

American and Australian Labor Law and Differing Approaches to Employee Choice

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The National Labor Relations Act At 75: Its Legacy And Its Future

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1. Introduction

It is indeed an honour to have been invited to this symposium on the seventy-fifth anniversary of the United States *National Labor Relations Act*¹ 1935. From my home half a world away in Sydney Australia, I wondered what could I possibly bring to this symposium which is a celebration of three quarters of a century of the rights of American workers to engage in collective bargaining under federal labor law.

As I sat at my desk in our Sydney home, my thoughts drifted back almost three decades ago to the Fall semester of 1982 when I taught comparative labor law at the Duke University School of Law in North Carolina.² In one class, we were comparing the NLRA with similar Canadian collective bargaining legislation. I explained to the students that in some Canadian provinces the provincial labor board could certify a trade union without holding a representation vote, provided a majority of the workers had signed trade union authorisation cards. So, I turned to the class and said: "Could we enhance American collective bargaining by adopting this Canadian approach?" One student took the wind out of my comparative labor law sails by simply saying, "Ron, in America elections are central to what we do: We elect everyone," and of course he made the important point that choice is a type of mantra to so many Americans.

That fateful class in the Fall of 1982 indelibly impressed into my mind two crucial matters. The first is to always be very careful when attempting to compare quite similar labor law regimes because labor laws operate in accordance with the values of the society which they are designed to serve.³ The second is that the striking feature of the NLRA is its emphasis upon worker choice.

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¹ *National Labor Relations Act*, 45 Stat. 449 (1935) (hereafter the "NLRA").

² In the Fall semester of 1982, I was the Martha B Price visiting lecturer at the School of Law, Duke University. I remain profoundly grateful to my Faculty colleagues for treating me with such courtesy during my memorable visit.

³ The most helpful book which I have read which gives thoughtful insights into the values and assumptions which shape United States collective labor law is JAMES B ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983).

What has struck me when musing upon United States and Australian labor law is their differing perspectives over employee choice. By viewing these two sets of laws through a lens of employee choice, it may be possible to better comprehend their essence and to gain some understanding of their development and operation.

As I comprehend the essence of American collective labor law, it is up to employees to decide, on the one hand, whether to have their wages and working conditions set by their employer, or on the other hand, whether to give a trade union the exclusive right to represent them to collectively bargain with their employing enterprise over their terms and conditions of employment. I suspect that once this choice was enshrined in "New Deal" legislation and modified after World War II by the *Taft-Hartley Act*,⁴ it has been difficult for reformers to alter this election mechanism which has kept the central tenet of the NLRA frozen in time.

In Australia by contrast, for most of the twentieth century, the choice of Australian employees over whether their terms and conditions of employment should be set by an agency dispensing compulsory interest arbitration was largely irrelevant. Put another way, the specification of minimum wages and work rules for entire industries was seen as a social good, irrespective of the views of individual employees, and as a necessary element of ensuring fair outcomes in a fledgling nation whose small population occupied an entire continent.

In little more than seventeen years, that is from 1993 to the present, Australia's federal labour laws were dramatically re-written on four separate occasions. This re-writing of our laws was, I suggest, a response to changes in the world economy and to the emergence of new ideas about the role of governments in free market economies. As a response to economic globalisation which impacted upon Australia's economy, the Australian Parliament sought in varying ways to deregulate Australian labor law by dismantling its mechanisms of compulsory conciliation and arbitration and replacing them with laws which enhanced labor flexibility. While the level of deregulation waxed and waned, depending upon whether the Australian Labor Party was in government, or whether the Liberal Party and National Party coalition occupied the treasury benches, it was clear that labor flexibility was necessary for the good of the nation.

The current laws which were enacted as the *Fair Work Act 2009*⁵ (the "FW Act"), give a large measure of choice to employees who have the right to engage in collective bargaining with their employers. Unlike the NLRA, however, Australian workers have bargaining rights as workers, whether or not they are represented by trade unions. Put another way, where a majority of employees wish the employing enterprise to determine wages and conditions on a collective basis, the employing enterprise must bargain with its workers, who may bargain for themselves, or select bargaining agents. In most instances, employees will select a trade union as their bargaining agent. This process of embedding bargaining rights within a workforce, sidesteps issues of trade union recognition, of elections, of card checks and of neutrality agreements. In part, it is the low priority given to employee choice which has made it easier for the Australian parliaments to amend our labor laws. However, it is also the case that a Westminster system of government where tight party discipline is in place, enables governments to amend our statute

⁴ *The Labor-Management Relations Act*, 61 Stat. 136 (1947) (hereafter the "Taft-Hartley Act").

⁵ *Fair Work Act 2009* (Cth) (hereafter the "FW Act").

laws with little difficulty.

In the following section, I shall examine the essence of the NLRA and shall explore the role which choice plays in enabling workers to engage in collective bargaining. The lack of choice under Australia's classical systems of compulsory conciliation and arbitration will be unpacked in section 3. The avalanche of changes to Australian federal labour law which have characterised the last two decades are the subjects of the fourth and fifth sections. In the penultimate section, Australia's current collective bargaining laws will be unpacked. In the final section, I shall endeavour to draw some of these disparate threads together. In so doing, however, I am conscious that comparisons between laws in rather different legal systems are rather difficult terrain.⁶

2. The NLRA: An Antipodean Perspective

Before delving into the collective bargaining mechanism under the NLRA, I shall unpack two general features of United States labour law which better assist me in contextualising American collective bargaining. They are the employment at will doctrine and the juridical nature of collective agreements. First, the employment at will doctrine⁷ is a peculiarity which strikes observers from other Common Law countries like Australia and the United Kingdom because it does not operate in these nations. Under this doctrine, without more, American workers may be terminated immediately, and in turn they may walk away without giving notice to their employers. Given that contracts of employment are terminable instantly, there appears to be little room for arguing about the operation of the terms of contracts of employment. Of course terms relating to confidentiality and to post-employment restraints are of importance in many industries.⁸ A type of employment at will doctrine did operate in many Australian workplaces in the nineteenth Century, when much hiring was on a daily basis. However, over the last fifty years, both statute law⁹ and indeed the Common Law¹⁰ have prescribed growing periods of notice for employment contracts. In Common Law countries like Australia where apart from serious and wilful misconduct employers and employees must give specified periods of notice before ending their relationships; the contract of employment is a living document which must govern their day to day relations. From an Antipodean perspective, American employees who are not governed by collective agreements and who have no access to a review of their discharge, appear to be in a relatively vulnerable position. While they have the right to instantly walk away, their employers have the far stronger right of being able to immediately dispense with their services.

⁶ Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD L REV 1 (1974); Anthony Forsyth, *The Transplantability Debate Revisited: Can European Social Partnership be Exported to Australia*, 27 COMP. LAB. L & POL'y J. 305, 324-342 (2006); E Erderle, *The Method and Role of Comparative Law*, 8 WASHINGTON U. GLOBAL STUDIES L. REV. 451 (2009).

⁷ See Sanford Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 1 (1982).

⁸ KATHERINE STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 127-156 (2004).

⁹ FW ACT s 117.

¹⁰ ROSEMARY OWENS & JOELLEN RILEY, *THE LAW OF WORK* 262-268 (2007); BREEN CREIGHTON & ANDREW STEWART, *LABOUR LAW* 413-421 (4th ed. 2005).

The regime encompassed by the NLRA is one where a trade union and an employing enterprise may conclude a collective agreement which usually governs and enables reviews of employer discipline and discharge.

The second feature is that once entered into by trade unions and employing enterprises, collective agreements seem to supplant the essence of individual Common Law contracts of employment. As was made clear almost seventy years ago in the *J I Case Company* decision of the Supreme Court,¹¹ without more, employers may not pay their employees either more or less than the rates specified by collective agreements as such payments would truncate collective bargaining. Thus, when American workers choose a trade union to bargain for them, any freedom to make individual arrangements is in most cases sacrificed for the benefit of the collective. This better explains to me the nature of the choice which is before American employees. By contrast, in Australia and in other Common Law countries like the United Kingdom, as a matter of law, collective agreements only set a floor of conditions, thus allowing for bargaining to occur above these minimum terms and conditions of employment. Put another way, Australian awards and collective agreements more easily coexist with Common Law contracts of employment because in most cases they specify minima and permit the parties to make any arrangements which they choose, provided these minimum terms are observed.¹²

It is obvious that the enactment of the NLRA seventy-five years ago as part of President Roosevelt's "New Deal" legislative package can be best understood in the context of American labor history;¹³ and at this venue I hardly need to recapitulate this well-known story. It is appropriate to add that it does seem to me that the business unionism approach of the American Federation of Labor, coupled with the local nature of many trade unions meant that any form of collective bargaining legislation would operate at the level of the employing enterprise. To put the NLRA regime at its crudest, where American workers are satisfied with their terms and conditions of employment which are set on an individual basis, they need not invoke the legislation. However, if they are dissatisfied with their conditions of work, they may invoke the NLRA, provided they are able to convince a majority of their immediate colleagues to vote in an election in favour of a trade union collectively bargaining on their behalf.¹⁴ Thus, whether or not employees may enter into collective bargaining is their choice, although they will often have to run the gauntlet of employer opposition.¹⁵

Professor James Brudney describes this focus upon employee choice via a representation election as the "election Paradigm".¹⁶ Professor Brudney also shows that since the 1990's, trade union certification after NLRB supervised elections has declined, when compared with employer

¹¹ *J I Case Co v NLRB* 321 U.S. 332 (1944).

¹² *Wiseman v Professional Radio and Electronics Institute of Australasia and Ors* 35 F.L.R. 24, 52-56 per Keely J (1978).

¹³ See the useful analysis of United States labor and trade union history by the Canadian academic Professor Roy Adams, ROY J ADAMS, *INDUSTRIAL RELATIONS UNDER LIBERAL DEMOCRACY: NORTH AMERICA IN COMPARATIVE PERSPECTIVE* 34-62 (1995).

¹⁴ ADAMS *supra* note 13 56-57.

¹⁵ See ROBERT A GORMAN & MATTHEW W FINKIN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 53-28 & 112-148 (2d ed. 2004).

¹⁶ James J Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms* 90 IOWA L. REV. 819 (2005).

recognition of unions which have proven that they have majority employee support via signed trade union authorisation cards. It is also the case that trade union recognition is made easier where employers sign neutrality agreements which preclude them from opposing trade union organising drives. However, both recognition via authorisation cards and neutrality agreements depend upon employer acquiescence. Forty years ago in the *Gissel Packing Co* case,¹⁷ the Supreme Court held that where a trade union had signed authorisation cards from the majority of employees, the employer could not engage in unfair labor practices to either prevent the union from bargaining with it, or to ensure that any subsequent election would go against the majority wishes of the workers. A few years later in the *Linden Lumber* decision,¹⁸ it was held that where an employer refused to recognise a trade union which had a majority of signed employee representation cards, the only recourse for the union was to petition the NLRB for a representation election.

I venture to believe that it will be extremely difficult to amend the NLRA to dislodge the representation election as the sole method of obtaining trade union certification, but of course this does not prevent employers from recognising unions with clear majority support for the purposes of collective bargaining.

3. Classical Australian Interest Arbitration without Employee Choice

At the beginning of the Twentieth Century, the Australian federal Government and several of the States established systems of compulsory conciliation and arbitration to settle labour disputes.¹⁹ These regimes lasted for the next one hundred years, although in the 1990's labor deregulation began to varying degrees to demolish these mechanisms. This is not the place to chart the rise and fall of Australian compulsory labor arbitration²⁰ because my focus is upon the lack of employee choice under these systems and I shall take as my prime example federal labor arbitration.

In order to secure labor peace, in 1904 the federal Government established a labor court which had power to settle interstate labor disputes by conciliation. Where conciliation failed, the labor court was empowered to settle the dispute by compulsory interest arbitration. Such a settlement became known as an award which specified minimum wages and work rules, usually on an industry basis. In other words, where a trade union disputed with employers in the industry, such as the metal industry, over which the trade union had coverage, the labor court would settle the dispute by prescribing the wages and other terms of conditions of employment. The award

¹⁷ *NLRB v Gissel Packing Co* 395 U.S. 575.

¹⁸ *Linden Lumber Div., Summer & Co v NLRB* 419 U.S. 301 (1974).

¹⁹ For details, see *FOUNDATIONS OF ARBITRATION: THE ORIGINS AND EFFECTS OF STATE COMPULSORY ARBITRATION, 1890-1914* (Richard Mitchell and Stewart MacIntyre Eds., 1989); *JOHN H PORTUS, THE DEVELOPMENT OF AUSTRALIAN TRADE UNION LAW* 100-115 (1958); Leroy Merrifield, *The Origin of Australian Labor Conciliation and Arbitration*, in *MEMORIUM, SIR OTTO KAHN-FREUND, 17.11.1900-16.8.1979: INTERNATIONAL COLLECTION OF ESSAYS: COLLECTION INTERNATIONALE D'ETUDES* 173 (f. Gammilescheg et al Eds., 1980).

²⁰ For an examination and an analysis of Australian compulsory conciliation and arbitration in the Twentieth Century, see *THE NEW PROVINCE FOR LAW AND ORDER: 100 YEARS OF AUSTRALIAN INDUSTRIAL CONCILIATION AND ARBITRATION* (Joe Isaac & Stewart MacIntyre eds., 2004); Michael Kirby, *Industrial Conciliation and Arbitration in Australia - A Centenary Reflection*, 17 *AUSTL. J. LAB. L.* 229 (2004).

obliged employers throughout the industry to pay the specified wage rate and the work rules to its employees who were members of the Union. This stipulation did not preclude employers from paying above award wage rates, or from granting to their employees work rules more favourable than as specified in the award. However, the arbitrated settlement specified a minimum floor of remuneration and terms and conditions of employment throughout an entire industry to both ensure fair outcomes between workers and employers and to maintain labor peace. The prescribing of terms and conditions of employment throughout entire industries was perceived as both necessary to promote economic stability and also as a social good by ensuring that employees wages were fair and reasonable.

As early as 1925 in the *Burwood Cinema* decision,²¹ the High Court of Australia held that employee choice was irrelevant for the purposes of collective interest arbitration. Several employers in the movie theatre industry put forward to the labor court, signed declarations from their employees who were members of the trade union, saying that they were satisfied with their employment conditions and were not in dispute with their employers. Other employers asserted that they could not be in dispute with the trade union because they did not employ any of its members. Nevertheless, the High Court held that the award would bind all of the employers in the industry. The views of individual employees had to give way to the social necessity of ensuring labor peace by specifying wage rates and work rules across entire industries. If existing employees joined the relevant trade union, they could receive the advantages of the arbitrated settlement. As Isaacs J put it, industrial disputes were not merely differences between individual employees and employers. They were group contests between labor and capital. Viewed in this light, group settlements were necessary to produce fair outcomes and labor peace, irrespective of the views of individual employees.²² Less than a dozen years later and after some prevarication on the part of some High Court judges,²³ in the famous *Metal Trades Case* of 1935²⁴ the High Court obliged employers to pay the same wages to all of their employees. The High Court held that not only would an award bind employers to pay wages and observe work rules with respect to trade union members, but that employers could not employ persons who were not union members on lesser terms and conditions than their union colleagues. This was necessary to secure labor peace by preventing employers from under-cutting trade union terms and conditions of employment by employing cheaper non-union labor.²⁵

This sublimation of individual interests into the collective interests of trade unions and employer associations would not, I surmise, sit well with American employees at the present time. Even during the great economic depression of the 1930's, I am sure that President Roosevelt would never have countenanced such a collectivist system. Yet, up until the early 1990s the main features of this classical model of Australian compulsory interest arbitration still operated throughout the length and breadth of Australia. As recently as 1990, approximately 80% of Australian employees had their wages and terms and conditions of employment either prescribed

²¹ *Burwood Cinema Ltd and Ors v The Australian Theatrical and Amusement Employees' Association* 35 C.L.R. 528 (1924).

²² 35 CLR 524, 540 (1924).

²³ EDWARD SYKES & HARRY GLASBEEK, *LABOUR LAW IN AUSTRALIA* 419-423 (1972).

²⁴ *Metal Trades Employers Association and Ors v Amalgamated Engineering Union and Ors* 54 CLR 387 (1935).

²⁵ For recent comment on the post-metal trades doctrine, see Karen Wood and Ron McCallum, *Crafting the Law: The High Court and Superannuation as an Industrial Matter*, 8 AUSTL. J. Lab L. 121 (1995).

or underpinned by federal and state awards.²⁶ What is remarkable about Australian classical conciliation and arbitration is that it lasted until the end of the Twentieth Century, in large part because its arbitrated rates of wages and terms and conditions of employment were regarded as fair and reasonable by the vast bulk of Australian working women and men.

4. An Avalanche of Labor Law Amendments, 1993-2009: Background

In 1993 the Keating federal Australian Labor Party ("ALP") Government enacted detailed amendments to Australia's federal labour laws.²⁷ These alterations were the most extensive which had been enacted since federal compulsory conciliation and arbitration was first established in 1904.²⁸ Three years later in 1996, the Prime Minister John Howard Liberal Party and National Party Coalition Government (the "Coalition") made further extensive amendments to these laws.²⁹ Almost a decade later in 2005, the Howard Coalition Government virtually rewrote federal labor law in its entirety, when it enacted its new laws which became known as the Work Choices laws.³⁰ Finally, in 2009, the Prime Minister Kevin Rudd ALP Government enacted the *FW Act* which was a new statute which once again rewrote our federal labour laws. Put briefly, this cascade of amending laws deregulated federal labor law by replacing compulsory conciliation and arbitration with collective bargaining. The differences between the Keating and Rudd ALP governments, on the one hand, and the Howard Coalition government, on the other hand, related to the nature and scope of the deregulation. For the ALP which in American parlance is made up of liberals, the bottom line was to institute collective bargaining with trade unions playing a significant role. For the Coalition which was a conservative administration, deregulation was best accomplished by enhancing individual contract-making over collective bargaining and by minimising the role of trade unions.

By any stretch of the imagination, these four changes to Australian federal labor law were mammoth in their size and scope. For Australians, the NLRA is a rather thin document because Australian laws are traditionally very prescriptive. For example, the Work Choices laws with their attendant regulations covered approximately seventeen hundred pages of the statute book. Although the current FW Act is slightly smaller, together with its companion statutes and regulations it is twelve hundred and twenty pages in length.³¹

The federal Parliament has used a number of heads of federal constitutional power to enact labor law. For most of the Twentieth Century, the Parliament relied upon its power to make laws with respect to conciliation and arbitration³² however, more recently it has relied upon other heads of

²⁶ *Australian Bureau of Statistics, 1990, Award Coverage Australia May 1990*, catalogue No 6315, Australian Bureau of Statistics, Canberra (1990).

²⁷ The *Industrial Relations Reform Act 1993* (Cth) amended the *Industrial Relations Act 1988* (Cth).

²⁸ Federal Compulsory Conciliation and arbitration was established in 1904 when the federal Parliament enacted the *Commonwealth Conciliation and Arbitration Act 1904* (Cth).

²⁹ The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) amended the *Industrial Relations Act 1988* (Cth), and also changed its name to the *Workplace Relations Act 1996* (Cth).

³⁰ The *Workplace Relations Amendment (Work Choices) Act* amended the *Workplace Relations Act 1996* (Cth).

³¹ CCH, AUSTRALIA FW Act WITH REGULATIONS AND RULES 19-1249 (2ND ed., 2010).

³² Section 51(xxxv) of the Australian Constitution gives the federal Parliament power to make laws with respect to "(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

constitutional power, with the major head of power now being the corporations power.³³ This constitutional territory is covered elsewhere and I shall not re-cross this ground on this occasion.³⁴ Suffice to write that the FW Act is squarely based on the federal Parliament's power to legislate about corporations, and in 2006 the High Court of Australia upheld the validity of such laws.³⁵ Approximately 70% of employers are corporations, however, all of the States save Western Australia have now enacted legislation to enable federal labor law to also cover employers who are not corporations, other than State government public sector employees.³⁶

Before further unpacking these four sets of laws, it is appropriate to ask: How did this avalanche of amendments come to pass, and how did the Australian political process cope with this high level of labor law change? To understand what happened, we need to go back to the 1980s when President Ronald Reagan was in the White House. By the mid-1980s, it became clear to most Australians and especially to federal and State governments that no longer could the Australian economy sustain the setting of wage rates and other work rules on an industry basis. While for most of the Twentieth Century Australian employers had been able to shelter behind tariff walls and rely on a fixed rate for the Australian currency, the economic globalisation of the 1980's put an end to this privileged situation. In 1983, the Australian dollar was floated, and the tariff walls came tumbling down. The fierce competition which is characteristic of international trade, intruded into Australia's domestic markets. Having regard to these global pressures on Australia, both the ALP and the Coalition agreed that our laws should be altered to ensure that the setting of wages and the making of work rules would occur at the level of the employing enterprise, and that wage setting on an industry basis should be discontinued because it was no longer sustainable in an era of economic globalisation. Of course, a minimum wage would continue to be set on a national basis.³⁷ Thus, by the early 1990s the scene was set for major labour law changes.

At this point in the narration, it is appropriate to briefly sketch the Australian federal political

³³ Section 51(xx) of the Australian Constitution gives the federal Parliament power to make laws with respect to "(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

³⁴ Ron McCallum, *Plunder Downunder: The Transplantation of the Anglo-American Deregulated Labour Law Model to Australia*, 26 COMP. LAB. L. & POL'Y J. 381 (2006); Ron McCallum, *The Australian Constitution and the Shaping of Our Federal and State Labour Laws*, 10 DEAKIN L. REV. 460 (2005).

³⁵ The use of the corporations power to enact labor law was upheld by the High Court of Australia in the Work Choices Case, *New South Wales v The Commonwealth* 229 C.L.R. 1 (2006); and for comment *See* Ron McCallum, *The Work Choices Case: Some Reflections*, 19 JUDICIAL OFFICERS BULLETIN 29 (2007).

³⁶ Under section 51(xxxvii) of the Australian Constitution, the States may refer matters to the federal Parliament which allows that Parliament to enact laws over these referred matters. All of the States, save Western Australia, have passed laws referring their legislative powers over the private sector workforce on labor relations matters to the federal Parliament. The most incisive account of how federal labor laws cover most employees in Australia's private sector up until the close of 2008, is eloquently told by Professor Andrew Stewart. Andrew Stewart *Testing the Boundaries: Towards a National System of Labour Regulation*, in FAIR WORK: THE NEW WORKPLACE LAWS AND THE WORK CHOICES LEGACY 19 (Anthony Forsyth & Andrew Stewart Eds., 2009).

³⁷ For background, *see* BRAHAM DABSCHECK, *THE STRUGGLE FOR AUSTRALIAN INDUSTRIAL RELATIONS* 19-115 (1995); Ritchard Mitchell and Malcolm Rimmer, *Labor Law, Deregulation and Flexibility in Australian Industrial Relations*, 12 COMP. LAB. L. 1 (1990); Ron McCallum & Paul Ronfeldt, *Our Changing Labour Law*, in ENTERPRISE BARGAINING, TRADE UNIONS AND THE LAW 1 (Paul Ronfeldt & Ron McCallum Eds., 1995).

institutions.³⁸ Australia has a federal structure a little like the United States with six States, two Territories and a federal Government. Under the Australian Constitution, writing generally, the enumerated legislative powers are within the province of the federal Parliament, with residual or policing powers with the parliaments of the States.³⁹ However, Australia inherited responsible government from Great Britain where the Prime Minister is the leader of the political party which holds a majority in the lower house of the Parliament. The federal Parliament is a bicameral legislature. The lower house is called the House of Representatives and its 150 members are elected from single member constituencies or districts in proportion to population. The upper house is called the Senate and it is comprised of 76 Senators, twelve from each of the six States and two from each Territory.

5. The Content and Scope of the Reforms 1993-2007

The burden of this section is to unpack the labor law reforms which were brought about through the enactment of major pieces of legislation by the federal Parliament in 1993, in 1996 and finally in 2005. I cannot hope to unpack every nuance or even every feature of these major alterations, however, I shall in the main focus upon the reforms which relate to collective bargaining and individual contract-making. With the passage of time, the 1993 reforms deserve the most attention. This is because the 1996 changes and the 2005 Work Choices laws are now of less importance, especially with respect to collective bargaining.

The major changes brought about by the 1993 reforms which were introduced by the Prime Minister Paul Keating ALP Government, concerned the full establishment of collective bargaining, as well as the introduction of a mechanism giving employees remedies for unfair terminations.⁴⁰ Dealing with this latter change first, ever since the enactment of this statute, Australian employees who operate under federal labor law have been able, to varying degrees, to challenge their terminations on the grounds of unfairness, and this is still the case under the present FW Act.

Of more importance for present purposes was the shift to full collective bargaining requiring a limited form of bargaining in good faith. To understand the magnitude of this change, it is essential to appreciate that workplaces under federal labor law were covered by federal awards which prescribed wages and rather detailed work rules. These awards can be best thought of as codes prescribing detailed working requirements, and in some instances even stating the starting and finishing times of the work day. The idea was to allow these prescriptive codes to be varied by collective agreements made at the level of the employing enterprise as a means of increasing productivity. If collective agreement-making was confined to trade unions, this would give significant advantages to unionised employing undertakings when compared with non-unionised

³⁸ See John Urh *Parliament*, in THE OXFORD COMPANION TO AUSTRALIAN POLITICS 386 (Brian Galligan & Winsom Roberts Eds., 2007); John Summers, *Parliament and Responsible Government*, GOVERNMENT, POLITICS, POWER AND POLICY IN AUSTRALIA 75 (Dennis Woodward, Andrew Parkin & John Summers Ed., 9th ed., 2009).

³⁹ For an introduction to the Australian Constitution see Helen Irving, *Constitution* 128 in (Galligan & Roberts Eds, supra note 38).

⁴⁰ For material on the 1993 laws, see 7 AUSTL. J. LAB. L. (SPECIAL ISSUE) 105-226 (1994); Ronfeldt & McCallum supra note 37; Ron McCallum, *The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993*, 16 SYDNEY L. REV. 122 (1994).

enterprises. Unionised employers could vary their awards through collective agreements made with the relevant trade unions. In order to allow all enterprises to participate in varying awards to increase productivity, the reforms enabled employers to make collective agreements directly with their workers.

This was indeed a novel approach because I am unaware of any other collective bargaining regime where union and non-union enterprise agreements operated alongside one another. With hindsight, it is surprising that the trade union movement acquiesced in the establishment of non-union collective agreements. After all, the trade unions are allied with the ALP, and it was the Prime Minister Keating ALP Government which enacted this fundamental change. Given that at this time the machinery of settling labor disputes by conciliation and arbitration was still largely intact, perhaps the trade unions felt secure enough to enable employers to conclude collective agreements directly with their employees. After all, this dispute settling mechanism could be relied upon to ensure that there were no significant diminutions in the general terms and conditions of employment.

It is important to appreciate that collective agreements, whether made with a trade union or directly with the employees were not enforceable until they were certified by the Australian Industrial Relations Commission (the "Commission") which was the successor to the former labor court. The Commission used what was called its "no disadvantage test" where it examined every collective agreement to see that in altering award conditions it was not being unfair to the employees having regard to other advantages bestowed upon the workers. For example, where the starting and finishing times for work were altered, and where the collective agreement offset this change through an increase in wages, such an arrangement would pass the test.

Again, the lack of choice is interesting. An employer was free to make a collective agreement with a trade union which had award coverage over its employees. An employer could do so, even where none of the employees were members of the union, however, an employer could not be compelled to engage in collective bargaining. While the trade union and the employer were obliged to consult the workforce about the collective agreement,⁴¹ the employees were not asked to vote on whether or not to accept the collective agreement. It was only where the collective agreement was made directly with the employees that before the agreement could be certified by the Commission a majority of the employees had to vote in favour of the collective agreement. Even as late as 1993, Australian federal collective bargaining was governed by a Commission with powers of agreement certification, and employee choice was to say the least rather truncated.

Finally, for the first time under federal labor law, trade unions were permitted to take strike action to press their bargaining demands. However, successive changes in 1996 and in 2005 truncated this right so that under the present laws trade unions must jump through a series of complex legal obstacles to engage in strikes to pressure their employers when bargaining for collective agreements.⁴²

⁴¹ Richard Mitchell, Richard Naughton & Rolf Sorensen, *The Law and Employee Participation - Evidence from the Federal Enterprise Agreements Process* 39 J. INDUS. REL. 196 (1997).

⁴² SHAE MCCRYSTAL, *THE RIGHT TO STRIKE IN AUSTRALIA* (2010).

With the election in 1996 of the Prime Minister John Howard Coalition Government, further moves were made to deregulate the system.⁴³ First, all trade union security provisions were made illegal. In other words, even where a trade union and an employer agreed to terms in their collective agreement giving preference in employment to members of trade unions, the new laws made such terms illegal and unenforceable. Second, less hurdles were placed upon employers who wished to conclude collective agreements directly with their employees, and all collective agreements could not proceed to certification by the Commission unless the employees of the enterprise had voted in favour. No longer could trade unions and employers conclude collective agreements without a majority vote from the workforce. It was also made clear that employers could choose whether or not to engage in collective bargaining. Even where a trade union was able to show strong majority support, it was legally up to employers to decide whether or not to deal with their employees on a collective basis. Put another way, Australian collective bargaining was voluntary because there were no legal mechanisms whereby trade unions could oblige employers to bargain with them.

Finally, the 1996 legislation made it possible for incorporated employers to enter into individual statutory agreements, known as Australian workplace agreements, with their employees. These workplace agreements could modify award conditions and they enhanced individual contract-making.

In 2005 when the Coalition found itself with a majority in both houses of the federal Parliament, it introduced its work choices laws which were designed to favour individual arrangements over collective bargaining.⁴⁴ First, the right of employees to seek remedies for unfair terminations was confined to those employees whose employers employed more than one hundred employees. This meant that as a majority of workers were employed in smaller enterprises, they lost their right to seek redress for dismissals which were unfair. Second, the power of the Commission to certify agreements using a "no disadvantage test" was abolished. Provided collective agreements and Australian workplace agreements adhered to minimum conditions concerning mainly pay and leave, they became enforceable upon signing. Third, the legislation made it clear that individual arrangements via Australian workplace agreements were to be preferred. Once an employee signed a workplace agreement, the worker was precluded from returning to collective arrangements, even after the expiry of the workplace agreement.

By early 2007, there was much disquiet about the work choices laws, so much so that in May of that year, the Howard Government strengthened the minimum conditions of employment and re-

⁴³ For material on the 1996 laws see JOELLEN RILEY, G. J. MCCARRY & MEGAN SMITH, *WORKPLACE RELATIONS: A GUIDE TO THE 1996 CHANGES* (1997); *EMPLOYMENT RELATIONS, INDIVIDUALISATION AND UNION EXCLUSION: AN INTERNATIONAL STUDY* (Stephen Deery & Richard Mitchell Eds., 1999); 10 *AUSTL. J. LAB. L. (SPECIAL ISSUE)* 1-157 (1997); Ron McCallum *Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws*, 57 *RELATIONS INDUSTRIELLES* 225 (2002).

⁴⁴ For material on the 2005 Work Choices Laws see JOELLEN RILEY & KATHRYN PETERSON, *WORK CHOICES: A GUIDE TO THE 2005 CHANGES* (2006); Owens & Riley 273-559 supra note 10; 19 *AUSTL. J. LAB. L. (SPECIAL ISSUE)* 95-318(2007); JAMES MACKEN, *MACKEN ON WORK CHOICES* (2006); IAIN ROSS, JOHN TREW & TIM SHARARD, *BARGAINING UNDER WORK CHOICES* (2006); Ron McCallum, *Australian Labour Law After the Work Choices Avalanche: Developing an Employment Law for our Children*, 49 *J. INDUS. REL.* 436 (2007).

introduced a modified fairness test for agreements.⁴⁵ However, the damage was done, and at the 24 November 2007 federal election the Government was defeated. It is generally agreed that a key factor in the Government's demise were the work choices laws because many workers either suffered reductions in their take home pay, or feared that they would eventually see an erosion in their terms and conditions of employment.

6. Collective Bargaining Under the Fair Work Act

Prime Minister Kevin Rudd's ALP Government took office in November 2007. Its key election promise was to abolish the Work Choices laws, and it began this process when it enacted transitional legislation in early 2008.⁴⁶ In November of that year, it introduced into the Parliament its Fair Work Bill. Then in March 2009 the federal Parliament passed the FW Act which commenced operation on 1 July 2009. This statute repealed the previous laws and it is now Australia's primary labour law statute.⁴⁷ While my focus is upon its new bargaining regime, it is appropriate to note the following changes. First, the right to seek remedies for terminations which are unfair has been restored to most employees. Second, the individual statutory agreements, known as Australian Workplace Agreements have been abolished, and it is clear that collective bargaining, as distinct from individual contract-making, is the primary public policy of the Government. Third, a stronger set of minimum terms and conditions of employment has been put in place as the National Employment Standards.⁴⁸ Fourth, awards have been modernised, and now Australian workers are covered by approximately 130 largely industry-wide modern awards.⁴⁹ Together with the National Employment Standards they provide a strong safety net of terms and conditions of employment. Finally, Fair Work Australia ("FWA") which is the successor agency to the Commission, has been given power to certify collective agreements which do not become operative until certification. It is still possible for collective agreements to vary modern awards, however, the old "no disadvantage test" has been re-introduced, but now it is called the "better off overall test". Interestingly, in Australian parlance this new test has become known as the "boot test".

As is the case with Australian labor law generally, the legal rules on collective bargaining under the FW Act⁵⁰ are extremely detailed and I cannot do them full justice here.⁵¹ Most collective

⁴⁵ *Workplace Relations Amendment (A Stronger Safety Net) Act* (2007) (Cth); see Carolyn Sutherland, *Stitched Up? The 2007 Amendments to the Safety Net*, 20 AUSTL. J. LAB. L. 245 (2007).

⁴⁶ *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008 (Cth); and See Andrew Stewart & Anthony Forsyth, *The Journey from Work Choices to Fair Work*, in Forsyth & Stewart supra note 36 1,7-19.

⁴⁷ For material on the FW Act see Forsyth & Stewart supra note 36; ANDREW STEWART, STEWART'S GUIDE TO EMPLOYMENT LAW (2nd ed., 2009); REMAKING AUSTRALIAN INDUSTRIAL RELATIONS, (Joellen Riley & Peter Sheldon Eds, 2008); Aaron Rathmell, *Collective Bargaining After Work Choices: Will "Good Faith" Take Us Forward with Fairness*, 21 AUSTL. J. LAB. L. 164 (2008); Andrew Stewart, *A Question of Balance: Labor's New Vision for Workplace Regulation*, 22 AUSTL. J. LAB. L. 3 (2009); Rae Cooper & Bradon ellem, *Fair Work and the Reregulation of Collective Bargaining*, 22 AUSTL. J. LAB. L. 284 (2009).

Anthony Forsyth, *"Exit Stage Left", Now "Centre Stage": Collective Bargaining Under Work Choices and Fair Work*, in Forsyth & Stewart supra note 36 120.

⁴⁸ FW Act Part 2-2.

⁴⁹ FW Act Part 2-3.

⁵⁰ FW Act Part 2-4.

⁵¹ For material on collective bargaining under the FW Act, see Stewart, STEWART'S GUIDE TO EMPLOYMENT LAW, 127-135 supra note 47; Stewart *A Question of Balance* etc, 26-36, supra note 47; Cooper & Ellem supra note 47; Forsyth, *"Exit Stage Left"* etc supra note 47.

bargaining will be at the level of the employing enterprise with employees engaging in direct bargaining with single employers.⁵² FWA will oversee the bargaining which must be conducted in good faith. Employees are able to take strike action to press their demands, provided they adhere to the complex legal rules governing the taking of industrial action.⁵³ Multi-employer bargaining may also take place, however, the bargaining must be purely voluntary. No strike activity may be undertaken and the parties are not required to bargain in good faith. However, if a multi-employer collective agreement is approved by both the employees and by FWA, it will become an enforceable agreement and will apply to the employees of all the employers whose workforces voted in favour of the agreement.

Turning to collective bargaining with single employing enterprises, this will be the primary collective bargaining mechanism for the determination of market rates of wages and work rules. The Prime Minister Kevin Rudd ALP Government wished to abolish non-union collective agreements, however, it did not want to place non-unionised employers in a type of legal straight jacket whereby they could not vary provisions of the new modern awards. The solution, which was rather masterful, was to do away with both union and non-union collective bargaining, and instead give all employees the right to decide on whether they wish to be dealt with collectively by their employers when negotiating for wages and for terms and conditions of employment. Accordingly, the legislation bestows bargaining rights upon the employees of the enterprise. When an employer wishes to bargain with the employees for an enterprise agreement, the employer must notify all of the employees of their representational rights.⁵⁴ The notices must explain that employees may appoint a bargaining agent to bargain for them. The notices must also specify that where employees are members of a trade union which is entitled to represent them, then by default, that trade union will be their bargaining agent, unless an employee expressly appoints another bargaining agent to act for the employee. Therefore, although trade unions do not possess bargaining rights in their own right, they will be able to automatically represent their members in bargaining unless the members appoint some other person to do so.

Where a trade union is a bargaining agent for employees of an enterprise, it may call upon the employer to engage in collective bargaining. Where the employing enterprise declines, the trade union may apply to FWA for a majority support determination.⁵⁵ In determining whether a majority of the employees wish to engage in collective bargaining, section 237(3) of the FW Act provides that " ... FWA may work out whether a majority of employees want to bargain using any method FWA considers appropriate." There have only been a handful of majority support determinations so far, and in almost all cases FWA has held a secret ballot to determine majority support.⁵⁶ It is important to appreciate that employees are not being asked whether they wish to be represented by a trade union, but whether they wish their wage rates and work rules to be

⁵² Two or more employers may seek authorisation as single interest employers which will enable them to bargain with their employees as though they were a single employing enterprise. Two categories of employers may seek authorisation, employers who operate pursuant to common franchising arrangements, and other employers like schools and hospitals who are able to obtain a ministerial declaration concerning their common interest where various factors are taken into account including the funding arrangements for such bodies. FW Act Part 2-4 Div. 10.

⁵³ McCrystal supra note 42.

⁵⁴ FW Act Part 2-4 Div. 3.

⁵⁵ FW Act ss 236-7.

⁵⁶ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Cochlear Ltd* 186 INDUS r 122 (2009); and for comment *See Cooper & Ellem* 296 supra note 47.

embodied in a collective agreement with their employer. This is rather different from the situation in the United States where American workers are asked in representation elections whether they wish a particular trade union to be their exclusive bargaining agent.

The contrast between this aspect of Australian and United States collective labor law is rather striking. For American employees to engage in collective bargaining, it is necessary for a trade union to obtain either employer recognition or NLRB certification before it may engage in collective bargaining. While the Australian FW Act rules on enterprise bargaining are still very new, it is clear to me that Australian workers are asked an easier question than are their United States counterparts. For Australian employees, the question asked when the FWA is making a majority support determination, is do they wish to engage in collective bargaining in their own right. On the other hand, American employees are asked in representation elections supervised by the NLRB, whether they wish to grant exclusive bargaining rights to a particular trade union.

Before concluding this brief survey of the collective bargaining laws under the FW Act, two matters deserve brief comment. They are bargaining orders and low paid authorisations. Where one of the bargaining parties is failing to bargain in good faith, FWA may issue bargaining orders, requiring the recalcitrant person or body to bargain in good faith.⁵⁷ If the order is not obeyed, FWA may issue a serious breach declaration. If after such a declaration the parties are still unable to conclude a collective agreement, FWA must make a bargaining related workplace determination.⁵⁸ The nature and scope of such a determination is complex, but briefly put, a determination is an arbitration of those matters which are unresolved bargaining issues between the parties.

Finally, FWA is given power to make a low paid authorisation to facilitate collective bargaining for low paid employees.⁵⁹ The provisions are complex, but briefly put, a bargaining agent, which will almost always be a trade union, may apply to FWA for a low paid authorisation to enable collective bargaining to take place between a group of employers and their employees. Such an authorisation will only be issued where the employees are paid low wages, where collective bargaining has not occurred, and where it is in the public interest for this type of determination to be made. When a low paid authorisation is operative, the parties must bargain in good faith. Where the parties are unable to conclude a collective agreement, then FWA may make a low paid workplace determination to arbitrate wage rates and terms and conditions of employment.⁶⁰ As yet, no low paid authorisation has been granted by FWA, but in my view, it is a sensible and indeed an appropriate mechanism to facilitate collective bargaining where employees with little bargaining power are in receipt of depressed wages.

7. Conclusion

The burden of this paper has been a twofold one. First, I have endeavoured to view United States and Australian collective labor law through the lens of employee choice in order to tease out the philosophical and legal differences between these two systems. Second, I have sought to

⁵⁷ FW Act Part 2-4 Div. 8.

⁵⁸ FW Act Part 2-5 Div. 4.

⁵⁹ FW Act Part 2-4 Div. 9.

⁶⁰ FW Act Part 2-5 Div. 2.

recount and to unpack the avalanche of amendments to Australian labor law since 1993, which contrasts sharply with the lack of amendments to United States collective labor law legislation.

By juxtaposing the employee choice mechanisms in Australian and American labor law, I have tried to comprehend their essence which is shaped by the values embodied in these laws. In Australia for almost all of the Twentieth Century, the individual choices of employees have been sublimated in favour of the social needs of the employees in the relevant industry who were engaged in group contests with their employers. After the labor law deregulation of the last two decades, however, the choices of individual employees have been elevated far above that of trade unions. By embedding collective bargaining rights in the individual worker, trade unions have necessarily lost their prior position of being disputants in their own right, to now being merely bargaining agents for their members.

In the United States by contrast, the parameters of employee choice which were enshrined in the "New Deal" legislation of the 1930's have remained static. Trade unions are still obliged to obtain majority support from the relevant employees, either to be recognised for bargaining purposes by the employer or to be certified as the exclusive bargaining agent by the NLRB. What has changed in recent years is that trade unions have relied far more on obtaining employer recognition, coupled with neutrality agreements, rather than relying upon NLRB certification via representation elections.

My assessment of the series of amendments to Australian labor law since 1993, is that they are undoubtedly the product of the need for deregulatory reforms in the light of economic globalisation. Once the winds of global competition penetrated the Australian labor market, the setting of terms and conditions of employment on an industry basis became untenable. The question confronting Australians in the 1990s and in the first decade of this new Century, was not whether our labor laws should be deregulated, but rather what should be the shape and scope of these new deregulated labor laws. The tussles between the successive ALP and Coalition governments has been driven largely by ideological notions of whether employment conditions should be governed by collective arrangements involving trade unions and regulating agencies, or whether individual employer and employee bargaining should be preferred. At the 2007 federal election, the Australian people rejected the Work Choices laws. So much so that during the campaign for the 21 August 2010 federal election, Mr Tony Abbott, the leader of the Coalition opposition continually said that Work Choices was dead and buried. While the current FW Act has enshrined collective bargaining as the centrepiece of labor relations public policy, in my opinion, Australia's debate over the shape and scope of our labor laws has not yet concluded.

If this paper has given a broader appreciation of the labor laws of the United States and Australia by analyzing them through the prism of employee choice, then this essay has been worthwhile.