LABOUR LAW REFORM IN AUSTRALIA AND NEW ZEALAND: ONCE UNITED, HENCEFORTH DIVIDED?

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Il fut un temps où le droit du travail applicable en Australie et en Nouvelle-Zélande reposait sur des principes communs lesquels privilégiaient l'intérêt général, justifiant ainsi l'intervention du gouvernement pour permettre de trouver une solution pacifique aux conflits sociaux. Au fil du temps, l'évolution du système a donné naissance à un processus original de conciliation obligatoire et d'arbitrage, lequel a attiré l'attention d'une bonne partie de la doctrine internationale.

Aujourd'hui, le droit du travail dans ces deux pays constitue encore une fois un véritable laboratoire notamment en raison de l'option retenue qui tend à laisser le secteur privé lui-même régler les conflits sociaux.

Il reste cependant qu'à l'inverse de l'Employment Relation Act 2000 (NZ), le texte australien de l'Australian Work Choices Legislation 2005, tente de trouver un compromis entre les modes de résolution des conflits sociaux laissés à l'appréciation des employeurs et le maintien d'un certaine interventionnisme des autorités australiennes pour assurer la nécessaire promotion des intérêts des petites entreprises (c'est-à-dire celles qui ne comprennent pas plus de cent employés). Dans ce contexte, il s'agit d'une modification radicale de la philosophie antérieure qui sous-tendait l'architecture du droit du travail australien.

L'auteur considère que cette situation risque sur le long terme de remettre en cause la stabilité sociale pour simplement pouvoir bénéficier d'un bénéfice politique à court terme.

Il propose que la réforme australienne soit analysée à la lumière de l'expérience néo-zélandaise en matière de relations du droit du travail notamment lors des réformes qui ont pu être entreprises après la période du gouvernement Lange. Il conclut, qu'à tout le moins, pareille étude peut servir de rappel utile du principe selon lequel il est rare que puissance donne raison en matière droit du travail.

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Once the labour law systems of Australia and New Zealand were based upon a shared belief that the public interest warranted, indeed necessitated, hands-on government intervention to ensure the peaceful resolution of industrial disputes. Over time a unique system of compulsory conciliation and arbitration evolved that attracted world-wide scholarly attention. Today the labour law systems of both countries again constitute living laboratories of social change because of the switch to a much more hands-off approach of, in effect, industrial self regulation. Unlike the Employment Relations Act 2000 (NZ), however, the Australian Work Choices legislation of 2005 seeks to combine self regulation with the promotion of small business interests – with "small" being defined rather broadly as encompassing companies with a workforce of up to 100 employees. In the result the Australian approach to labour law reform questions the very essence of labour law in terms of Arbeitnehmerschutzrecht (employee protection law). It certainly risks jeopardising longer-term social stability for the sake of short-term political gain. It is suggested that a careful study of the New Zealand experience with industrial relations reform in the post-Lange era may be beneficial. At a minimum such a study can act as a reminder that might is rarely right in matters of labour law.

I INTRODUCTION

Towards the end of the 19th century Australia and New Zealand introduced an innovative system of industrial conflict resolution. Generally known as compulsory conciliation and arbitration, central state involvement by means of the Arbitration Court or the successors thereof remained a central feature of industrial relations regulation for most of the past century. Intriguingly, at the start of the 21st century, the labour law regimes of both countries once again can be viewed as living laboratories of social change. At one level the purpose of this paper is to discuss the statutory backdrop to this most recent episode of labour law reform on each side of the Tasman, to highlight any differences in approach, and to offer some tentative explanations for their existence. For New Zealand the successive reform legislation as encapsulated at first in the Labour Relations Act 1987, next in the Employment Contracts Act 1991 and, finally, in the Employment Relations Act 2000 (NZ) will be reviewed. For Australia the focus will largely be on federal reform through the Workplace Relations Act 1996 and a major amendment of that Act, the Work Choices Act 2005.

The need for labour law reform was first articulated during the 1980s. The call for the removal of rigidities in the labour market seemed the natural by-product of deregulation in the economic and financial spheres. The overall aim then was to boost international competitiveness. Intriguingly, the political persuasion of the incumbent government seemed of little consequence at the time. Thus New Zealand embarked upon its path of industrial relations reform under a Labour government led by David Lange. While the conservative (Liberal/National) coalition of John Howard undoubtedly has taken labour law reform to new heights, in Australia as well the first (timid) steps towards reform were taken by the successive Labour administrations of Bob Hawke and Paul Keating.

The shape and extent of change, together with the manner of its introduction, were very much affected by the ideological persuasion of the political party in control at the relevant time.

Differences in the parliamentary structure of each country also mattered. In particular, the uni-cameral structure of the New Zealand parliament has allowed for rather extreme swings of the reform pendulum. This is reflected most dramatically in the (now repealed) Labour Relations Act 1987 and its successor (now also repealed), the Employment Contracts Act 1991, as will be discussed more fully below. In sharp contrast, the bi-cameral structure of the Australian federal parliament typically has a moderating effect on legislative reform. A case in point is the Workplace Relations Act 1996, enacted by a (conservative) Coalition in the mid 1990s. And yet, when a re-elected Howard II administration uncharacteristically succeeded in controlling both houses of parliament, much more radical reform became possible. The end product is the Work Choices Act 2005. While technically presented as an amendment to the 1996 legislation, its sheer length is overwhelming. The 2005 Act totals some 700 pages. Even then much of the detail has been left to regulations.

At a second, more fundamental level, the purpose of this paper is to encourage reflection upon the underlying rationale of labour law as an academic discipline in its own right. Hugo Sinzheimer, who is generally viewed as the "father" of contemporary labour law, defined the subject in terms of employee protection law (*Arbeitnehmerschutzrecht*).[1] Do the labour law reform programmes of both countries challenge this conventional wisdom? Especially the 2005 reform package in Australia appears inspired, not just by the (conservative) ideology of the political party in control, but also by a desire to wield power for its own sake. The New Zealand experience with the enactment of the Employment Contracts Act 1991 and its subsequent repeal by the Employment Relations Act 2000 suggests that, whenever the proverbial pendulum swings excessively in one direction, long-term stability risks being compromised. The writing of this text is based upon the premise that labour law is too important a field for it to be reduced to a mere political ping-pong game.

II IN THE BEGINNING: CONCILIATION AND ARBITRATION

Whereas regulation of the individual employment contract was largely left to the vagueness of the common law, the British *laissez-faire* approach as regards the collective union-management relationship was deliberately rejected as unsuitable to local conditions in the new colonies. The geographical isolation of Australia and New Zealand, together with the sheer size and shape of the land, may help explain a relatively high dependence of the colonists on government assistance in terms of basic infrastructure needs during the early years. A series of local events towards the close of the 19th century proved more directly determinative in shaping Australasian labour law. The first half of the 1890s, in particular, was marred by massive industrial unrest on both sides of the Tasman. New Zealand historian Noel S Woods points to the maritime strike of 1890, the shearers' strikes in Queensland and New South Wales, and the strike at the silver mines at Broken Hill as

1 Kahn-Freund singled out Hugo Sinzheimer (1875-1945) for having conceived of labour law as a unified, independent legal discipline: see Martin Vranken "Autonomy and Labour Law: A Comparative Analysis" (1989) 5 Int J Comparative Labour Law and Industrial Relations 100 at 101 and the references there.

precursors of the Industrial Conciliation and Arbitration Act 1894 (NZ) and its Australian counterpart, the Conciliation and Arbitration Act 1904 (Cth).[2]

The new legislation stood in sharp contrast to the United Kingdom model of free collective bargaining. It also differed from the approach that would be adopted in the USA under the National Labor Relations Act of 1935. Known today as the Wagner Act, the NLRA effectively does away with the common law of employment for those employees who come within the scope of the Act. Instead Australia and New Zealand decided to operate on the basis of a dual system. Specifically, conciliation and arbitration at the collective level were to function against a backdrop of the (English) common law at the individual employment level. The collective (statutory) model built upon the individual (common law) model, but it never sought to replace it.

III THE NEED FOR CHANGE

Pivotal features of the Australasian model of conciliation and arbitration were its centralised, compulsory, adversarial and corporatist nature. Firstly, there existed but one, publicly funded body charged with the conciliation and arbitration of industrial disputes in the public interest for the whole country.[3] Secondly, neither submission nor resolution of industrial disputes required the agreement of both parties. Thirdly, the nature of proceedings before the Arbitration Court effectively encouraged the adoption of extreme positions by either party in order to maximise its chances of obtaining a favourable outcome.[4] The parties were treated as adversaries, in sharp contrast to the situation on the European continent where employers and unions are typically referred to as social partners. Finally, the corporatist outlook of the industrial relations system was directly linked to a union tradition of organising the membership along craft or occupational lines.[5] In practical terms, it meant that one employer typically had to negotiate multiple awards or collective agreements in order to cover the entire workforce. These awards and agreements invariably were negotiated at an above-company level.

The net result was that by the end of the 20th century employers complained about a top-heavy industrial relations system marred by excessive government regulation and stifling internal rigidity. Employees for their part were heavily dependent on union coverage for the protection of their interests including access to legal remedies eg in instances of alleged unfair dismissal. Paternalistic

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2 At each occasion the cause of the unrest was the growing tension between an ever better organised labour movement, on the one hand, and employers seeking to respond to a downturn in the world economy, on the other hand: Noel S Woods, *Industrial Conciliation and Arbitration in New Zealand* (1963, Government Printer, Wellington) 35.

3 While Australia operates a federal system of government, the various state systems traditionally mirror the federal model of labour law.

4 This feature formed the basis of a practice known as ambit claims.

5 By contrast, in much of continental Europe unions tend to be organised along industry lines.

tendencies of the above kind aside, increasingly the general public as well was made aware that the existing industrial relations system was designed for 19th century conditions and did not sit easily with late 20th century attempts at opening up the country, including its financial and economic markets, to the forces of international competition.

IV SHAPE OF CHANGE AND METHOD OF ITS INTRODUCTION

A New Zealand

1 The Labour Relations Act 1987

A newly elected Lange/Douglas Labour government embarked upon a thorough, considered review of industrial relations and its regulatory framework. From the outset it was decided to conduct this review in an open fashion. It is instructive to record the manner in which the review was conducted. Subsequent legislative reform of labour law – whether in New Zealand or in Australia - would be carried out in a far more cavalier fashion, and certainly with much less emphasis on input from the general public. The contrast with the approach adopted in Australia, especially in the lead-up to the enactment of the Work Choices Act 2005, is a particularly sharp one.[6]

In December 1985 the then Minister of Labour, the Hon Stan Rodger, released a Green Paper entitled *Industrial Relations: A Framework for Review*.[7] This Green Paper, a document of several hundreds of pages in length and necessitating a separate executive summary, was intended to provide a broad-based platform for public discussion and comment on just about any aspect of industrial relations regulation. In an attempt to guide public input somewhat, the Green Paper listed 44 questions, ranging from the role of unions and their relationship with individual workers to the role of government and government bodies in industrial dispute resolution.

The success of this approach to public consultation was directly reflected in the number and quality of submissions, some 200 in total, from both individuals and groups. Continuing in the spirit of openness, a summary of these submissions was published by the Department of Labour.[8] The submissions next formed the basis for the release of a White Paper, a policy document in which the government's philosophy was stated more explicitly.[9] In essence, the government put forward the proposition that much of what went wrong with the existing system of industrial relations had to do with excessive state intervention. In view of this diagnosis the cure for industrial relations' ailments was said to lie in a reduction of government intervention so as to allow for greater opportunities for

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6 See the discussion of the 2005 Act below at IV B 3.

7 (1985, Department of Labour, Wellington), 2 volumes.

8 *Industrial Relations: A Framework for Review. Summary of Submissions* (1986. Department of Labour, Wellington) 79 pp.

9 *Government Policy Statement on Labour Relations* (1986, Department of Labour, Wellington).

the directly involved parties, ie employers and employees or their organisations, to arrange their own affairs and, by way of corollary, also assume greater responsibility for their own actions.[10]

Key terms in the White Paper were self-regulation and self-reliance. In view of later developments in the labour law reform saga, two important qualifications are called for, though. Firstly, the focus in this first wave of regulatory reform clearly was on a reduced role for government, not a complete withdrawal. In practice, this meant that the compulsory nature of arbitration could be removed from the legislation without jeopardising the continued existence of state-supported arbitration itself. In effect, the Labour Relations Act 1987 (NZ) replaced the Arbitration Court with two new public bodies, an Arbitration Commission for dealing with disputes of interest (typically, wage disputes) and a Labour Court with adjudicative powers as regards disputes over existing rights (including personal grievances – typically, dismissal disputes). Secondly, self-regulation unquestionably meant collective self-regulation. Put differently, the inherent inequality of the individual employment relationship – a fundamental premise upon which labour law is traditionally built – was not questioned by the 1987 legislature. The role of unions as collective representatives of the employee was therefore preserved, even though it occasionally risked coming at the expense of particular individual employees.[11]

2 The Employment Contracts Act 1991

Following the election defeat of Labour in 1990, a conservative (National) government reiterated its desire to continue the labour law reform started under the Lange government. The incoming administration confirmed Labour's earlier diagnosis of excessive government intervention in industrial relations, but it disagreed as to the appropriate remedy. Collective self-regulation was said to warrant as much distrust as state intervention itself. Thus individual self-reliance and individual self-regulation became hallmarks of the new legislative agenda.[12]

The Labour Relations Act 1987 was repealed and in its place came the Employment Contracts Act 1991. Because it had become viewed as a symbol of collectivism, the 1991 legislation abolished the Arbitration Commission.

As suggested by the title of the 1991 Act, the preferred vehicle for regulating employment conditions henceforth was the new construct of employment contracts. While these contracts in

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10 For a detailed discussion, see Kevin Hince and Martin Vranken "Legislative Change and Industrial Relations: Recent Experience in New Zealand" (1989) 2 Australian Journal of Labour Law 120.

11 Access to the Labour Court was restricted to union members only. On the other hand, the Labour Relations Act 1987 (NZ) dropped the earlier, separate requirement of award coverage. For a fuller discussion, see Martin Vranken and Kevin Hince, "The Labour Court and Private Sector Industrial Relations" (1988) 18 VUWLR 105.

12 Kevin Hince and Martin Vranken "A Controversial Reform of New Zealand Labour Law: The Employment Contracts Act 1991" (1991) 130 International Labour Review 475.

principle could be negotiated collectively, a preference seemed to exist for individual arrangements instead.[13] Tellingly, the legislature deliberately avoided any open use of the term union throughout the Employment Contracts Act 1991. A more constructive attempt at emphasising the importance of the individual in labour law was the opening up of access to a revamped (and renamed) Employment Court to all employees, regardless of their union membership status.

In the end, the Employment Contracts Act 1991 proved short-lived. In 1999 a Labour coalition regained office on an election platform of labour law reform that included an immediate repeal of the 1991 legislation.

3 The Employment Relations Act 2000

The latest episode in this seemingly never-ending saga of reshaping labour law for the 21st century is the Employment Relations Act 2000. The 2000 Act seeks to steer a middle course between the approach of the 1991 legislature and the (officially acknowledged) out-dated award system. In a speech by the then Minister of Labour, the Hon Margaret Wilson stressed the need for a greater balance between economic and social policy objectives.[14] To this effect the right of unions to bargain collectively are now restored, subject to an overriding obligation for the bargaining parties to act in good faith. Essentially a pro-active obligation to meet and confer constructively, this for once amounts to positive borrowing from US labour law.[15] To quote Margaret Wilson, the introduction of the concept of good faith in New Zealand labour law signals "an important step towards creating a new culture of co-operative and inclusive employment relations".[16]

This is neither the time nor the place for a detailed study of the 2000 Act.[17] From a comparative perspective, however, it is intriguing to observe how the principal object of Australia's Workplace Relations Act, both before and after the 2005 amendment, is formulated in similar terms. In particular, that legislation as well claims "to provide a framework for cooperative workplace

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13 The underlying rationale of the 1991 legislation is discussed by Brian Brooks, "Deregulating the Labour Market: Reflections on the New Zealand Experience", in Chris Engels and Manfred Weiss, (eds) *Labour Law and Industrial Relations at the Turn of the Century* (1998, Kluwer, The Hague) 651-671.

14 Hon Margaret Wilson "The Employment Relations Act: A Statutory Framework for Balance in the Workplace" (2001) 26 NZJIR 5-11.

15 Ellen Dannin "Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience" (2001) 26 NZJIR 45-58. The Howard government's distinction between mandatory, permissive and – in particular – prohibited bargaining topics arguably is a less attractive instance of American import. See below at IV B 3.

16 "Minister of Labour addresses Nation's Employers", The Employer, June 2000 issue, 6, as cited in John Hughes "The Collective Bargaining Code of Good Faith" (2001) 26 NZJIR 59-84, 59.

17 In 2001 a special issue of the New Zealand Journal of Industrial Relations was devoted to the new legislation: see its Volume 26, Number 1.

relations which promotes the economic prosperity and welfare of the people of Australia".[18] Less than 20 years ago official inquiries into the desirability and feasibility of adopting the European model of worker participation drew negative conclusions on both sides of the Tasman.[19] It would seem that (decentralised) bargaining over wages and employment conditions is currently being heralded as a more appropriate, contemporary version of industrial democracy by the Australian as well as the New Zealand legislature. Back then the European legislation on cooperative workplace relations was said to be too prescriptive. It remains an open question as to whether the new Australian legislation, in particular, is any less prescriptive. The shape of labour law reform in Australia, including the method of its introduction, is set out below.

B Australia

1 A Late Start

In Australia the move away from awards and the associated emphasis on central government control, did not really get off the ground at first. Under the Labour government of Bob Hawke a committee to review the industrial relations system was established. The committee produced a report in 1985.[20] Its conclusions stand in sharp contrast to New Zealand's White Paper on industrial relations to be released two years later. The Hancock report, named after the committee's chair Professor Keith Hancock, saw no need for radical change in Australia's regulatory framework for industrial relations. This "steady–as-she-goes" philosophy was subsequently reflected in the drafting of the Industrial Relations Act 1988 (Cth).[21]

The Industrial Relations Act 1988 (Cth) did introduce one innovation that, with the benefit of hindsight, would prove instrumental in facilitating more fundamental change later on. The 1988 Act allowed for the negotiation, under the aegis of the Industrial Relations Commission, of so-called certified agreements. At first certified agreements existed side-by-side with awards, and the position of the latter as the traditional vehicle for determining employment conditions was not really in

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18 Section 3 of the Workplace Relations Act 1996 (Cth) as amended by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

19 First the Commonwealth government of Australia published *Industrial Democracy and Employee Participation – Policy Discussion Paper* (1986, Department of Employment and Industrial Relations Working Environment Branch, Canberra). Three years later, a New Zealand committee of inquiry released its report on industrial democracy: *Report of the Committee of Enquiry into Industrial Democracy* (1989, Government Printer, Wellington). For a joint discussion, see Martin Vranken "An Australasian Approach to Industrial Democracy?" (1991) Australian Journal of Labour Law 81-88.

20 *Committee of Review into Australian Industrial Relations Law and Systems* (1985, Australian Government Printing Service, Canberra).

21 Creighton and Stewart refer to the 1988 Act in the following terms: "little more than a consolidation measure, which affected no substantial change to the system as it had operated for 85 years": Breen Creighton and Andrew Stewart*, Labour Law* (2005, Federation Press, Sydney) 56.

question. But subsequent amendments to the 1988 legislation, passed in 1992 and 1993, brought about a major change of scene. Especially the Industrial Relations Reform Act 1993 (Cth) has been identified as displaying a concerted effort, by a Labour administration under the prime ministership of Hawke's successor: Paul Keating, "to shift the entire emphasis of the system away from the settlement of disputes by conciliation and arbitration in favour of prevention and settlement through direct bargaining at enterprise level".[22] The Coalition government of John Howard would build upon the Keating reforms from the 1990s onwards. An initial attempt at substituting individual for collective self-regulation failed, as the discussion below will show. Interestingly, when viewed from a comparative perspective, at no stage did the Australian government embark upon a broad-based public consultation exercise comparable to that which had occurred during the Lange era in New Zealand.

2 *The Workplace Relations Act 1996(Cth)*

(i) Australian Workplace Agreements

Australian workplace agreements or AWAs are the functional equivalent of New Zealand's employment contracts. They represent Australia's attempt at effectively weaning the country off awards. The Act defines an AWA as a written agreement between an employer and an employee that deals with matters pertaining to the employment relationship.[23]

While the Act does not explicitly state so, the overall structure of the Workplace Relations Act 1996 strongly suggests that AWAs are meant to be individual documents that cover only individual employees and their employer.[24] Where convenient, presumably, the various individual agreements between an employer and members of the workforce can be bundled into a single document,[25] in which instance the AWA resembles an enterprise agreement. In any case, the parties are allowed to appoint a bargaining agent.[26] Not unlike the legal situation in New Zealand under the Employment Contracts Act 1991, the agent for the employee need not be a union.

In principle, the parties (or their agent) can freely negotiate the contents of an AWA, subject to certain minimum requirements. Thus, for example, AWAs must include a dispute resolution procedure,[27] and they are stipulated to expire after a maximum of three years.[28]More importantly, from an employee protection perspective, AWAs must pass a so-called no-disadvantage test.

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22 Above, 57.

23 Workplace Relations Act 1996 (Cth), s 170VF(1).

24 Breen Creighton and Andrew Stewart, above n 21 at 249.

25 Workplace Relations Act 1996 (Cth), s 170VE(1).

26 Workplace Relations Act (Cth), s 170VK(1).

27 Workplace Relations Act 1996 (Cth), s 170VG(3).

(ii) The No-Disadvantage Test and the Employment Advocate

The single most important restriction on the contents of Australian workplace agreements and, by the same token, also the single most important disincentive for employers to use these agreements as preferred instruments to govern the employment conditions of their employees, is the statutory requirement for AWAs to satisfy a no-disadvantage test.[29] The 1996 Act stipulates that AWAs may "not disadvantage employees in relation to their terms and conditions of employment".[30] An agreement is said to disadvantage employees if, "on balance", it results in "a reduction in the overall terms and conditions of employment of those employees" (as compared to the relevant, applicable award).[31]

In one sense, the notion of a no-disadvantage test is nothing new. The test certainly was not invented by the Coalition government of John Howard. Rather, it was first introduced under Paul Keating in 1992 as part of Labour's attempt at promoting decentralised bargaining.[32] The 1996 Act simply extends the operation of the test to AWAs. Noteworthy is the fact that compliance with the no-disadvantage test is now the responsibility of the newly created office of the Employment Advocate.[33] Academic commentators have suggested that a potential conflict of interests exists between the Employment Advocate's role of vetting AWAs while, at the same time, promoting their use. Research to date indicates that any tension between both functions is resolved in a manner that fails to do justice to the former.[34] In any event, the take-up rate of AWAs during the past decade has been slow. The 2005 amendments to the Workplace Relations Act 1996 seek to boost the use of AWAs by removing the requirement for AWAs to comply with the no-disadvantage test. The matter is discussed more fully below.

3 The Work Choices Act 2005

(i) Process of Change

Prior to the 2005 amendment of the Workplace Relations Act 1996, awards effectively acted as a floor of minimum employee rights that decentralised bargaining could only improve upon.

28 Workplace Relations Act 1996 (Cth), s 170VH.

29 Workplace Relations Act (Cth), Part VIE.

30 Workplace Relations Act 1996 (Cth), s 170XA(1).

31 Workplace Relations Act 1996 (Cth), s 170XA(2).

32 The relevant legislation is the Industrial Relations Legislation Amendment Act 1992 (Cth).

33 Workplace Relations Act 1996 (Cth), Part IVA. Under the previous (1992) legislation, compliance was ensured by Australia's conciliation and arbitration watchdog, the Industrial Relations Commission.

34 Richard Mitchell, R Campbell, A Barnes, E Bicknell, K Creighton, J Fetter and S Korman *What's Going on with the No Disadvantage Test?* (2005, Working Paper No 33, Centre for Employment and Labour Relations Law, Melbourne) 32pp.

Following the federal election of 2004, the Liberal/National coalition gained control over both Houses of Parliament from 1 July 2005 onwards. It allowed the Howard administration to complete those aspects of its labour law reform programme that previously had proven difficult to pass into legislation. In the result AWAs now occupy the very top of the hierarchy, effectively operating to the exclusion of other (collective) industrial documents.[35]

The Workplace Relations Amendment (Work Choices) Bill was formally tabled in Parliament on 2 November 2005. Notwithstanding its length – some 700 pages plus 500 pages of Explanatory Memorandum – the Bill was passed, in an amended form,[36] precisely one month later, on 2 December 2005, after the Government used its numbers to cut short debate.[37] While rumours about its contents had been circulating for months prior to the formal presentation of the Bill by Workplace Relations Minister Kevin Andrews in the House of Representatives, the federal opposition immediately expressed its outrage for not having been provided with copies of the actual Bill in advance.[38] Admittedly, an overview of the government's reform agenda had been presented by the Prime Minister in an address to Parliament on 26 May 2005. In addition, a 68-page information booklet had been released to the general public on 9 October 2005.[39] The information it contained was sufficient to cause anxiety among large segments of the community as reflected in the presence of large crowds at mass rallies in major cities throughout Australia.[40] But the actual drafting of the Bill occurred in a most peculiar, fragmentary fashion, with individual parts of the Bill outsourced to a dozen or so private law firms.[41] This manner of proceeding must have made it extremely difficult for even the Minister himself to stay fully on top of the detail throughout the drafting process.

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35 *Work Choices. A New Workplace Relations System* (2005, Commonwealth Government of Australia, Canberra) 24.

36 The government introduced over 300 of its own amendments – mainly to correct factual errors or improve expression. See Andrew Stewart, *The Work Choices Legislation: An Overview* (www.federationpress.com.au/pffWorkChoicesLegislation 0206.pdf, accessed on 14 February 2006).

37 Royal Assent was received on 15 December 2005.

38 ABS Online, *Labor outraged as Government tables IR Bill* (www.abc.net.au/news/newsitems/200511/s1495829.htm, accessed on 2 November 2005).

39 Above n 35. The booklet was part of a public information campaign estimated to have costed AUD $55 million – reportedly more than the entire spending on the federal election campaign by both parties in 2004: reply by Beazley to the Second Reading of the proposed Work Choices Legislation (www.alp.org.au/media/1105/speloo030.php accessed on 14 February 2006).

40 Some 200,000 people marched during a national day of action in November in Melbourne alone.

41 In total, 11 "big city" law firms were hired to assist with the writing of the Bill. See Kim Beazley, Leader of the Opposition, Speech to the House of Representatives, 3 November 2005, at www.alp.org.au/media/1105/speloo030.php, accessed on 14 February 2006.

(ii) Contents of Change

On the positive side, the Work Choices Act seeks to establish a national system of workplace relations that replaces the separate industrial relations systems that hitherto have operated at the level of the States and the Territories. The efficiency gains of having one single, unified system of labour law are beyond doubt.[42] Ironically, it is this aspect of the 2005 Act that is currently being challenged in the High Court. Questioned is the Act's constitutional validity, in particular the Commonwealth's expanded use of the corporation power in the Constitution as the basis for usurping State powers.

Much more controversial is the legislature's attempt at individualising labour relations. In line with the New Zealand experience during the 1990s, the marginalisation of unions and the Industrial Relations Commission are both cause and effect of this individualisation process. Of special interest to a New Zealand audience may be that, unlike the Employment Contracts Act 1991, the Australian legislation does not abolish the Industrial Relations Commission (hereafter, the IRC) outright but rather it seeks to do so by stealth. Indeed, the 2005 Act substantially reduces the jurisdiction of the IRC, partly through the establishment of a new public body, the Australian Fair Pay Commission (hereafter: the AFPC).[43] The new Commission takes over the wage-setting function of the IRC. However, the focus of the AFPC is bound to be more economic than social in nature. The 2005 Act expressly states that the objective of the AFPC is to promote economic prosperity. To this effect, regard must be had, not just to "providing a safety net for the low paid", but also to "the capacity for the unemployed and low paid to obtain and remain in employment" as well as "employment and competitiveness across the economy".[44] Already it is feared by some commentators that future increases in the minimum wage will be lower, and possibly less frequent, than in the past.[45]

(iii) Hierarchy of Sources

In New Zealand, clarity of statutory interpretation is greatly assisted by the clever use of object clauses. Regrettably, the Australian legislature does not always make effective use of this type of drafting technique. Even so, the 1996 Act, as amended in 2005, does contain a general object clause. Section 3 of the Act lists as its "principal object" the provision of "a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia". The Work Choices Act seeks to achieve this overall objective by, inter alia:

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42 Othmar Vanachter and Martin Vranken (eds) *Federalism and Labour Law: Comparative Perspectives* (Intersentia, Antwerpen, 2004) 128 pp.

43 Schedule 1A of the 2005 Act inserts a new Part 1A, entitled Australian Fair Pay Commission, into the 1996 Act.

44 Section 7J of the new Part 1A.

45 Andrew Stewart, above n 36, 13.

(d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and

(e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances.

Nowhere in this opening clause is individual bargaining directly referred to as the preferred means for the negotiation of employment conditions. Yet it is in the legal regulation of the hierarchy between the various employment instruments that a clear preference emerges.

To understand the relative complexity of the inter-relationship between the various sources of employment regulation in Australia, it must be appreciated that the 2005 legislation uses the generic term of workplace agreement to refer to various types of industrial instruments. The basic principle is, though, that an employee can only be covered by one workplace agreement at any particular time.[46] Further, should an award be operative in relation to some employees, the personal scope of application of that award is automatically reduced once a workplace agreement has been negotiated in relation to one or more of these employees.[47]

Workplace agreements can either be individual or collective, depending on the number of employees covered. The term AWA is henceforth reserved for agreements between an employer and individual employees.[48] This type of workplace agreement prevails over collective workplace agreements and the latter have no effect in relation to an employee covered by an AWA.[49] Depending on whether or not they have been negotiated with a union, collective workplace agreements are either known as union collective agreements[50] or employee collective agreements.[51] Collective workplace agreements cover more than one employee but, typically only one employer. Where workplace agreements are intended to cover multiple employers, the relevant employer must first apply to the office of the Employment Advocate for authorisation to enter into a so-called

46 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 100A(1).

47 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 100B.

48 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 96.

49 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 100A(2).

50 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 96B.

51 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 96A. The 2005 Act makes a further distinction in relation to new businesses. A workplace agreement negotiated prior to the employment of any employee covered by the agreement is either a union greenfield agreement (Section 96C) or an employer greenfield agreement (section 96D).

multiple-business agreement. Authorisation depends on whether the agreement serves the always somewhat elusive public interest.[52]

(iv) Negotiable Matters

Certification of workplace agreements is no longer a statutory requirement under the 2005 Act. In the process both the need and the ability for the Employment Advocate to scrutinise the contents of the agreement have been removed.[53] Previously, application of the no-disadvantage test by the Employment Advocate constituted a formal aspect of the certification process. Presumably, the need for certification has become mute now that the no-disadvantage test is gone.

The 2005 Act protects a minimum number of award conditions, for now. Specifically, award provisions dealing with public holidays, rest breaks, incentive–based payments, annual leave loadings, penalty rates and shift/overtime loadings remain in place until renegotiated (or removed) by a workplace agreement. Of course, once removed from the award, these conditions risk being gone forever because awards themselves are effectively being "moth-balled" by the 2005 legislation in more than one way. Thus, for instance, awards are progressively being deprived of any meaningful contents as a result of the decrease in the number of "allowable matters" from 20 to 16. Also, the negotiation itself of awards has become more difficult because of the reduced powers of the IRC in setting employment conditions.

The notion of allowable matters in awards is nothing new. The 1996 Act already restricted the subject-matter of awards. Only, the 2005 Act extends the application of this principle to – supposedly freely negotiated by the parties - workplace agreements. Mystifyingly, the 2005 Act does not contain an exhaustive list of items that constitute so-called prohibited content.[54] Instead the specifics are largely left to be sorted out by means of subsequent regulation.[55] The 2005 legislation does spell out the applicable sanctions. Provisions of a workplace agreement that contains prohibited content are void.[56] Any offending provisions may be removed by the Employment Advocate. They even can attract a civil remedy.

(v) Unfair Dismissals and Unlawful Dismissals

One type of prohibited content that is clearly identified in the 2005 Act concerns unfair dismissal. Under the Work Choices legislation protection against unfair (as distinct from unlawful) dismissal is no longer available to employees employed in companies with a workforce at or below

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52 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 96F.

53 The only requirement is for workplace agreements to be "lodged".

54 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 101D-N.

55 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 101D.

56 Workplace Relations Amendment (Work Choices) Act 2005, Schedule 1, s 101F.

100 employees.[57] The inclusion of unfair dismissal protection provisions in workplace agreements has been outlawed. In effect, the Work Choices legislation disallows employees (and their employers!) the choice of free negotiations on the matter.

Prior to the 2005 amendment, unfair dismissal claims were heard by the IRC, whereas unlawful dismissal claims had to be brought in the (ordinary) Federal Court of Australia. Unfair dismissal claims typically question the reasons for the dismissal and/or the procedure followed by the employer in carrying out the dismissal. Unlawful dismissal is a much narrower concept. It concerns the discriminatory termination of an employee on expressly prohibited grounds of gender, race, union membership, and the like. Available remedies in instances of unfair dismissal include reinstatement. Unlawful dismissal only triggers damages. On the one hand, the 2005 legislation has broadened access to the IRC by removing the need for the relevant employee to be covered by an award or a certified agreement. On the other hand, the immunity of small and medium-size companies from unfair dismissal claims largely makes this a hollow move: the 100+ rule effectively bars the vast majority of Australian employees from disputing the fairness of their dismissal.[58]

Even employees in large firms are negatively affected by the 2005 Act. In an apparent attempt to facilitate business restructuring, unfair dismissal claimants can no longer question dismissals "for genuine operational reasons *or for reasons that include genuine operational reasons*".[59] Operational reasons are defined to include "reasons of an economic, technological, structural or similar nature".[60] This definition is sufficiently broad to cover redundancy scenarios. According to at least one commentator, it is also sufficiently broad to render just about any other termination decision by employers potentially immune from scrutiny![61]

V EVALUATION AND CONCLUSION

This paper set out to review the recent history of labour law reform in New Zealand and Australia. It makes sense to study both countries in tandem. After all, New Zealand and Australia have in common a long tradition of industrial dispute resolution through compulsory conciliation and arbitration. In more recent times both countries have also shared a desire to decentralise and deregulate their labour markets.

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57 Workplace Relations Act 1996, s 170CE(5E) as inserted by the 2005 Act.

58 ABS data for 2001 show that small business employs 3.6 million people or 49% of all private sector employees. Small business is defined narrowly by the ABS as encompassing companies employing fewer than 20 people. See ABS, Small Business in Australia, 2001, issue no. 1321.0, at http://www.abs.gov.au/ausstats. Under the much broader definition of small business in the 2005 Act, that percentage inevitably is significantly higher.

59 Workplace Relations Act 1996, s 170CE(5C) as inserted by the 2005 Act. Emphasis added.

60 Workplace Relations Act 1996, s 170CE(5D) as inserted by the 2005 Act.

61 Andrew Stewart, above n 36, 21.

As regards the timing of labour law reform, the pressure for change manifested itself almost simultaneously on both sides of the Tasman. On its own this observation is not particularly unusual. Labour law systems elsewhere in the Western advanced world equally embarked upon an exercise in labour law deregulation from the 1980s onwards.[62] What sets New Zealand and Australia apart is both the speed and the thoroughness of change.

Twenty years ago New Zealand and Australia commenced the dismantling of the core pillars upon which their labour law systems had once been built. A centralised arbitration system thus gave way to a decentralised system of collective – and individual! – bargaining at the level of, by preference, the actual place of work. Fundamental change of this order has so far proved elusive on the Western European continent.

Upon closer examination, differences between New Zealand and Australia do emerge. The pace of change in New Zealand was higher than in Australia. Because of this, New Zealand has already been able to take corrective action once it became clear that the country might have gone too far too fast. It explains the substitution of the Employment Relations Act 2000 for the Employment Contracts Act 1991. Because of its different constitutional and parliamentary make-up, Australia initially lagged behind New Zealand as regards the timing and the degree of change. Only when the Work Choices legislation was passed In December 2005 did Australia finally catch up with the state of affairs in New Zealand back in 1991.

Predictably, the party-political composition of the incumbent government had an impact on the nature of the reforms, hence the tension between collective and individual approaches to self-regulation on both sides of the Tasman. Much more peculiar is the most recent amendment to the Workplace Relations Act 1996 in Australia. The Work Choices Act offers choices in name only. The Act openly displays elements of a Margaret Thatcher type of small business ideology to the point of an unhealthy obsession. In the process the fundamental rationale underlying labour law as employee protection law has been compromised. The removal of the no-disadvantage test, together with the extension of prohibited bargaining topics to unfair dismissal protection, represent major setbacks for Australian employees in this regard.

Labour relations will probably always be power relations. The employee protective rules of labour law traditionally are based on an official acknowledgment of the inherent inequality that exists between the parties. For as long as one party in the employment relationship is economically and financially dependent on the other for his/her livelihood, it remains an axiom of contemporary labour law. The abolition of the conciliation and arbitration system has meant that the state discontinued the pretence of being a disinterested party in industrial relations. However, there ought to be a difference between being interested and being an openly biased party. As history has shown,

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62 Martin Vranken "Deregulating the Employment Relationship: Current Trends in Europe" (1986) 7 Comparative Labor Law 143-165.

the Howard government's insistence that whatever is good for business is necessarily also good for employment and for employees is overly simplistic. It is only a matter of time before sanity prevails and corrective action occurs, no doubt similar to change effected by New Zealand's Employment Relations Act 2000. The unsettling effects of a constant chopping and changing in the regulatory framework of labour law are a heavy, unnecessary price to pay for employers and employees alike.