Conscience: The Wakefields* (Auckland University Press, 2002). Thus I have expressed the position cautiously in the text.

99 The reference is to Daniel Wakefield QC, uncle of Edward Gibbon.

100 His Christian name is not given in the report in the *Times*, 25 July 1834, 5, but is stated in the *Doncaster, Nottingham and Lincoln Gazette*, 25 July 1834, 3.

101 House of Commons Parliamentary Papers (1837) vol XLIV, 9.

102 House of Commons Parliamentary Papers (1839) vol XLI, 80.

103 Boothby may be found at the Council's meeting in early December 1836 (*Nottingham Journal*, 9 December 1836, 4; *Nottingham and Newark Mercury*, 10 December 1836, 394), but he is missing at all meetings in 1837 starting with that recorded in, eg, the *Nottingham Journal*, 10 February 1837, 2, 4. Howitt does not mention this in his autobiography, but this must surely be tact rather than ignorance.

104 *Nottingham Journal*, 28 July 1837, 3. I was not able to consult the *Nottingham Review* for the same date, there being no copy available for use by readers either in the British Library or in the University of Nottingham.

105 25 December 1839 (pages not numbered).

Wilde (Lord Truro). The reason for Boothby's change of political views and adhesion to the Whigs he had previously scorned is nowhere to be found; the unkind explanation would be that he saw greater prospects of advancement with them, but perhaps he found that the honourable member for Newark genuinely persuaded him of their superiority, and as we have seen the left was coming together anyway. It may also be that his sense of order was offended by the significant increase in violence and disorder associated with Chartism by the late 1830s (a general strike was attempted, and an armed march on Newport raised fears of rebellion). At any rate, the newspaper records that 'Boothby, a person who came down with Mr Serjeant Wilde, is still here', and that he and others were sitting in the Castle and Falcon with a few voters but many 'young fellows, such as generally cause rows and riots at elections'. Wilde was said to be willing to spend up to £5000 to win the forthcoming elections. There is a later report of Boothby as Wilde's principal election agent,[106] but I have not been able to find any reports of extensive speeches comparable to those quoted from Boothby's Radical period.

The Whigs and Radicals soon discovered more common ground. A chronicler of Nottingham reports that in 1842, a compromise was reached in a disputed election under which John Walter (connected with the *Times* newspaper and an inveterate enemy of Daniel O'Connell)[107] would be elected unopposed to one of the two seats for Nottingham.

> It is unnecessary to enter into all the details of this shameless piece of political jobbing and nefarious juggling, further than to say, that the whole scheme … broke down. When the writ was issued for a new election, on the 30th of July [1842], the town was speedily in a condition bordering almost on phrenzy. Mr Walter was again brought forward by his friends; and in place of the [previous member] Mr Joseph Sturge, a member of the Society of Friends, was announced as the representative of the conjoined powers of the Whiggism and Charterism of the borough. Feargus O'Connor, Dr McDouall, Henry Vincent and Mr B Boothby (now a barrister, formerly an iron founder in the town, and an enthusiastic supporter of the ballot and the principal points in the People's Charter) were continually, along with Mr Sturge, engaged in haranguing the people in public, and at their sectional meetings in the different wards. On the other side [various named persons] were similarly engaged for Mr Walter. The election came off on the 3rd of August, when Mr Walter was returned by a majority of eighty-four over his opponent.[108]

106 *Northern Star and Leeds General Advertiser*, 14 January 1843.

107 Richard D Fulton, *Walter, John (1776–1847)* (2004) Oxford Dictionary of National Biography <http://www.oxforddnb.com/view/article/28637>.

108 Bailey, above n 88, 426. Boothby remains, however, unmentioned in newspaper reports such as that of the *Doncaster, Nottingham and Lincoln Gazette*, 12 August 1842, 7; *Nottingham Journal*, 5 August 1842, 3. Nor do Sturge's papers in the British Library (Add MSS 43722 ff, 43845 and 50131) contain any letters to or from Boothby. The present author also conducted a search of the papers of other likely correspondents of Boothby without success.

Unhappy with this result, the defeated candidate challenged the election before a committee of the House of Commons which included Benjamin Disraeli. His counsel were John Kinglake, later a Liberal MP, and one Benjamin Boothby, admitted to the Bar in the previous year but one. The latter gentleman examined many of the witnesses, and his efforts were reported at length in the newspapers.[109] Their joint efforts were crowned with success: Walter was unseated and a by-election held which was won by one Thomas Gisborne, a radical Whig.

The two seats for Nottingham were re-contested at the election of 1847, when they were won by John Walter's son as a Conservative candidate and Feargus O'Connor as a Chartist. However, Boothby's involvement in politics appears to have ceased rather abruptly with his involvement in the challenge to the election of 1842 just mentioned; if, as his biographer quoted at the outset of this article maintained, he attained 'great skill in electioneering tactics', he had the good sense to quit while he was ahead, at the summit of his success and powers. He had also moved to London in 1838 and no doubt found much of his time taken up by practising and writing about the law.

## V Legal Practice

Benjamin Boothby was admitted as a student of Gray's Inn on 21 April 1838, aged 35.[110] It is not known how he financed his legal studies, especially after his bankruptcy; it would be pure speculation to refer to the possibility of support by relations, part-time work with friendly barristers or any other of the several obvious possibilities. Boothby's later *Synopsis of Indictable Offences*, however, carried a dedication to Wilde, 'in warm esteem of his private virtues and in grateful acknowledgment of the many advantages obtained through his kindness during the period of probation as a student', so he at least may be ruled in. Boothby's seventh son, born on 9 December 1839, also bore the middle name Wilde.

In March 1838, as we have seen, the Boothbys were compelled by bankruptcy to leave their home in Nottingham; both moved to Holloway (a suburb of London). Census records from 1851 show that, of the younger Benjamin's 12 children then resident in his house,[111] those born up to 1838 were born in Nottingham, whereas those born afterwards were born in Holloway in the borough of Islington.[112] When Boothby's admission was recorded in Gray's Inn in April 1838, his father's address was listed as Holloway,[113] just as it was in 1851.

109 House of Commons Parliamentary Papers (1843) vol VI, 223; *Times* (and other newspapers), 16–22 March 1843.

110 Joseph Foster (ed), *Register of Admissions to Gray's Inn, 1521–1889, together with the Register of Marriages in Gray's Inn Chapel, 1695–1754* (Hansard, 1889) 457.

111 One of his daughters at least married before the rest of the family left for Australia: *Morning Post*, 28 June 1850, 8.

112 Ancestry.com, above n 13 (search of database).

113 As it is also in the *Morning Post*, 15 August 1840, 1.

Three sources, none of which is entitled to a great deal of credit, suggest that Boothby might have been a special pleader in the office of Thomas Denman (later Lord Denman LCJ) before his admission,[114] but in the absence of more reliable information it would be hazardous so to conclude without qualification — all the more so given that Lord Denman became Chief Justice of the King's Bench in 1834, when Boothby was still practising ironmongery rather than the law. Perhaps, though, Lord Denman's former chambers were meant. Boothby's name does not appear in the list of special pleaders in *Clarke's New Law List* in the late 1830s, but when Boothby's name starts to appear in that publication as a barrister from 1842,[115] it is adorned with the abbreviation 'sp pl north cir'. It was certainly quite common for would-be barristers to serve an apprenticeship as special pleaders, and if we may conclude from that abbreviation that Boothby too did this, no matter in whose chambers or even on which circuit he was placed, it would go a long way towards explaining the attitude he later took to the need for exact compliance with the forms of procedure.

Boothby left no record of his reasons for turning to the law, but some may be deduced from the history of his life to this point: an interest in politics and membership of a local authority lead naturally to learning about the law; he had made the acquaintance of some lawyer-politicians such as Wilde and Mr Eagle, the barrister candidate for Nottingham; and his bankruptcy will have brought him into contact with assorted legal professionals. Perhaps he was also intellectually attracted by the rigour and pedantry of the law, and by the high social status of the barrister.

After his call to the Bar on 28 April 1841[116] it may be said with virtual certainty that Boothby must have relied on his patrons and contacts, above all Thomas Wilde, in order to build up his practice. He may be found for the first time in the *English Reports* in a case in late 1841 entitled *Sheppard v Shoolbred*,[117] heard before Lord Abinger CB. The case was brought in trover and involved an accusation against the defendants that they had bought goods realising that they must have been obtained by fraud, but the plaintiffs could not provide any proof of such knowledge and accordingly lost. Boothby did not, of course, have a speaking part. He was the most junior of three counsel appearing for the victorious defendants. It was something of a star-studded cast: he was led by (Sir) Frederick Thesiger and (Sir) William Erle (a future Lord Chancellor and Chief Justice of the Common Pleas respectively), and the plaintiffs were represented by Sir Fredrick Pollock, the Attorney-General, and (Sir)

114 *Register*, 24 May 1853, 3 (letter by JB Mather, on whom see above n 9; mentions Lord Denman, but not special pleader); *Adelaide Times*, 30 August 1853, 2 (mentions special pleader, but not relationship with Lord Denman); 'Judges of South Australia' (1910) 24 *Honorary Magistrate* 305, 305 (mentions both).

115 It is as well to add that there is no other barrister listed in this period also called Boothby.

116 (1841) 6 *Legal Guide* 54; *Derby Mercury*, 5 May 1841, 2, which adds that Boothby's father had now died. His brother Captain William Boothby died at his home in Upper Holloway on 31 August 1851; he was 47 and had spent 25 years associated with Calcutta: *Hampshire Advertiser and Salisbury Guardian*, 6 September 1851, 8.

117 (1841) Car & M 61; 174 ER 409.

Fitzroy Kelly, two future Lord Chief Barons, alongside one S. Martin. It is a surprise in particular to see Boothby alongside Thesiger KC, who had opposed Boothby's patron, Wilde, as the Conservative candidate in the Newark election of 1840; perhaps Wilde had alerted Thesiger to the talented young (or perhaps rather, newly admitted) barrister and suggested that party feeling should not stand in the way of exploiting his skills. Boothby did, of course, also appear from time to time with Wilde[118] until the latter's appointment as Chief Justice of the Common Pleas in July 1846.

Boothby's next major case was something of a minor sensation. He again found himself junioring Erle KC in a criminal action before Lord Denman LCJ, Patteson and Wightman JJ against the justices of Staffordshire for failing to admit certain Chartists to bail. The case was very extensively reported.[119] The information was brought because, after an arrest for seditious language, the magistrates had rejected, as sureties for bail, two gentlemen of means solely because they had attended Chartist meetings. Although politically he was no longer in league with the Chartists, it would be hard to imagine a case which could appeal more strongly to the political instincts of Boothby, and Lord Denman LCJ (who had been a Whig MP before his elevation) was hardly an unsympathetic judge either. The case was all but a complete victory for the right of personal liberty, with the Lord Chief Justice expressing the pointed view that 'the assumption of powers not given by the law appears to us peculiarly ill judged at a period of political disturbance, and not to be palliated, but rather rendered so much the more culpable if deliberately done by high functionaries'[120] and awarding costs against the magistrates; but his Lordship concluded that they were acting bona fide, however negligently, and a criminal information should not be brought. Nevertheless, the magistrates could not have read the judgment with pleasure. In argument, Boothby had actually had a speaking part: a Dublin newspaper[121] — for the case was widely reported in the daily press as well as the law reports — records him as submitting that 'he considered it a matter of evil omen to see the law officers of the Crown engaged as they were on the present occasion in defending the illegal and oppressive conduct of the magistrates'.

Boothby's cases were not all triumphs, of course. A few months after the major constitutional case just mentioned he found himself representing a small-time artist in Court who was suing for the price of two portraits of the defendant's daughter and a Spanish man, who wanted to take the likeness of the young lady with him to Mexico — for what purpose may be guessed at, but is not stated. The successful defence was that the portraits were not accurate, and that the purpose for which they were made, whatever it was, had thus not been accomplished. Boothby suffered the indignity of seeing his case laughed out of Court.

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118 See, eg, *Morning Post*, 26 February 1844, 2 — a case which caused some comment in the conservative press, as the plaintiff's failure to seek a *tales* was reckoned by them a victory. Perhaps this experience was behind Boothby's sponsorship of what became Act No 8 of 1854 (SA): *Register*, 1 November 1854, 3.

119 *R v Badger* (1843) 4 QB 468; 7 *Jurist* 216; 25 *Legal Observer* 413.

120 *R v Badger* (1843) 4 QB 468, 474.

121 *Freeman's Journal and Daily Commercial Advertiser*, 30 January 1843.

> Mr Jones [counsel for the defendant] — You say that you [the daughter] are fourteen years of age, but this [picture] is more like a woman of four score.
>
> Witness — He was to have painted me in a puce gown, but he has made it a vulgar flaming red.
>
> Mr Boothby — Did he not ask you which of the colours on his palette you would like?
>
> Mr Jones — He could have had no *palate*, he has shown so little taste. (Laughter)
>
> The witness then took off her bonnet and produced the portrait, that the jury might see what sort of a likeness it was.
>
> Mr Jones — Now, 'look here upon this picture, and on this' [*Hamlet*, Act III scene 4]. (Roars of laughter).[122]

On another occasion, applying for an order for costs to be rescinded, he was informed rather abruptly from the commanding heights of the Bench that

> [w]hat you are now asking is to vary the judgment of the Court after the appeal has been determined. You might as well go to the House of Lords, and say to their Lordships, after they had given judgment in the case with costs, that they had no right to do so. There is no ground whatever for the application.[123]

Boothby developed a parliamentary practice appearing for the promoters of private Bills such as railway Bills;[124] once he even appeared in Parliament against a Bill and opposite Wilde.[125] Boothby developed in addition a flourishing criminal practice, particularly as a prosecutor,[126] and appeared regularly at the York Assizes,[127] but also in the Old Bailey,[128] mostly as a prosecutor, often led but sometimes alone. However, he remained active in the civil law as well until his departure for Australia.[129]

How extensive Boothby's general practice was and how prosperous it made him cannot now be discovered — certainly not so prosperous that he was freed of money worries for the rest of his life! While it is true that 'his career at the Bar had no special

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122 *Morning Post*, 12 March 1843, 7 (emphasis in original).

123 *Gale v Chubb* (1847) 33 *Legal Observer* 355, 356.

124 *Nation*, 7 June 1845, 7.

125 *Borrow's Worcester Journal*, 14 May 1846, 3.

126 But not always: *Times*, 13 March 1852, 3.

127 Reported cases are *R v Marcus* (1846) 2 Car & K 356; 175 ER 147; *R v Stokes* (1848) 2 Car & K 536; 175 ER 222; 3 Car & K 185; 175 ER 514; 1 Den 307; 169 ER 259.

128 *R v White* (Unreported, Old Bailey Proceedings Online, 2 February 1852, Reference No t18520202-254) <http://www.oldbaileyonline.org/browse.jsp?ref=t18520202-254>.

129 *Webster v Kirk* (1852) 17 QB 944.

marks of distinction', as the *Australian Dictionary of Biography* claims, it was much shorter than usual given his late start: at the time when others were looking towards an imminent appointment to the Bench, Boothby was just out of his apprenticeship. By way of comparison: his patron, Wilde, had become an attorney (a solicitor in today's terms) in his early twenties, and by his late thirties, the time of life at which Boothby was only just beginning as a barrister, was engaged in defending Queen Caroline. Perhaps the thought that there was insufficient time for a judicial post at home played a role in Boothby's decision to apply for a colonial judgeship.[130] It must also be said, in fairness, that the Staffordshire justices case was an exception to the general lack of importance of most of his cases (except to the parties).

In the census of 1851 already mentioned, Boothby is recorded as living at 23 Park Road, Upper Holloway (now Parkhurst Road, N7; the famous prison just down the road, HMP Holloway, was opened in 1852, just before Boothby left London forever). His household included his wife and 12 of his children, assisted by a servant, cook and maid; two nieces aged 18 and 11; and a visiting law student from Yorkshire aged 23 — a household of 20 in all. Boothby needed a large house for such a brood, which may explain why he lived so far out and in a suburb which was 'not favoured by the well-to-do, and … occupied by a mixed population of labourers, railwaymen, artisans, shopkeepers and clerks'[131] alongside one ambitious barrister. His eldest son — William Robinson Boothby (1829–1903), later Sheriff and Returning Officer for South Australia and the man after whom the federal electorate is named — graduated BA from the University of London in 1850 and began to share his father's passion for politics, becoming secretary at an election in Yorkshire in the early 1850s before moving with his father to South Australia.[132]

## VI Revising Barrister, Recorder and Published Author

Despite his lack of any outstanding achievements or major triumphs in his short time in practice, Boothby had kept his nose clean, cultivated his contacts and performed competently enough across various fields of practice. He was therefore in line for any number of minor posts. He obtained two: Revising Barrister for Yorkshire and Recorder of Pontefract, a small town also in Yorkshire.

Appointments as Revising Barrister were made under s 28 of the *Parliamentary Voters Registration Act 1843*, 6 & 7 Vict, which conferred the making of the appointment annually on the summer assize judge in each county. The function of the Revising

130 On the other hand, it was not unheard of for lawyers to be appointed County Court Judges after about 15 years' practice: see, for an example, the obituary of CJ Gale, (1876) 61 *Law Times* 277. However, we shall see why Boothby would not have considered an appointment to that Court.

131 Stephen Inwood, *A History of London* (Carroll & Graf, 1998) 582; and see the map of London in 1862 published at http://www.mappalondon.com/london/north-west/islington.jpg; directions to the road are also to be found in Henry Large, *Large's Way About London* (1867) 342.

132 *Register*, 14 July 1903, 6.

Barrister was to audit the electoral rolls by means of quasi-judicial proceedings; objections and claims were to be made before him in open Court. The summer assize judge for 1845, the year of Boothby's first appointment, was Mr Baron Rolfe, and his appointment of Boothby was announced in late August 1845. Boothby was appointed with two colleagues, William Blanshard and John William Harden, for the West Riding and Ripon.[133] Having regard to his involvement in politics, Boothby's appointment, at least, could scarcely be said to be that of a political neuter. Rolfe B, however, was not one such either. He had stood as a Whig in the elections of 1831 and 1832, and retained the seat he won in the latter year until his appointment to the Bench in 1839. In 1843 he had been the trial judge at the trial of Feargus O'Connor for sedition: the accused was so impressed by the fairness of the judge that he dedicated his published account of the trial to him.[134] Rolfe B, as it happens, was to become Lord Cranworth LC, and was Lord Chancellor at the time of Boothby's appointment to the South Australian Bench also, but that appointment was a Colonial Office one rather than the Lord Chancellor's.

The three Revising Barristers held their Court for the first time in Boothby's birthplace, Doncaster, in September 1845. 'In consequence of its being the races', the newspaper informs us, 'the parties required to attend were much annoyed at the arrangement, and expressed their disapprobation on all sides'.[135] Thus Boothby's judicial career, in this humble part-timer's Court in a provincial town, began as it was to end in the capital city of a vigorous young colony: by causing inconvenience and annoyance to the public.

The Revising Barristers appeared at several places in Yorkshire, sometimes sitting separately in parallel Courts in order to get through the business faster. Boothby was reappointed in 1846 and subsequent years up to and including 1852, his last full year in England — by other judges than Rolfe B — but Harden's place was taken by one Leofric Temple from 1846. Their circuit of parts of Yorkshire took two or three weeks per year.[136]

This very minor quasi-judicial role was rendered even less taxing — and even less of a test for suitability for higher judicial office — by the numerous occasions on which the business was formal only or did not raise any significant points of interest.[137] Despite Boothby's political background, his decisions appear quite even-handed,

133 *Times*, 4 September 1845, 5.

134 Rolfe B's entry in the *Oxford Dictionary of National Biography*, above n 94.

135 *Sheffield and Rotherham Independent*, 20 September 1845, 8.

136 *Bradford Observer*, 25 September 1845, 1; 2 October 1845; *Lancaster Gazette*, 29 August 1846, 3; *Sheffield and Rotherham Independent*, 12 September 1846, 1; *Leeds Mercury*, 26 September 1846; *Blackburn Standard*, 18 August 1847, 3; *Leeds Mercury*, 4 September 1847, 1; *Daily News*, 18 September 1847, 3; *Bradford Observer*, 31 August 1848, 4; 13 September 1849, 1; 5 September 1850, 1; *Huddersfield Chronicle and West Yorkshire Advertiser*, 6 September 1851, 2; *Bradford Observer*, 9 September 1852, 1.

137 *Daily News*, 28 September 1846, 3; *Sheffield and Rotherham Independent*, 18 September 1847, 8; *York Herald and General Advertiser*, 2 October 1847, 2; *Sheffield and Rotherham Independent*, 21 September 1850, 2.

with rarely more than small gains for one party or the other, and one party's gains in one year or one place cancelled out by the other's gains at other times or places.[138] Only rarely did complicated questions of fact or law have to be decided. An appeal lay from the decisions of revising barristers to the Common Pleas;[139] appeals were brought every year against a few such decisions, and this provision was not a dead letter; but no record of any such decision on appeal from Boothby could be found.[140]

On one occasion, Boothby showed traces of the sort of attitude he would later take to judicial decisions that displeased him, denigrating a decision of the Common Pleas (Tindal CJ — a Tory — and Coltman, Maule and Erle JJ). Their decision in *Alexander v Newman*[141] allowed men to manufacture their eligibility for the franchise (which then could be had only by the propertied) by buying land and dividing it among numerous persons with the sole aim of qualifying each of them for the franchise — a tactic pioneered by the Anti-Corn-Law League. This was known as the 'faggot vote'.[142] Boothby dismissed an objection to a 'faggot vote' as he was bound to do after *Alexander* with the disrespectful remark that 'after the decision of last year, any objection of this kind would not avail; they might meet now and manufacture a dozen votes, for the decision of the Common Pleas went to that length'.[143] But the Corn Laws were repealed in mid-1846 and agitation on that front subsided in intensity.

Boothby's appointment as Recorder of Pontefract added only marginally to his official duties. The vacancy arose because the previous Recorder, one Hepworth Hill, died after a very short illness on 4 January 1849;[144] little more than a week later, the London *Morning Post*[145] announced the appointment of Mr Recorder Boothby, 'who is a protégé of Sir Thomas Wilde, Lord Chief Justice of the Common Pleas'. It was well for Boothby that he had acted quickly, for the local council had met on 6 January and recommended to the central government the appointment of one (Sir) James Taylor Ingham.[146] Ingham's later career amply justified the council's confidence in

138 *Sheffield and Rotherham Independent*, 18 September 1847, 8; *Huddersfield Chronicle and West Yorkshire Advertiser*, 20 September 1851, 8; 9 October 1852, 5, 8.

139 *Parliamentary Voters Registration Act 1843*, 6 & 7 Vict, s 60.

140 There is none in the English Reports nor in CP 47/47 (Public Record Office, London). The appeal in *Alexander v Newman* (1846) 2 CB 122; 135 ER 889 ('*Alexander*') itself was from Yorkshire, but given that the appeal from the revising barrister was dismissed it cannot have been Boothby's decision.

141 *Alexander* (1846) 2 CB 122; 135 ER 889 (other related cases were decided at the same time).

142 Derek Beales, 'Victorian Politics Observed' (1978) 21 *Historical Journal* 697, 704 ff; John Prest, *Politics in the Age of Cobden* (MacMillan, 1977), 77–102; G R Searle, *Entrepreneurial Politics in Mid-Victorian Britain* (Oxford University Press, 1993), 21.

143 *Bradford and Wakefield Observer*, 8 October 1846, 6; cf *Leeds Mercury*, 16 October 1852, 5.

144 *York Herald and General Advertiser*, 6 January 1849, 5.

145 13 January 1849, 5. Same: *Wakefield Journal*, 12 January 1849, 2.

146 HO 45/2751 (Public Record Office, London).

him, but Boothby beat them to the post. Written records do not show how Boothby procured his appointment in such a short time: presumably he relied on contacts of some sort, largely Wilde CJ.

Boothby entered on to the duties of his new office within the space of another week, and his first trials showed that it was certainly not the pressure of business which had prompted the demise of his predecessor. His first case involved a girl charged with stealing two towels and two napkins, whom Mr Recorder Boothby imprisoned until the rising of the Court. The second involved a pickpocket who was imprisoned for four months.[147] With these two cases, his Honour's first session as Recorder closed. His Honour sat, of course, with both grand and petty juries. As he had pointed out in his book on criminal law in 1842, to be mentioned shortly, there was a long list of the more serious offences that Recorders could not try, from treason and murder — all capital offences, in fact — down to forgery, bribery and various forms of aggravated theft.

His Honour's trials were not always reported in the newspapers — Pontefract did not have its own journal until 1857 — but in July 1850 it was an occasion for comment when there was an unusually large number of defendants at one sitting: three, against whom a total of five indictments were brought by the grand jury. As before, all were for the type of petty theft which nowadays would be dealt with by magistrates. Four of the five charges were found proved by the petty jury, and all three defendants received sentences between one and four months.[148] By April 1851 there was only one case again: mistreating an ass,[149] an act which for some reason engaged the law's special attention — perhaps because of something which Charles Dickens had just pointed out about the law in *Oliver Twist*. In January 1852, there were four cases of petty theft or dishonesty again, the longest sentence being 12 months on account of prior convictions.[150] On another occasion, however, his Honour sentenced an 'impudent incorrigible thief'[151] to 10 years' transportation, presumably to Western Australia, for stealing 40 yards of cloth from a draper — that appears to have been his harshest sentence. (When his Honour had himself wanted to make off with other people's money, on the other hand, he chose the legal path of bankruptcy, and his transportation to Australia was therefore of the voluntary description.)

Although Mr Recorder Boothby's term of office still had over a year to go after the comparatively busy sessions of January 1852, those four cases of petty theft were to be his last, for the next report we have is from October 1852, when it is stated that there had been no further cases of felony in Pontefract since January and there had therefore been no business for the Recorder's Court since then. The Recorder's

147 *York Herald and General Advertiser*, 20 January 1849, 6.

148 *Leeds Mercury*, 6 July 1850, 10.

149 *Leeds Mercury*, 5 April 1851, 10; *Wakefield and West Riding Examiner*, 5 April 1851, 5.

150 *Leeds Mercury*, 17 January 1852, 10.

151 *Leeds Mercury*, 14 July 1849, 10 — the newspaper's own description, but it may have been taken from his Honour.

only duty had been congratulating the grand jury on the lack of crime in the town![152] In January 1853, at Mr Recorder Boothby's last session, there was again no case for trial, and elaborate speeches were given by him and the mayor in commemoration of the gratifying fact that a whole year had passed in Pontefract without the commission of a single felony. Boothby received a pair of white kid gloves as a memento.[153] The *Adelaide Times*[154] was moved to say of Boothby J on his appointment that he had had 'some judicial experience': perhaps its readers, most of whom will have known what a small place Pontefract was, were meant to understand that the emphasis was decidedly on the first of those words. Nevertheless it was not always the case that those appointed to the colonial Bench had any such experience at all, so perhaps even this smidgin was meant to be seen as better than nothing.

Needless to say, Pontefract collapsed into disorder after Mr Recorder Boothby's departure, and his successor (one Percival Pickering, the father of Evelyn De Morgan, the noted painter) found himself trying no fewer than five accused at his maiden sessions in April 1853.[155]

The last of Boothby's major legal achievements in England to be mentioned is his authorship of two legal works: a practitioner's manual and a pamphlet. The former was produced in 1842 — the preface is dated 21 February 1842, less than 10 months after his call — and the latter in 1844. Like many newly admitted and occasionally underemployed barristers in this period, he used the time between briefs to write in the hope of making a contribution to the law, a bit of money and a name for himself through publication.

The full title of the book gives a guide to its contents: *A Synopsis of the Law relating to Indictable Offences: in which the Crimes in Alphabetical Order; the Respective Punishments; the Necessary Evidence; together with Observations; embracing a condensed Digest of Cases, are Tabularly Arranged; and Comprising also, References to Precedents of Indictments for Each Offence, and the Text Writers on Criminal Pleading and Evidence*. Originally published in 1842,[156] it ran to a second edition in 1854, which, as Boothby was beyond the seas, was issued (no doubt with his permission) by his old colleague as Revising Barrister, Leofric Temple. The first edition was, as already mentioned, dedicated to Sir Thomas Wilde.

The book was emphatically a practitioner's manual, and the present writer cannot claim to have read every word. It was not a work of scholarship but of compilation and digesting, but Boothby did not claim for himself any greater merit: in his preface,

152 *Daily News*, 30 October 1852, 5.

153 *Newcastle Courant*, 21 January 1853, 3.

154 30 August 1853, 2.

155 *Leeds Mercury*, 9 April 1853, 10.

156 (Saunders and Benning). The author had access to the copy held in the University of Adelaide's Law Library, which, from an inscription in the front, once belonged to Hanson CJ, of all people. With the addition of a table of cases and statutes, the first edition is very like the second of 1854, which is available on the *Making of Modern Law: Legal Treatises 1800–1926* database.

he wrote that he had 'no other pretension than as collecting from the Statute Book, the text writers and the decided cases, the law, as it relates to indictable offences' and claimed to have invested 'most laborious care, to secure entire accuracy, as the most important object to be regarded'. Certainly a look at the book confirms the assertion about the labour invested in it: countless cases are cited; but whether it represented the law of 170 years ago with unerring accuracy cannot now be determined without disproportionate effort.

The book was well reviewed at the time;[157] there are even records of the sale of the first edition of the book in 1848 in Sydney, when it was six years old,[158] and the reading of a long extract from the book as late as 1859 before the justices in Birmingham.[159] The 1854 edition is in a catalogue of the Library of the Supreme Court of Victoria published only in the following year and in various other catalogues. The publication of a second edition also testifies generally to some demand for the work and to its utility. The reviewers were kind as well. In the *New Zealand Journal*[160] an anonymous reviewer opined, rather strikingly in view of Boothby's later colonial career, that he had written a book which was 'especially adapted to colonial practice', 'merits a place in every professional library' and was useful also to law students. This last characteristic may not be a coincidence, as it may, in whole or large part, be the fruit of Boothby's student notes. It is hard to imagine that he researched and wrote all of it in the 10 months after his call, having regard to the amount of detail and the other tasks confronting the newly admitted barrister.

The following review, from no lesser journal than the *Spectator*, may be quoted both as representative and because it provides an accurate description of the book.

> An ingenious and useful synopsis of the criminal law — quite a *multum in parvo*, and containing more of the *multum* than is usually the case. The arrangement is alphabetical; each offence, from Abduction to High Treason, being [ar]ranged dictionary-wise; whilst by a four-fold columnar division, the reader sees at once the offence and by what authority created, the punishment, the evidence necessary to insure conviction and the author's observations. Foot-notes contain fuller remarks, where requisite, than the columnar arrangement would conveniently admit; and there is a copious reference to cases for the student or practitioner to study or refer to. Copious indexes of contents, cases and statutes, with some general information, complete this useful though not bulky volume.[161]

It was this arrangement, rather than the information arranged, which was the novel feature of the book.

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157 Reviews located, apart from those quoted in the text, were: (1842) 6 *Justice of the Peace* 147; (1842) 6(2) *Jurist* 168; (1842) 24 *Legal Observer* 258.

158 *Sydney Morning Herald*, 6 May 1848, 1.

159 *Birmingham Daily Post*, 25 January 1859.

160 2 April 1842, 80. It is tempting to imagine that the reviewer was (Sir) Richard Hanson, but that would be mere speculation. See also, above n 156.

161 (1842) 15 *Spectator* 449.

Two years after the completion of the book, Boothby moved from mere compilation to critical commentary with his 37-page pamphlet *Local Courts Not the Remedy for the Defects of the Law* of 1844. The general thrust of this pamphlet was an attack on the proposal to establish County Courts; how far this attack succeeded appears adequately from the enactment of the *County Courts Act 1846*, 9 & 10 Vict.[162]

Nevertheless Boothby's entry in the Colonial Office List for 1867[163] claimed that some of the suggestions he made in the pamphlet were adopted by Imperial legislation in 1853. They were, clearly, not the central suggestion. A perusal of the statute book for 1853 does not reveal anything that would obviously qualify as an implementation of Boothby's proposals, but s 2 of the *Common Law Procedure Act 1854*, 17 & 18 Vict, does give effect to his proposal for allowing judges of the same Court to sit not *in banco* at *nisi prius* but alone in sessions parallel to and concurrent with those of the other judges. However, this was such an obvious reform that it would be a stretch indeed to ascribe it to Boothby's pamphlet of 10 years before. Furthermore, Boothby's suggested reform — while made with the same intention as the statute, namely to mitigate 'the crying mischief of delay'[164] of the law — was materially different, for he suggested not single judges sitting alone but two parallel courts of three judges each, which were to be made possible by the appointment of additional judges. Only as an ancillary measure did he suggest single-judge courts, with one judge dealing with routine business.

In 1855 Boothby's pamphlet was extensively discussed by an anonymous reviewer, who believed it to have been written by 'Sir Benjamin Boothby, now Chief Judge of the Supreme Court at Adelaide'.[165] (It is amusing to contemplate the reaction of the Colonial Office of the 1860s, fed up to the back teeth with Boothby J, to the suggestion of conferring a Knighthood upon him.) The writer did not suggest that any of 'Sir' Benjamin Boothby's proposals, some of which he reviewed favourably, had actually been adopted two years earlier. Aside from that, Boothby's pamphlet was noticed by only a few reviewers, all of whom also reviewed it well — although one mentioned it in the same breath and in the same favourable tones as a proposal to abolish grand juries, something that would hardly have pleased Boothby J![166]

Boothby's pamphlet was not hostile to reform, as he suggested a total of 10 changes. And it shows that his hostility to modern legislation extended not only to colonial legislation, for there is some trenchant criticism of recent English legislation in his pamphlet also. There are also some further strong indications of the various stances, and above all of the cast of mind he was to exhibit in South Australia.

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162 Short title conferred by the *County Courts Act 1867*, 30 & 31 Vict 34, sch D.

163 See above n 7.

164 Boothby, *Local Courts*, above n 3, 13.

165 (1855) 23 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* 288, 317.

166 (1844) 31 *Law Magazine and Review: A Quarterly Review of Jurisprudence* 241 (with grand juries); (1844) 27 *Legal Observer or Journal of Jurisprudence* 390; 466.

His hostility to the proposed County Courts in 1844 is amplified by a discussion of the defects of the existing Courts of Requests, and all this certainly found an echo in his decision 21 years later in *Dawes v Quarrel*[167] holding that the Local Courts of South Australia did not exist. His objections in 1844 were manifold: the 'monstrous innovation of an abolition of jury trial'[168] (the County Courts established in 1846 largely did away with juries), the inferior standing of the judges and above all the lack of uniformity of the law which they produced.

Uniformity was, for Boothby, almost the sole desideratum of the law. In Boothby's view — and this sort of black-and-white, absolutist thinking is strongly redolent of the stances he would take in South Australia — there was something which, 'in the jurisprudence of any country, is beyond all price — UNIFORMITY'. For him, 'centralisation is so obviously a requisite to secure the first object of law, uniformity'.[169] This is certainly an odd view. For many people, the first, most obvious object of the law might be the achievement of justice, or perhaps economic efficiency, but it is hard to think of uniformity as good for its own sake. The most terrible laws are not made good just because they are uniform. And the blessings of centralisation, too, are very mixed: the lack of local Courts was one of the reasons why justice was so often denied to poorer people before the rigours of centralisation were relaxed by measures culminating in the creation of the County Courts in 1846.[170]

Clearly the idea that experimentation might be a good thing even if it detracted from uniformity had not occurred to Boothby; and uniformity with English law was to be one of his chief hobbyhorses in Adelaide.

In another part of his pamphlet Boothby astonishingly refers to '[o]ur system of pleading, so justly esteemed the perfection of human science, as a device for bringing to determination issues of fact or in law'.[171] This suggests far too high an estimate of the merits of the law, one which would have been shared by only the most conservative lawyers in this era of legal reform. It is no doubt significant that Boothby had no equity practice! And there are strong signs of ancestor worship in the pamphlet also, with Boothby referring to what he calls on one occasion the 'wise beginners of our law'[172] several times: reform he holds to be necessary in some areas, but it is required, he thinks, in order to restore the principles of the ancestors and to adapt the wisdom of the golden age of the past to the realities of the present.

## VII Conclusion: Farewell to Old England Forever

The news of the death of Mr Justice Crawford in September 1852 reached the Colonial Office, which was responsible for selecting a replacement, on 12 January

167 (1865) 0 SALR 1.

168 Boothby, *Local Courts*, above n 3, 6.

169 Ibid 8 (capitalisation in original).

170 Sir William Searle Holdsworth, *A History of English Law* (Methuen, 1982) vol 1, 188.

171 Boothby, *Local Courts*, above n 3, 26.

172 Ibid 9.

1853. It was also published in some newspapers on the following day, Thursday 13th.[173] In his despatch to the Imperial officials notifying them of the vacancy on the Bench, the Governor of South Australia, Sir H E F Young, wrote that there had been no need for him to appoint a temporary replacement urgently pending the expression of London's wishes, as the amount of business in the Supreme Court of South Australia had declined owing to the loss of population to the gold fields in Victoria; he abstained from commenting on the applications of the several local lawyers who had put forward their names. The Colonial Office therefore concluded that he was requesting, or at least consenting to the appointment of an English barrister to the vacant post. On 2 March 1853, then, only seven weeks after it first learnt of the vacancy, the Colonial Office was able to write to the Governor and inform him that The Queen had been pleased to appoint Mr Benjamin Boothby to the vacant post. Informing the Governor of this appointment, the Colonial Secretary, the fifth Duke of Newcastle, wrote that Boothby J 'has been recommended to me as well qualified for the appointment'.[174]

When the Colonial Office began looking for candidates to replace Crawford J, Boothby was presumably in or around Pontefract for his last and trial-less session as a Recorder, a report of which appeared in the newspapers on Friday 21 January 1853.[175] There is no written record of how long he had been thinking of a colonial appointment or how he found out about the vacant spot in South Australia.

In December 1852, fortunately for Boothby, Lord Derby's Conservative government had fallen, and a Whig–Peelite coalition under Lord Aberdeen was formed. (The Peelites were Tories who had broken away over the repeal of the Corn Laws.) Lord Truro (Sir Thomas Wilde) had ceased to be politically active, although may have put in a good word behind the scenes with the Peelite fifth Duke of Newcastle, who as the new Colonial Secretary appointed Boothby J. If the new Lord Chancellor, Lord Cranworth LC, was consulted about likely candidates, it is quite possible that he will have remembered Boothby as his appointment to the post of Revising Barrister in 1845 when he was Rolfe B. Boothby's principal champion, however, appears to have been Sir Charles Wood from the Whig party.

In 1852, as the fall of Lord Derby's Conservative government approached, Sir Charles Wood, Bart, had been urging his fellow Whigs 'to court the Peelites, especially Graham and Newcastle, for without them a Liberal government would not be able to gain the support of the Irish members who constituted, Wood believed, the rank and file of the Newcastle party'.[176] Sir Charles Wood (later Viscount Halifax) had been born at Pontefract, Mr Recorder Boothby's bailiwick, and his father resided near Doncaster, Boothby's birthplace, but at this point Sir Charles was member of Parliament for Halifax. He was also connected to the (Earl) Greys by marriage with a daughter of the second Earl. His nearest approach to legal qualifications was that his

173 *Morning Chronicle*, 13 January 1853, 3.

174 CO 13/78/135 (AJCP 786).

175 See *Newcastle Courant*, above n 153.

176 Munsell, above n 39, 135.

maternal grandfather had been Recorder of Leeds. In Lord Aberdeen's government which took office in late 1852, Sir Charles was President of the Board of Control, that is, responsible for India.[177]

On 17 February 1853, just over a month after the vacancy in Adelaide had become known in England, Wood wrote to the Duke of Newcastle, newly appointed Colonial Secretary, to ask him to have the 'kindness to put him [Boothby] out of his anxiety one way or the other' about the appointment in Adelaide — for Boothby had written to him (Wood) stating that he (Boothby) had heard nothing yet — and added that he (Wood) had previously 'ventured to recommend' Boothby to his Grace 'for some judicial appointment in Australia'.[178] Wood, therefore — rather than any legally qualified or knowledgeable person — was the source of the recommendation referred to by the Duke of Newcastle in his letter to the Governor of South Australia advising him of Boothby J's appointment. Besides this recommendation, his Grace 'probably … knew very little about him';[179] had that not been so, the recommendation and the letter of 17 February would hardly have been required.

How far exactly Boothby's string-pulling for the job extended can never be known. Possibly there was another recommendation from a lawyer or judge who knew his professional character, or the Duke of Newcastle made his own further enquiries in such quarters. Boothby may well have relied on other contacts from the legal and political worlds that he had been building up since his conversion to Whiggism in the late 1830s. We have already met some of the possible suspects, at least, such as Lord Cranworth LC. On Boothby's behalf it was also said, in 1867, that he was acquainted with the Chittys, who held him in esteem.[180] Hannan has demonstrated that he admitted the accusation that he had made fruitless attempts to pull strings with persons of influence in his dispute over the rightful occupant of the Chief Justice's chair in Adelaide in the mid-1860s, but unfortunately the identity of those whose strings were pulled is unknown.[181] (Thomas Wilde, by then Lord Truro, had inconveniently died in 1855 and thus deprived Boothby of perhaps his closest patron, but Sir Charles Wood was still alive.) But if any further contacts or enquiries were made before his appointment, I have not found any trace of them. As far as we know, Boothby J was recommended for the judicial post by a non-lawyer. Nor is it even clear how well Sir Charles Wood knew Boothby; there is no other correspondence between them in the former's voluminous papers.[182] Perhaps then it was not a friendship, but

177 David Steele, *Wood, Charles, First Viscount Halifax (1800*–1885*)* (2004) Oxford Dictionary of National Biography <http://www.oxforddnb.com/view/article/29865>.

178 University of Nottingham Manuscripts and Special Collections, above n 39.

179 Hannan, above n 1, 74.

180 *Advertiser*, 17 January 1867, 2.

181 Hannan, above n 1, 88–90. There is no record, however, of any correspondence with Viscount Halifax (Sir Charles Wood): see below n 182.

182 They do contain a letter from a B Boothby to 'My dear Courtenay' (the 11th Earl of Devon), dated 'All Souls, Tuesday' and referring to a 'loss you have sustain'd' and to one or two other persons who do not otherwise feature in the story of Boothby J's life (Borthwick Institute, University of York, Halifax Archive A3/3/3). The letter is very

rather Boothby had just done some sort of favour for Wood or his circle which was being repaid.

Boothby, at all events, got the job. Preparing to leave England forever — Boothby J would never see his homeland again — the Boothbys paid a farewell visit to a family friend in April 1853 who recorded that '[a]ll his sons are eager about Australia',[183] but unfortunately said nothing of the judge's motives for going or his own state of mind. I give little credence to the oft-told story that Queen Victoria, on being asked why Boothby J had chosen South Australia, received the answer that his need to provide for his numerous children was the cause,[184] but no doubt he hoped for a field in which his sons as well as he might rise further and faster than would be possible in England. If so, his hopes for them were fully justified, but for him South Australia would hold only deserved dismissal and deserved disgrace.

probably from the Rev'd Brooke Boothby, ninth Baronet (to give him his later titles). No letters from our hero appear in the period from 1832–1868 in the general correspondence series A4/181/1-6, or elsewhere in the papers, judging from the finding list in the Borthwick Institute of the University of York which holds Viscount Halifax's papers. Nor are there any relevant letters from the Duke of Newcastle or Lord Truro in A4/181/1–6, although judging solely on the occasional letter the latter seems to have been on quite civil terms with Sir Charles Wood in the early 1850s.

183 Howitt, above n 10, vol 2, 97.

184 Another version of this legend may be found in Robinson and Spence, *Robinson Family*, above n 13, 50, where Boothby personally is said to have given 'seven reasons — seven sons' in response to a query by Earl Grey about his motives for going. The same work at the same page states however that he was admitted to the Bar in 1825! There is also no reason why Earl Grey would have been involved in the appointment — just as there is no particular reason why Queen Victoria would ask for a reason behind one of the numerous minor appointments she was called upon to approve, and no particular reason why South Australia (as distinct, for example, from some African colonies with their notoriously high mortality rate) would call for any special explanation.

***Seb Tonkin****

# *GOOGLE INC v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION* (2013) 294 ALR 404

## I Introduction

In *Google Inc v Australian Competition and Consumer Commission*,[1] the High Court determined whether, in displaying misleading or deceptive advertisements, an online search engine company could itself be liable for 'misleading or deceptive conduct' under s 52 of the *Trade Practices Act*.[2] This case note examines the decision and its background, and assesses the different judgments' responses to the somewhat deficient pleadings of the Australian Competition and Consumer Commission ('ACCC'). Finally, it briefly considers the public policy implications of decisions which deny liability to service providers on the internet.

## II Facts

Google Inc ('Google') is the company operating the free search engine Google.[3] Google makes most of its revenue through the sale of advertisements, known as 'sponsored links', which appear alongside search results.[4] Advertisers use the Google product 'AdWords' to create and purchase this advertising, specifying the web address the link will lead to, the clickable headline, the body text, and their keywords. Sponsored links only appear when a Google user's search term matches one of the advertiser's keywords. When triggered, those keywords can also be dynamically inserted into the title or text of the sponsored link, allowing the text of one advertisement to be somewhat tailored to a number of different search terms.[5]

This case concerned four particularly cunning sponsored links. In these, the advertisers included the names of competing businesses in their keywords, and used the keyword insertion mechanism to insert those business names into the titles of their advertisements. Google users searching for a business were then presented with sponsored links that used that business's name, but when clicked, linked to a competitor's website (see Table 1).

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1 (2013) 294 ALR 404 ('*Google v ACCC*').

2 *Trade Practices Act 1974* (Cth) ('*Trade Practices Act*').

3 For a detailed, first principles elucidation of the Google search engine and the World Wide Web in general, see: *Google v ACCC* (2013) 294 ALR 404, 410 [18]–[23] (French CJ, Crennan and Kiefel JJ), 431 [126]–[128] (Heydon J).

4 $43.7 billion in 2012: Google Inc, *2012 Financial Tables* <http://investor.google.com/financial/2012/tables.html>.

5 *Google v ACCC* (2013) 294 ALR 404, 411 [26] (French CJ, Crennan and Kiefel JJ).

| SEARCH TERM | SPONSORED LINK |
|---|---|
| 'Harvey World Travel' | Harvey Travel<br>Unbeatable deals on flights, Hotel & Pkg's Search, Book & Pack Now!<br>www.statravel.com.au |
| 'honda.com.au' | Honda.com.au<br>www.carsales.com.au/Honda-Cars Buy/Sell Your Civic The Fast Way on Australia's No 1 Auto Website |
| 'Alpha Dog Training' | Alpha Dog Training<br>DogTrainingAustralia.com.au All Breeds. We come to you. No dog that can't be trained. |
| 'Just 4x4s Magazine' | Just 4x4s Magazine<br>www.tradingpost.com.au New & Used 4WD Cars — See 90,000+ Auto Ads Online. Great Finds Daily! |

**Table 1**[6]

## III Issues

Section 52 of the *Trade Practices Act* provided that '[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.[7] Misleading and deceptive conduct has been described as a relatively simple action to make out, requiring neither proof of intention or knowledge, nor evidence that anyone has actually been misled or deceived.[8] The provision protects competing businesses as well as consumers, and, perhaps due to its 'uncompromising terms', is a popular alternative to actions like passing-off.[9]

The ACCC originally raised two claims against Google, both relying on s 52 of the *Trade Practices Act.* The first claim was that Google had failed to adequately distinguish between ordinary search results and sponsored links. The second claim was that Google had engaged in misleading and deceptive conduct by displaying the particular sponsored links described above.[10] The High Court was called upon, on appeal, to decide the second claim. The trial judge had found that all four sponsored links had made misleading and deceptive representations regarding the advertisers having commercial associations, or website content, which they did not.[11] This

6 Ibid 412 [34], 413 [40], 414 [45], 415 [49].

7 A near identical provision can be found in the new consumer law: *Competition and Consumer Act 2010* (Cth) sch 2 s 18 ('*Australian Consumer Law*').

8 Grant Holley, 'Old Law Meets the New World of Cyberspace — *ACCC v Google* (Round 2)' (2012) 64(5) *Keeping Good Companies* 292.

9 Brenda Marshall, 'Liability for Unconscionable and Misleading Conduct in Commercial Dealings: Balancing Commercial Morality and Individual Responsibility' (1995) 7(2) *Bond Law Review* 42, 48, 52.

10 Ibid 15–16 [53].

11 *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498, 550–1 [236]–[238], 554 [251], 567 [317]–[318], 572–3 [342].

finding lay rightfully undisturbed, and the issue was therefore whether *Google* could be liable for *its* conduct with respect to the misleading advertisements.

## IV Decision

All three judgments absolved Google of any liability under the *Trade Practices Act*.[12]

### A *French CJ, Crennan and Kiefel JJ*

The majority judgment of French CJ, Crennan and Kiefel JJ relied largely on a line of case law suggesting that, while honest conduct can still contravene s 52,[13] if the defendant is merely passing on another's message (without 'adopting or endorsing it') they will not be held to have made the misleading or deceptive statement (the 'mere conduit' principle).[14] The ACCC argued that the misrepresentations, appearing as they did in response to Google's algorithms, had been made or produced by Google, rather than merely passed on.[15] The majority rejected this argument on a number of grounds, holding that all the relevant parts of the deceptive sponsored links (keywords, insertion points, and text) had been specified not by Google, but by the advertisers. Google's technological role in assembling those parts did not make it the creator, any more than the technical act of broadcast would make a television station a creator.[16] The majority also cited, with approval, the trial judge's findings that 'ordinary and reasonable users' would have understood that the sponsored links were created by advertisers, and not by Google.[17]

### B *Hayne J*

Hayne J agreed with the orders of the majority, viewing the trial judge's findings on the reasonable user's understanding of authorship as sufficient to allow the appeal.[18] However, his Honour cautioned against extrapolating beyond the wording of the *Trade Practices Act* to a general rule with respect to intermediaries.[19] Hayne J suggested that the meaning of 'conduct' under s 52 was wide, and that the bare act of publication, if likely to mislead or deceive, could nonetheless suffice.[20] His Honour interpreted the case law to mean that, while adoption or endorsement were relevant

12 *Google v ACCC* (2013) 294 ALR 404, 404 (Orders).

13 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 197 (Gibbs CJ).

14 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 605 [40]. See also: *Yorke v Lucas* (1985) 158 CLR 661, 666.

15 *Google v ACCC* (2013) 294 ALR 404, 418 [63].

16 Ibid 419–20 [69].

17 Ibid 420 [70].

18 Ibid 422 [82].

19 Ibid 422-3 [83]–[84].

20 Ibid 425 [97].

factors, they were not in themselves decisive.[21] In this case, however, the ACCC argued only that Google's conduct made it the *creator* of the messages, not that its conduct in a wider sense was likely to mislead or deceive, so such a question did not fall to determination.[22]

### C *Heydon J*

Heydon J substantially concurred with the judgment of the majority, placing particular emphasis on rejecting the technological arguments advanced by the ACCC — that is, denying any distinction between online advertising and advertising in other media.[23]

### D *Publisher's Defence*

In cases where s 52 liability is otherwise made out, the *Trade Practices Act* provided a 'publisher's defence' in s 85(3), protecting a defendant whose business it is to publish advertisements, and who was unaware of (and had no reason to suspect) any contravention.[24] Though the initial conclusions made it unnecessary to determine, the majority judgment commented on the distinction between the aforementioned 'mere conduit' principle of *Yorke v Lucas*[25] and the statutory defence in s 85(3) of the *Trade Practices Act*. Their Honours stated that, whereas acting as a 'mere conduit' can be sufficient to exclude s 52 liability entirely, the s 85(3) defence operates where a publisher *does* adopt or endorse a misleading or deceptive representation, but 'without appreciating the capacity of that representation to mislead or deceive'.[26] Such an interpretation suggests that the statutory defence has little work to do. Furthermore, their Honours suggested that publishers might need to show they had 'appropriate systems' in place to catch potential contraventions.[27]

## V Analysis

*Google v ACCC* is a case defined, and in some ways hamstrung, by the pleadings of the respondent. The ACCC declined to plead accessorial liability, or that Google's conduct in displaying the sponsored links was misleading or deceptive in a wider sense. Instead, they narrowly alleged that Google had *made* the representations in the advertisements.

The majority's identification of a fairly narrow test based on the concepts of adoption and endorsement limits quite substantially the plain language of the *Trade Practices Act*. Hayne J correctly noted that 'to hold that publishing an advertisement

21 Ibid 425 [98].

22 Ibid 429 [117].

23 Ibid 438–9 [151].

24 See, now, *Australian Consumer Law* s 251.

25 (1985) 158 CLR 661, 666.

26 *Google v ACCC* (2013) 294 ALR 404, 421 [75].

27 Ibid.

may mislead or deceive requires no extreme or strained reading of that section'.[28] Hayne J's interpretation would open up the possibility of a holistic fact-based inquiry giving effect to the words of the statute: was the conduct in publishing the advertisement, seen in its entirety, likely to mislead or deceive? This assessment would necessarily include adoption and endorsement, but extend to the full gamut of the defendant's conduct. Such an approach was not called for by the pleadings of the ACCC.

Two of the judgments here also noted the failure of the ACCC to raise accessorial liability under s 75B of the *Trade Practices Act*.[29] Under that section, Google could have been liable for being 'directly or indirectly, knowingly concerned in, or party to, the contravention' of the advertisers.[30] Heydon J rightly noted that the involvement of Google employees in creating the sponsored links would be relevant here.[31] The evidence that those employees in some cases both proffered and commended the suspect keywords supports a genuine argument to be made along these lines.[32] However, given its absence in the ACCC's submissions, it remains to be seen whether s 75B accessorial liability could apply in these, or similar, circumstances.

## VI Implications

In 2010, the Court of Justice of the European Union decided a similar AdWords case involving Google France.[33] Brought by several French brands including Louis Vuitton, the action, like *Google v ACCC*, challenged the use of business names as AdWords keywords — but it did so under European Union trademark law, underlining the surrogate intellectual property role that misleading and deceptive conduct actions under the *Trade Practices Act* sometimes take in Australia. Despite the different causes of action, the outcome, at least in the abstract, was similar: while the AdWords service might have enabled infringing use of trademarks by advertisers, such practices did not, in and of themselves, constitute infringement *by Google*.[34] Like *Google v ACCC*, the *Google France* outcome was consistent with a fledgling legal trend towards a hands-off approach to service providers on the web who act in a third party or intermediary capacity.

The ACCC's key contention in this case was that the interactive nature of the Google search engine made it qualitatively different from other advertising mediums, like

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28 Ibid 430 [122].

29 *Google v ACCC* (2013) 294 ALR 404, 406 [4] (French CJ, Crennan and Kiefel JJ), 433 [132] (Heydon J). It should be noted that s 75B of the *Trade Practices Act* only defines the term 'involved' — actual liability for involved parties is established under later remedies sections. The s 75B definition is replicated in the new consumer law: *Australian Consumer Law* s 2.

30 *Trade Practices Act* s 75B.

31 *Google v ACCC* (2013) 294 ALR 404, 439 [153].

32 Ibid 414 [43].

33 *Google France SARL v Louis Vuitton Malletier SA* (C236/08–238/08) [2010] ECR I-02417 ('*Google France*').

34 Ibid 416 [55]–[57].

television and print — a contention that succeeded in the Full Court, but was ultimately rejected here. The majority held that Google's role in managing AdWords was no different to other broadcasters. The fact that Google had developed the technical features of the system that the misleading advertisements exploited was 'implicit in the fact that Google operates a search engine business', and imposed no greater responsibility.[35] An analogy may be drawn between this case and *Roadshow Films Pty Ltd v iiNet Ltd*,[36] in that both cases concern whether internet facilities providers should be responsible for the actions of their customers. Some have discussed such examinations from a broad public policy standpoint — the question being essentially what burden of oversight and enforcement should rest on those in charge of largely automated web services. Megan Richardson, for example, views the Australian AdWords dispute from the principle of the 'cheapest cost avoider'.[37] She argues that the Federal Court's ruling was sound from this perspective, and submits that a broad intermediary liability under s 52 is appropriate for large enterprises, and 'akin to the liability for defective products that the *Trade Practices Act* also created'.[38] The judgments in this case (other than that of Hayne J) run counter to that view, finding the imposition of such liability to be burdensome.[39] Certainly, the size and automatism of Google's services would make such policing difficult — though they have always set standards of conduct to some extent.

## VII Conclusion

Google's AdWords policies have changed in a number of ways since the events in this case — in 2010, 'sponsored links' were renamed simply 'ads',[40] and in 2011, an icon was added to advertisements which, when clicked, explains that they are tailored to the user's search terms.[41] Such measures certainly help prevent any confusion regarding which content on the results page is Google's, and which is provided by advertisers. On the other hand, perhaps emboldened by this decision, Google, since April 2013, no longer restricts the use of trademarks as keywords, even when a complaint is received.[42] This particular change is couched in the language

35 *Google v ACCC* (2013) 294 ALR 404, 435 [143].

36 (2012) 286 ALR 466 ('*iiNet*').

37 Megan Richardson, 'Before the High Court — Why Policy Matters: *Google Inc v Australian Competition and Consumer Commission*' (2012) 34 *Sydney Law Review* 587, 592.

38 Ibid 594.

39 *Google v ACCC* (2013) 294 ALR 404, 443 [164].

40 Danny Goodwin, 'Google's "Sponsored Links" Renamed "Ads"' on *Search Engine Watch* (5 November 2010) <http://searchenginewatch.com/article/2050426/Googles-Sponsored-Links-Renamed-Ads>.

41 Drew Olanoff, 'Google Launches "Why These Ads" to Educate Consumers on Ad Targeting' on *The Next Web* (1 November 2011) <http://thenextweb.com/google/2011/11/01/google-launches-why-these-ads-to-educate-consumers-on-ad-targeting/>.

42 Google Inc, *AdWords Trademark Policy* (7 May 2013) Google Support <https://support.google.com/adwordspolicy/answer/6118>. The use of trademarks in the *text* of an advertisement is still reviewable, however.

of consumer choice — that 'people searching for one brand of product should be able to easily find information about products from similar brands to make informed decisions'.[43] While consumers may indeed benefit, Google's advertising customers will also, no doubt, be pleased.

43 Google Inc, *Trademarks — Country Requirements* (27 March 2013) Google Support <https://support.google.com/adwordspolicy/answer/3041059>.

*Adam J MacLeod**

# AT AND ALONG: A REVIEW OF *THE LAW AND ETHICS OF MEDICINE: ESSAYS ON THE INVIOLABILITY OF HUMAN LIFE*

**by John Keown**
**Oxford University Press, 2012**
**xxii + 392 pp**
**ISBN 978 0 199589 55 5**

Discourse about bioethics is plagued by the appearance of simplicity. The most controversial issues — abortion, embryo-destructive research, assisted suicide, and euthanasia — are perceived as some of the simplest. If one views personal autonomy as intrinsically valuable, or as an indispensable precondition of morally significant choosing, then one will naturally find oneself committed to expansive liberties in bioethics, as in other areas of law. Likewise, if one perceives intrinsic value in human life qua human life then one feels bound to circumscribe some of those liberties. On both sides the arguments seem to run in straight lines.

As the best discussions of medical law reveal, things are not so simple.[1] The study of bioethics is trammeled in thickets of misunderstanding, and in the complexities of human intention and action. Those who are committed to the study will find John Keown's latest book a helpful resource. *The Law and Ethics of Medicine*, published by Oxford University Press,[2] is not designed primarily to persuade, but rather to clarify.[3] Keown's project is to clear away obstructions that have gathered around the keystone principle of the inviolability of human life, so that the thing *itself* comes into view. In this, Keown succeeds. But the number of words required to clear the view, and the challenges that Keown meets in bringing out very fine distinctions against attacks from capable scholars and lawyers, makes it easy to see how the inviolability principle came to be misunderstood in the first place.

Keown proceeds first to rough out the monument, removing fragments that might resemble the principle of inviolability but in fact obscure it. He contrasts the

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1 See, eg, Emily Jackson and John Keown, *Debating Euthanasia* (Hart Publishing, 2012).

2 John Keown, *The Law and Ethics of Medicine: Essays on the Inviolability of Human Life* (Oxford University Press, 2012).

3 Keown states that he has not in this book attempted a comprehensive analysis or defence of the inviolability principle in either law or ethics. Nevertheless, much of the book is devoted to critiquing the arguments of skeptics of the principle.

inviolability principle with vitalism, and with quality-of-life. Vitalism holds that life 'is the *supreme* good and one should do everything possible to preserve it'.[4] On the other side, a measure of the quality of human life makes it permissible to terminate life when it loses its instrumental value.[5] The inviolability principle neither requires the administration of futile or unwanted medical treatments,[6] nor entails that any withdrawal or withholding of treatment must be viewed as an assessment that the patient's life is no longer worthwhile.[7]

In the medical context, the core of the inviolability principle holds that 'it is always wrong to try to extinguish a patient's life',[8] whether the attempt is made by act or omission.[9] The principle holds that the value of life is neither absolute nor merely instrumental. Instead, human life is a basic or intrinsic good, the value of which inheres in the radical capacities of humans to exercise 'understanding, rational choice, and free will'.[10] All humans possess these capacities, even if they have not yet developed, or have lost, the ability to exercise them.[11] Thus, as a Select Committee of the House of Lords found, the prohibition against intentional killing, a 'cornerstone of law and social relationships', embodies 'the belief that all are equal'.[12]

The book is a collection of essays, and is therefore not organised as a systematic or comprehensive rehabilitation of the inviolability principle. Keown deals with several misunderstandings of the principle in passing. The variety of criticisms to which Keown is moved to respond suggests that, though the injunction against intentional killing is itself simple, it rests upon a complex understanding of the human person, human reasoning, and moral and legal obligation.

Things get particularly complicated around the principle of double effect, a corollary of the inviolability principle, which holds that one may do something good even though one foresees a harmful effect from one's action.[13] This principle makes sense of a doctor's decision to administer palliative care that he knows will abbreviate the life of the patient. Given the known difficulties of distinguishing intention

4 Keown, above n 2, 4. As Keown documents, many of the most influential critics of the inviolability of human life have mistaken the principle for vitalism, and therefore rejected the latter while claiming to refute the former: at 63, 65–6, 89–93.

5 Ibid 5.

6 Ibid 75–6, 92–5.

7 Ibid 93–5.

8 Ibid 6.

9 Ibid 12.

10 Ibid 5.

11 Ibid.

12 Ibid 83.

13 Ibid 8–12. See also Germain Grisez, 'Toward a Consistent Natural-Law Ethics of Killing' (1970) 15 *American Journal of Jurisprudence* 64; Joseph M Boyle, 'Toward Understanding the Principle of Double Effect' (1980) 90 *Ethics* 527; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 293–5.

from foresight and of evaluating proportionality, one understands how skeptics of the inviolability principle might perceive double effect as an evasion. And at one point, even Keown might appear to give way to consequentialism. In explaining why the inviolability principle forbids only unjust acts of killing he states that '[i]ntending a good end (protecting the innocent from unjust attack) can justify what would, absent such an intention, be impermissible (the use of deadly force)'.[14] The ambiguity in this formulation[15] is uncharacteristic of Keown's writing, and it demonstrates just how difficult these concepts are to articulate, even for those who best understand them.

Double effect is not the only source of confusion. Keown concedes that 'it is not surprising that judges and academics have sometimes confused' evaluations of the value of treatment with evaluations of the value of the patient's life.[16] Keown might have assisted his readers by supplying a fuller discussion of the distinction between the intrinsic value of human life and life's instrumental value. Keown's 'quality of life benefits', a measurement of the benefits of treatment, and his critics' 'quality of life', a measurement of the quality of the life lived after the treatment,[17] will often converge upon the same benefits. In each approach the burdens of treatment are being weighed against *something*, and that something will generally be the patient's marginally improved (or unimproved) ability to enjoy the goods for which life is instrumentally valuable.

This recognition does not cast doubt upon the *intrinsic* value of the patient's life. Defenders of inviolability can accept the claim of critics that a patient who rejects unduly burdensome treatment is, in a limited sense, passing judgment on the future instrumental value of her life. The inviolability principle rests upon the *independent* claim that human life always retains its intrinsic value, even when its instrumental value diminishes as a result of illness. Thus, though a patient at the end of life might rationally refuse treatment that is unlikely to produce much improvement in her ability to enjoy the rich experiences that life instrumentally enables, her life remains a reason for action in itself. No-one may act with an intention to end the patient's life, and we need not view the patient's refusal of treatment as evincing an intention to die.[18]

Keown attributes much of the confusion in bioethics to the importation of parental privacy interests into the definition of the legal status of unborn humans. The Supreme Court's decision in *Roe v Wade*[19] looms large over American medical law,

14 Keown, above n 2, 10–11.

15 Perhaps a more precise formulation would state that the means are not evil, and therefore require no independent justification, as long as the actor's intention truly is to defend himself or another, and not to kill, and he takes action proportionate to the necessity. Keown defends the principle at some length: see ibid 8–12, 53–4, 62–3, 85–6, 319–21, 344–5.

16 Ibid 12–13.

17 Ibid 93–5.

18 See ibid 345–6.

19 410 US 113 (1973).

and Keown argues persuasively that the gravitational pull of *Roe* and its progeny has distorted areas of the law in which the privacy right is not implicated. But things are just as muddled at the other end of life.[20] Proposals to legalise assisted suicide and euthanasia often conflate intention and foresight.[21] Unwarranted attention to the distracting difference between action and omission leads to sloppy references to 'passive euthanasia', which often refers not to euthanasia, but rather withdrawal of futile treatment,[22] a practice that everyone agrees is morally unobjectionable and legally unproblematic.

Keown traces the history of confusion back to Glanville Williams and his influential book, *The Sanctity of Life and the Criminal Law*.[23] Published in 1958, the book became the 'foundation stone' of medical law. Despite attacking the inviolability principle, Williams did not anywhere articulate it, but instead presented various caricatures of it. The book was replete with misstatements and departures from the historical record,[24] and at critical junctures in his argument, Williams 'seemed to assume what he needed to prove'.[25]

Some might find it implausible that a principle which plays such a prominent role in bioethics and law can be so badly misunderstood by so many competent scholars and lawyers. Those whom Keown criticises are capable intellectuals. How could they have erred so badly? A possible explanation comes to mind when one considers the perspective that Keown has adopted in this book. He is not looking at the problems of bioethics opposite, but rather orthogonal, to his interlocutors.

Much as H L A Hart opened to view new insights about law by adopting the 'internal point of view'[26] of the law-abiding citizen — looking with the citizen along the law, rather than merely at it — Hart's pupils, especially John Finnis and Joseph Raz, have achieved significant insights into practical reason and deliberation by looking along reasons for choice and action, rather than merely at them. Many reasons, when viewed from the internal point of view of the person whose choice and action is guided by such reasons, are transparent for more fundamental goods. Money is desirable because it enables one to purchase other things. But some reasons are — whatever their instrumental worth — also valuable in themselves, as intelligible reasons for action in their own rights. Looking toward those reasons, one can perceive their beauty and their value as basic goods, reasons for action the value of which is not dependent upon any more fundamental goods.

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20 Keown notes that under current law in the United Kingdom 'doctors may not intentionally end the life of a patient in [persistent vegetative state] by an act but they may do so by withholding or withdrawing tube-feeding': Keown, above n 2, 343.

21 See ibid 341–2.

22 Ibid 289–90.

23 Glanville Williams, *The Sanctity of Life and the Criminal Law* (Faber & Faber, 1958).

24 Keown, above n 2, 26–59.

25 Ibid 51.

26 H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 90–6.

The inviolability principle supposes that life is one such intrinsically valuable good. Looking along a life from the internal point of view of the person living it, life, much like a beam of light through a keyhole, is transparent for the ends toward which it is directed, goals and commitments that supply life's instrumental value. But one can also step outside the beam to view it from the internal perspective of another human being, who perceives its intrinsic and unique beauty.

To see the full worth of each member of the human family one must view each life from *both* directions. Generalising a bit, it seems that confusion about the inviolability principle often results from failure to do just that. At the beginning of life, the beam has not yet projected itself into space and time, and can thus elude observation. The corrective here is to look along the life of the newly existent being and to recognise the capacities for future, distinctly human, actions and experiences, which capacities are already present in the very young human being. The tendency at the end of life is to defer to the internal point of view of the patient who, suffering from physical, mental, or emotional anguish, sees no point to it all. This person needs the external perspective of others, whose view is not obstructed by pain and depression. Looking *at* the patient one sees a human being with intrinsic worth. By considering the internal perspectives of both patients and those who encounter them, we might correct many misunderstandings about the important role that law and ethics play in protecting the equal dignity of all human beings.

*John M Williams**

# *FAILING LAW SCHOOLS*

**by Brian Z Tamanaha**
**University of Chicago Press, 2012**
**xv + 187 pp**
**ISBN 978 0 226923 61 1**

## I Introduction

In early December 1997 Brian Tamanaha, an untenured Faculty member at St John's University Law School in Queens, New York, inadvertently stumbled into a spontaneous celebration with senior colleagues. Whiskey was poured. A toast was made. The Dean had just resigned.[1]

The departure of the Dean prompted Tamanaha to write to the President of the University to caution against an immediate replacement. Rather, he argued that the reforms that the now-former Dean had been urging should not be delayed by the search for a replacement.

The following day the author was summoned to the President's offi ce and, after some discussion, was installed within three months as the interim Dean. In addressing the Faculty — after the announcement of his appointment was met with stony silence — Tamanaha outlined his plan for the future. He commenced by declaring what he described as his 'nonnegotiable' points:

> First, we all have to work. This is a full-time job. We have an obligation to work at least forty hours a week on matters directly related our responsibilities to the institution ...
>
> The second nonnegotiable point is that we have to serve the students. They are the ones who pay our salaries. Our obligation is not just to teach them in the classroom, but also to answer their questions, to offer help when necessary, to serve as mentors, to write letters of recommendation, and more. To satisfy this obligation we must be here physically, in the building, and we must be welcoming to the students. Our doors must be open to them.
>
> The fi nal nonnegotiable point is that this is an academic institution, which by its nature requires that we are all teachers and scholars. We are in the business of conveying knowledge and teaching people to think ... That does not mean, however, that we cannot discuss different ways of living up to these requirements. We each have strengths in different areas.[2]

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* Dean, Adelaide Law School, The University of Adelaide. The author wishes to thank Matthew Lee for bringing Professor Tamanaha's work to his attention.

1 Brian Z Tamanaha, *Failing Law Schools* (University of Chicago Press, 2012) 1.

2 Ibid 3–4.

These events were, as Tamanaha acknowledges, an extraordinary time in the life of St John's Law School. Confronting change was dramatic and not without pain.

Tamanaha's *Failing Law Schools* offers a searing account of the state of legal education in the United States. Not unlike his experience as interim Dean, Tamanaha provides a full-throated account of what he argues are the structural problems with American law schools. In the end he argues that unless changes are made (either from within, or from without) then there will be a growing cohort of graduates who will have no real likelihood of a financially secure career. They will be indebted and will rightly feel aggrieved by their legal education.

## II The Problem

At its core the book explores

> how law schools have arrived at this sorry state and the implications of this sad condition for the present and future. At the root of these problems is the way law schools today are chasing after prestige and revenue without attention to the consequences. The enviable resources law schools enjoy relative to their poor neighbors in economics and English departments are the riches obtained in the chase.[3]

The book outlines in four parts the factors that have lead to this 'crisis' in legal education. The Parts are headed: 'Temptations of Self-Regulation', 'About Law Professors', 'The *US News* Ranking Effect' and 'The Broken Economic Model'.[4]

In brief, Tamanaha argues that through a process of self-interest, misleading commentary, and a self-defeating economic model, the leading law schools have sown the seeds of a looming crisis. Tamanaha's major arguments are fourfold.

First, the United States law schools have, over time, reduced teaching load to improve research activities and to expand clinical legal education programmes. The need to attract leading scholars (and improve rankings) has meant an expansion in the size of law schools, and an increase in competition for academic talent. The lowering of teaching loads, and the increase in the ratio of tenured staff to students, has been reinforced by the requirements of the American Bar Association, and has been supported by the Association of American Law Schools.

Secondly, the rate of pay increases amongst law professors has been significant over the last three decades. 'Star professors' now command salaries in excess of US$300 000. The consequence of the top-end salaries has been to pull up the average pay of all professors.[5]

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3 Ibid x.

4 Ibid pts 1–4.

5 Ibid 48–51.

Thirdly, the need to fund the increase in salaries, coupled with the limits on the employment of adjunct or casual staff, has seen an increase in tuition fees. Citing the 'prime mover', the Yale Law School, Tamanaha states that the pace in the increase in fees has been 'stunning'. For instance, in 1987, annual tuition fees were set at US$12 450. By 1999, tuition fees had risen to US$26 950, and by 2010, fees had risen to US$50 750.[6]

Fourthly, the increase in fees may have been palatable for some students during the jump in remuneration during the early 2000s supported by the dotcom boom. Corporate law firms competing for graduates raised starting salaries on average from US$70 000 to US$130 000.[7] This, in turn, increased the number of law school applicants, who took some misguided comfort in the potential salary, despite the increased student debt associated with a legal education.

Tamanaha argued that the equation of increased professorial salaries, increased research support, and increased students and tuition fees, may have been sustainable for as long as students could see the career benefit. Today, however, the arithmetic certainty of the proposition no longer appears to hold true. As Tamanaha states, '[t]he most problematic combination is a law school with high average indebtedness among graduates, a low percentage of lawyer jobs, and a low salary on graduation'.[8] He concludes that students after first year need to make a serious calculation:

> Students around the bottom of the class after the first year at a bottom-ranked law school will know that their chance of landing a job as a lawyer after graduation, unless they have connections, is not good. Students in any of these positions should revaluate. Walking away with $40 000 debt and no law degree beats leaving after two more years of lost earnings with $120 000 debt and a job that does not pay the bills.[9]

For Tamanaha, the situation is now in crisis with the certainty of significant debt being coupled with the uncertainty of meaningful employment for students upon graduation.

## III What Then is To Be Done?

In the final chapter of the book, Tamanaha outlines some possible solutions to the situation that legal education finds itself in the United States. Some alternatives involve a structural shift in the way that the 'market' for legal jobs and remuneration is calibrated. Though not necessarily subscribing to the market solution, Tamanaha makes it clear that 'law schools are producing streams of economic casualties,' and cannot ignore the problem.[10]

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6 Ibid 109.

7 Ibid 126–7.

8 Ibid 154.

9 Ibid 159.

10 Ibid 172.

Tamanaha puts forward a number of alternatives to deal with the situation. The first is a return to the past: a bifurcation of the system to allow 'research-orientated law schools to co-exist alongside schools that focus on training good lawyers at a reasonable cost'.[11] Standing in the way of such a solution, Tamanaha argues, are the American Bar Association and the Association of American Law Schools, who have composed and enforced the rules regarding the length of the degree and the ratio of tenured staff to cheaper adjunct or casual teachers. If such a change were made, then students could 'pick the legal education programs they wanted at a price they could afford'.[12]

Similarly, Tamanaha argues that there is a need to break the accreditation stranglehold of the American Bar Association by allowing students from non-accredited schools to sit the Bar exams in their respective states. A further change that is proposed is the reduction and capping of the loans that can be granted by the federal government so as to provide downward pressure on tuition fees.

However, in the end, Tamanaha is pessimistic about whether the 'warped economic' arrangements that all schools have created will be changed by the law schools themselves.[13]

*Failing Law Schools* is a well-written and powerfully argued case against the current model of legal education in the United States. Tamanaha has meticulously gathered together economic analysis and trends to provide a worrying account of the future of legal education in the United States. If his diagnosis proves to be correct, then many law schools and graduates face a grim future.

## IV The Australian Experience

So what can an Australian reader take from this account? It would be easy to note the differences between the two systems and take comfort that Australian law schools are not suffering under the same pressures. Clearly there are differences — but little comfort can be had from that fact.

As the 2011 Lomax-Smith *Base Funding Review: Final Report* noted, the current model of funding for legal education in Australia is not adequate. The report states:

> The panel was also concerned about the funding for law and humanities (CGS funding clusters 1 and 2), not because there was conclusive evidence in the costing study that costs exceed funding but because it formed the view that the costs for these disciplines reflect the impact of funding constraints that have been accommodated through compromising course delivery.[14]

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11 Ibid.

12 Ibid.

13 Ibid 182.

14 Higher Education Base Funding Review Panel, 'Higher Education Base Funding Review' (Final Report, October 2011) 55 <www.deewr.gov.au/basefundingreview>.

The Panel further recommended that the Australian Government should 'consider increasing the funding level for humanities and law'.[15] The Australian Government has rejected the report's recommendations.[16]

Undoubtedly, a legal education remains a popular alternative for students entering the Australian higher education system. Demand and enrolments appear to increase year-on-year. In response, universities have continued to open more law schools to meet the seemingly endless demand.[17]

Notwithstanding the great value that a legal qualification offers graduates working in both traditional legal positions and beyond, there remains a concern amongst the profession as to the number of graduates. Moreover, students are rightly voicing their anxiety about obtaining internships, clerkships, and ultimately employment. This is the situation at a time when the Australian economy is in rude health by international standards.

The Australian experience is one of underfunding, rather than law schools setting tuition fees for undergraduate degrees. That said, the undifferentiated demanded system has seen the growth of graduates with significant Higher Education Contribution Scheme ('HECS') debts. These graduates face a competitive jobs market like their American cousins.

The future of Australian legal education will remain a hotly debated issue. There is much to be learnt from other jurisdictions — especially if the lessons are delivered in such clear and cautionary tones as Tamanaha's in *Failing Law Schools.*

15 Ibid recommendation 4, xix.

16 Julie Hare, 'Response to Review Met with Derision', *The Australian* (online), 30 January 2013 <http://www.theaustralian.com.au/higher-education/response-to-review-met-with-derision/story-e6frgcjx-1226564553107>.

17 Margaret Thornton, 'The Market Comes to Law School', *The Australian* (online), 13 September 2011 <http://www.theaustralian.com.au/higher-education/opinion/the-market-comes-to-law-school/story-e6frgcko-1226134877209> (observing that Australia has seen an increase from 12 to 32 law schools in just the last two decades). Since this article was written in late 2011, we have seen another three law schools open (at the Australian Catholic University, the Central Queensland University, and Curtin University), with another set to open next year (at the University of the Sunshine Coast), bringing the total to 36.

# SUBMISSION OF MANUSCRIPTS

In preparing manuscripts for submission, authors should be guided by the following points:

1. Submissions must be made via email to the Editors or Book Review Editor, or to the Publications Officer <panita.hirunboot@adelaide.edu.au>, or via ExpressO <http://law.bepress.com/expresso/> or Scholastica <http://scholasticahq.com>.

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3. Biographical details should be starred (*) and precede the footnotes. They should include the author's current employment.

4. Submissions should comply with the *Australian Guide to Legal Citation* (Melbourne University Law Review Association, 3rd ed, 2010) <http://law.unimelb.edu.au/mulr/aglc>.

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