

Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws

La reconnaissance syndicale et les lois néo-libérales sur la négociation volontaire en Australie

El reconocimiento del sindicato y la ley neoliberal de negociación voluntaria en Australia

Ron McCallum

Volume 57, numéro 2, printemps 2002

URI : <https://id.erudit.org/iderudit/006779ar>

DOI : <https://doi.org/10.7202/006779ar>

[Aller au sommaire du numéro](#)

Éditeur(s)

Département des relations industrielles de l'Université Laval

ISSN

0034-379X (imprimé)

1703-8138 (numérique)

[Découvrir la revue](#)

Citer cet article

McCallum, R. (2002). Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws. *Relations industrielles / Industrial Relations*, 57(2), 225–251. <https://doi.org/10.7202/006779ar>

Résumé de l'article

L'Australie présente une étude de cas probante sur la façon dont les pressions de la mondialisation et des technologies de l'information ont modifié les régimes libéraux collectivistes. À mon avis, en Australie, ce sont les pressions exercées par la mondialisation de l'économie qui ont guidé les changements introduits tant par les politiciens fédéraux que ceux des États à la législation du travail au cours de la décennie 1990. Les mécanismes de conciliation et d'arbitrage obligatoires, qui dataient du début du 20^e siècle, servaient à déterminer la plupart des taux de salaire de marché sur la base d'une industrie et protégeaient les conditions d'emploi des travailleurs en éliminant une bonne partie de la concurrence dans les marchés du travail spécifiques à l'industrie. Pour accroître la flexibilité de la main-d'œuvre, les politiciens de toute allégeance ont cherché d'une manière ou d'une autre à démanteler l'arbitrage et la conciliation obligatoires et à établir des mécanismes de détermination des salaires et des conditions de travail au niveau de l'entreprise, de l'unité d'affaires et de l'usine. De fait, les changements apportés à la législation du travail néo-libérale au cours de la dernière décennie ont été d'une ampleur telle que la législation actuelle ressemble très peu aux lois d'avant 1990 qui prévoyaient la conciliation et l'arbitrage obligatoires comme moyens de règlement des conflits du travail.

En 1993, dans une tentative en vue de protéger les relations collectives du travail de la tempête de la mondialisation, le parti travailliste australien du premier ministre Paul Keating au palier fédéral fit adopter le projet de loi de 1993 sur la réforme des relations du travail, qui introduisait plus de changements à la législation fédérale du travail qu'on en avait connu depuis son adoption quelque quatre-vingt-dix années plutôt. La législation fédérale du travail a été déréglementée au moment où ses mécanismes d'arbitrage et de conciliation obligatoires étaient abandonnés pour préparer la venue la négociation collective volontaire sur la base de l'entreprise.

Trois années plus tard, avec l'élection du parti libéral du premier ministre John Howard et la coalition du parti national au niveau du gouvernement fédéral, des changements importants ont encore été apportés à la législation vers la fin de 1996. Ces changements étaient basés sur la déréglementation partielle du gouvernement Keating, mais l'objectif visé par les réformes néo-libérales de 1996 consistait à réduire le rôle des syndicats et à faciliter un accroissement du contrôle unilatéral de l'employeur. Ces nouvelles dispositions facilitaient le contrôle de l'employeur de bien des manières : par une réduction des pouvoirs de la commission des relations industrielles; par l'introduction de dispositions sur la liberté d'association qui rendent illégale toute forme d'atelier syndical; en facilitant les aménagements directs entre employeur et salariés libres de toute interférence syndicale; en créant la possibilité d'ententes individuelles, connues comme étant les ententes australiennes sur les lieux de travail.

Cet article analyse la législation sur la négociation collective volontaire adoptée en 1993 et modifiée en 1996. Mon argumentation est à l'effet que ces changements n'arrivent pas à protéger adéquatement la négociation collective impliquant les syndicats. Je cherche à démontrer qu'au moment de légiférer en 1993 en faveur de la négociation collective volontaire, le gouvernement Keating (parti ouvrier australien) — qui aurait dû le savoir — n'a pas réussi à adopter les procédures juridiques favorisant la reconnaissance syndicale, en grande partie parce qu'il ignorait la manière dont cette nouvelle législation allait refaçonner le mouvement ouvrier en Australie. On croyait alors que si on accordait aux syndicats le droit de recourir à la grève pour promouvoir leurs demandes à la table des négociations, un mécanisme de reconnaissance judiciaire des syndicats ne serait plus nécessaire.

Les modifications apportées en 1996 à la législation fédérale sur la négociation réduisaient encore davantage la capacité des syndicats de s'engager dans la négociation collective. Le conflit BHP Iron-Ore qui a duré deux ans a démontré que les lois de 1996 sur la liberté d'association n'a pas créé chez les employeurs l'obligation de reconnaître les syndicats pour fins de négociation collective.

Pour assurer le maintien et la croissance de la négociation collective par les syndicats, la législation australienne sur la négociation volontaire, et plus particulièrement celle de niveau fédéral, devrait être modifiée de façon à permettre aux employés d'être représentés par des syndicats à la négociation. En particulier, je procède à une analyse des procédures de reconnaissance syndicale aux États-Unis, au Canada, en Grande-Bretagne et en Nouvelle-Zélande en cherchant à préciser ce que les législateurs en Australie peuvent apprendre de ces régimes. À mon avis, ils devraient accorder une certaine considération à l'idée de l'adoption de mécanismes de reconnaissance syndicale qui tiennent compte du passé de la réglementation du travail en Australie et de l'assortiment unique de lois en matière d'arbitrage, de négociations individuelles et de négociations collectives.

Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws

RON MCCALLUM

When Australia deregulated its economy in the 1980s, political pressures built up leading in the 1990s to the dismantling of Australia's industry-wide conciliation and arbitration systems. New laws established regimes of collective bargaining at the level of the employing undertaking. This article analyzes the 1993 and 1996 federal bargaining laws and argues that they fail to protect the right of trade unions to bargain on behalf of their members. This is because the laws do not contain a statutory trade union recognition mechanism. The recognition mechanisms in the Common Law countries of the United States, Canada, Britain and New Zealand are examined, and it is argued that Australia should enact trade union recognition mechanisms that are consonant with its industrial relations history and practice.

Free market economics has swept over the industrialized world, affecting local markets everywhere. This economic globalization has narrowed the scope of liberal collectivist industrial regimes in most western economies, especially in those countries in which the legal system is based upon the principles of the Common Law and where the default position is the individual common law contract of employment. At the same time, computer-based information technologies have altered the manner in which

-
- MCCALLUM, R., Faculty of Law, University of Sydney, Sydney, Australia.
 - The writing of this essay would not have been possible without the help of my University of Sydney colleagues Christine Cargill, Yane Svetiev and Joellen Riley; and from York University Toronto, Judy Fudge, and from Griffith University Brisbane, David Peetz. This paper was largely written in the Fall semester of 2001 when I was a visiting Professor in Industrial Relations Department at Université Laval; and I wish to thank my Université Laval colleagues, Corinne Blanchette, Gregor Murray and Pierre Verge. I also wish to thank my colleagues in the Centre de recherche interuniversitaire sur la mondialisation et le travail (CRIMT) for their assistance. Finally, I wish to thank my teacher and friend Harry Glasbeek and my wife, Mary Crock, for their help and encouragement.

much remunerated work is performed by facilitating the use of high performance production regimes and the outsourcing of many functions to smaller workplaces. There is no doubt that these two trends have tipped the political, social and economic balances in the industrialized world towards the setting of wage rates and work rules on an individual basis and away from the support of liberal collectivist labour relations mechanisms. The liberalization of trade regimes, including regional free trade agreements such as the North American Free Trade Agreement, have further added to these pressures. Thus, since the early 1980s, but especially over the last decade, the economic underpinnings of collectivist industrial relations regimes in Common Law countries like Canada and Australia have been undermined by these trends (International Labour Organization 1997).

The Canadian pluralist industrial relations regime, which took root at the close of the second world war¹ and blossomed until the late 1970s, has begun to unravel in the face of economic globalization (Arthurs 1996, 2000). In particular, as has been pointed out by a number of scholars (Adams 1993, 1995; Fudge and Glasbeek 1995; Fudge and Vosko 2001, 2001a), the bargaining regimes established by Canadian labour law legislation have failed to shield private sector workers from the economic winds of globalization. Based on the paradigm of industrial employment prevalent from the 1940s to the 1960s in which workers (mainly men) were permanently employed by large employing undertakings, the North American collective bargaining laws mainly confine bargaining to the level of the employing enterprise and oblige trade unions to mobilize a majority of the workers either in each undertaking or to organize categories of employees within the enterprise into particular bargaining units. The Canadian legal regimes contain statutory trade union recognition mechanisms that oblige each union to obtain majority employee support in the bargaining unit before the employer is required to bargain with it in good faith in order to conclude a collective agreement. When a collective agreement is signed (and this is important for our subsequent discussion of Australia), its clauses become the employment code for all of the employees in the bargaining unit and the individual Common Law contracts of employment between employee and employer are nullified (Summers 1998: 48–49).

In the year 2001, only one in every three Canadian workers (32.6%) were governed by collective bargaining law (Akyeampong 2001). However, it is the unionization of the public sector that maintains Canadian collective bargaining at this level. In Canada's private sector, collective bargaining has declined to cover only one in five employees (20.5%), with

1. The federal Government introduced the North American model of labour regulation into Canada when it promulgated Wartime Labour Relations Regulations, PC 1003, 17 February, 1944.

the remaining 79% governed by unilateral employer regulation through the individual contract of employment (Akyeampong 2001). In Canada's public sector, on the other hand, three quarters of the employees (73.7%) are governed by collective agreements (Akyeampong 2001). What is of special interest to this antipodean observer is that Canadian private sector collective bargaining has diminished in size and coverage, yet its collective bargaining laws have largely remained intact, in part because they have not been a significant impediment to an increase in the growth of individual employment relationships that entrench unilateral employer control.

Australia provides a compelling case study in how the pressures of globalization and information technologies—in different ways and depending upon the socio-legal features of national states—have led to an alteration of liberal collectivist regimes. In the case of Australia, I contend, the pressures of economic globalization have made the enactment of changes to labour law a major pre-occupation of federal and State politicians throughout the 1990s. Australia's mechanisms of compulsory conciliation and arbitration, which took root at the beginning of the 20th Century, set most market wage rates on an industry basis and protected employee terms and conditions of employment by eliminating much of the competition in industry-specific labour markets. In order to increase labour flexibility, politicians of all complexions sought, in varying ways, to dismantle compulsory conciliation and arbitration and establish mechanisms to determine wages and conditions at the level of the firm, business unit or plant. In fact, the neo-liberal labour law alterations of the last decade have been of such a magnitude that current Australian labour law bears little resemblance to the pre-1990 laws mandating compulsory conciliation and arbitration for the settlement of labour disputes.

Given that the powers to make labour laws are shared between Australia's federal (Commonwealth) Parliament and the parliaments of the States,² it is not possible here to examine all of these regimes and how to varying degrees they have dismantled compulsory conciliation and arbitration (see McCallum and Ronfeldt 1995; Nolan 1998). However, as federal labour law covers half (50.3%) of the Australian workforce (Reith 2000),³ as well as governing the nation's most significant and largest

2. This article does not examine the constitutional law aspects of Australia's labour laws and, in particular, the constitutional underpinnings of the post-1992 federal labour law amendments. The most readable account of the constitutional aspects of federal labour law is to be found in Williams (1998).

3. Federal coverage was increased in late 1996 when the Parliament of Victoria abolished most aspects of that State's labour relations mechanism and referred most of its powers concerning labour relations to the Commonwealth Parliament. For details, see Victorian Industrial Relations Taskforce (2000: Ch. 4).

industries, this analysis will focus on the post-1992 alterations to federal labour law.

In 1993, in an endeavour to protect collective labour relations from the harsh winds of economic globalization, Prime Minister Paul Keating's Australian Labor Party federal Government enacted the Industrial Relations Reform Act 1993,⁴ which made more changes to federal labour law than at any time since its establishment some 90 years earlier. Federal labour law was partially deregulated as aspects of compulsory conciliation and arbitration were dismantled to make way for the full implementation of voluntary collective bargaining at the level of the employing undertaking. Other beneficial measures were also enacted, with the major one being an unfair dismissal regime based largely on International Labour Organization standards (for details of these reforms, see *Australian Journal of Labour Law* 1994; McCallum 1994).

Three years later with the election of Prime Minister John Howard's Liberal Party and National Party coalition federal Government, major changes were once more made to federal labour law at the close of 1996. These alterations built upon the Keating Government's partial deregulation, but the objective of these 1996 neo-liberal reforms was to diminish the role of trade unions and to facilitate an increase in unilateral employer control. These laws, which are set out in the Workplace Relations Act 1996,⁵ facilitate employer control in several ways: by curtailing the powers of the Australian Industrial Relations Commission (the federal Commission); by the establishment of freedom of association provisions that outlaw all forms of trade union security; by making it easier for employers to make arrangements directly with their employees free from trade union interference; and by providing for statutory individual agreements known as Australian workplace agreements (see *Australian Journal of Labour Law* 1997; Riley 1997; Mac Dermott 1997, 1998; Coulthard 1999; McCallum 1997, 2001).

This article examines the voluntary collective bargaining laws enacted in 1993 and amended in 1996. I shall argue that they fail to adequately protect collective bargaining by trade unions. This argument will be developed by showing that when legislating for voluntary collective bargaining in 1993, the Keating Australian Labor Party government—which should have known better—failed to adopt legal procedures for trade union recognition largely because they did not perceive the manner in which these

4. The Industrial Relations Reform Act 1993 (Cth) amended the Industrial Relations Act 1988 (Cth) (hereafter "IR Act").

5. In 1996, the Commonwealth Parliament enacted the Workplace Relations and Other Legislation Amendment Act 1996 (Cth), which amended the IR Act and also changed its name to the Workplace Relations Act 1996 (Cth) (hereafter "WR Act").

new laws would reshape Australia's trade union movement. The argument proceeds in four steps.

The first section examines Australian compulsory conciliation and arbitration as it existed until ten years ago and, in particular, the special legal position of trade unions within these regimes. The second section focuses on the 1993 voluntary collective bargaining laws. The *Asahi* decision will be used as a test case to show how the lack of a trade union recognition procedure in these bargaining laws has inhibited the ability of trade unions to engage in collective bargaining. In this case, a trade union, which did not have any of its members employed by an undertaking, unsuccessfully sought to obtain bargaining in good faith orders against the undertaking.

The current federal labour relations regime will be examined in the third section. Through an analysis of the recent *BHP Iron Ore* litigation, I shall highlight the limitations and contradictions in Australia's federal bargaining laws. In the *BHP* litigation, trade unions sought court orders that when breaking off collective bargaining negotiations and offering individual contracts to its employees, the employer had discriminated against the unionized members of its workforce contrary to the federal freedom of association laws.

In the fourth section, I shall argue that in order to ensure the maintenance and growth of collective bargaining by trade unions, Australia's voluntary bargaining laws—and especially those at the federal level—should be altered to enable employees to exercise the right to be represented by trade unions in collective bargaining. In particular, an examination will be made of the trade union recognition procedures in the United States, Canada, Great Britain and New Zealand with a view to determining what Australian policy-makers can learn from these regimes. Australian law makers should give consideration to enacting trade union recognition mechanisms that take account of Australia's history of labour regulation and its unique mix of arbitral, collective bargaining and individual contracting laws. The conclusion seeks to draw all of these threads together.

THE CLASSICAL PERIOD OF AUSTRALIAN LABOUR RELATIONS 1900–1992

In the early years of the 20th century, a majority of the Australian parliaments enacted compulsory conciliation and arbitration statutes establishing courts of conciliation and arbitration (Portus 1958: 100–115; Mitchell and Stern 1989). These courts—what would now be called industrial relations commissions—possessed power to settle labour disputes

by conciliation and, if conciliation failed, could utilize powers of final and binding interest arbitration to impose a settlement on the parties (Isaac and McCallum 1987: 6–11). Australian compulsory conciliation and arbitration (at least until the 1970s) was one of three interlinked economic and social strategies pursued by all political parties. It went hand in hand with a “white Australia” immigration policy designed to keep out cheaper Asian labour and with significant levels of tariff protection for Australian industries. During this classical period of regulation, the industrial relations commissions usually arbitrated settlements on an industry and/or occupational basis. The arbitrated decisions of the commissions were embodied in awards specifying market wage rates and related terms and conditions of employment, which all the employers in the industry or occupation were bound to apply to all of their employees, whether or not they were members of the relevant union. Even as late as 1990, approximately 80% of the Australian workforce had their market wage rates and related work rules either specified in or governed by federal or State awards (Australian Bureau of Statistics 1990).

Increases in national wages were determined by national test cases in the federal Commission and its predecessor bodies, and the State commissions usually followed its lead. In fact, test cases by the federal Commission were the means of bestowing benefits upon Australian workers with test case decisions covering not merely hours of work, but a range of other conditions such as forms of equal pay for women,⁶ four weeks annual leave, twelve months unpaid maternity leave⁷ and later parental leave,⁸ consultations with trade unions over redundancies,⁹ and superannuation payments to workers.¹⁰ Subsequently, many of these measures were enacted into legislation by the federal and State parliaments, largely because these test case pronouncements gave these benefits legitimacy within the social mores of Australia.

These juridical labour law mechanisms could not have functioned without the cooperation of Australia’s trade unions. When they became registered under the labour relations statutes, they were given either de

6. *Equal Pay Case 1969* (1969) 127 CAR 1142; and *National Wage and Equal Pay Case 1972* (1972) 147 CAR 172.

7. *Maternity Leave Case* (1979) 218 CAR 121.

8. *Parental Leave Case* (1990) 36 IR 1.

9. *Termination, Change and Redundancy Case* (1984) 8 IR 34 ; and *Termination, Change and Redundancy Case (Supplementary Decision)* (1985) 9 IR 115. See now WR Act ss 170Fa-170GD.

10. *National Wage Case 26 June 1986* (1986) 301 CAR 611.

facto or actual legal personality, and were granted exclusive coverage over particular modes of industrial and/or occupational employment. As late as 1990 with some minor exceptions, registered trade unions were the exclusive spokespersons for Australia's workforce before the network of State and federal commissions. Moreover, they possessed the capacity to seek arbitrated settlements of industrial disputes between themselves and the employers within the industries over which they had coverage.

Given the significant role of registered trade unions (and this is of crucial importance), the law regarded them as "parties principal"¹¹ who had the obligation to initiate industrial disputes to safeguard the wages and conditions of all of the employees in the relevant industries and/or occupations over which they had coverage (Frazer 1995; Shaw 2001). Registered trade unions were regarded as parties principal because as juridical persons separate and distinct from their members, they possessed the capacity to police the relevant industries and/or occupations by securing fair and up-to-date wages and terms and conditions of employment through arbitration awards. Put another way, registered trade unions did not act as agents for their members. Rather, they possessed the legal capacity to obtain arbitrated awards on their own account. In this respect, trade unions spoke for the entire working class. In 1990, approximately 46% of workers were members of trade unions (Trade Union Statistics 1990). Trade unions also had a political dimension because most were affiliated to the Australian Labor Party where they endeavoured to obtain employment benefits through the political process.

The federal and State commissions prescribed market wage rates and work rules for all employees, whether or not they were unionists and whether or not they desired this form of state intervention. This was because the establishment of wage rates on an industry basis was regarded as a social good supported by the parliaments, the trade unions, the Catholic Church and, to a lesser extent, by most Protestant denominations. While employers may not have liked trade unions, they were required to deal with them because, failing an agreement, the unions could seek an arbitrated settlement that would bind employers.

Much has been written on the economic and political changes that led to the partial dismantling of Australia's compulsory conciliation and arbitration regimes in favour of voluntary collective bargaining (Dabscheck 1989, 1995; McCallum and Ronfeldt 1995; McCallum 1996; Nolan 1998).

11. The role of registered trade unions as parties principal was recognized by the High Court of Australia in *Burwood Cinema Ltd and Ors v The Australian Theatrical and Amusement Employees Association* (1925) 35 CLR 528.

Suffice it to emphasize here that when elected to office in 1983, the Hawke Australian Labor Party federal Government sought to establish a form of neo-corporatism by entering into a series of prices and incomes “accords” with the Australian Council of Trade Unions. However, the economic downturn of the mid- to late-1980s led to the virtual demise of this strategy. Instead, the government focused upon encouraging trade union amalgamations and in facilitating a managed form of decentralization of the setting of wages within the award system presided over by the federal Commission (ACTU/TDC 1987; Mitchell and Rimmer 1990).

The economic pressures on the Australian economy were significant at this time. Towards the close of the 1980s, Australia was feeling the winds of global competition. The Australian dollar had been floated at the close of 1983, tariffs were reduced and the national debt level sharply increased. Key employer bodies, like the Business Council of Australia, were in favour of increasing productivity and employer flexibility by enabling wage rates and work rules to be set at the level of the employing undertaking through collective bargaining. In its influential 1989 report, the Business Council (Business Council of Australia 1989) argued that increased productivity and flexibility would occur if enterprise bargaining was substituted for industry-wide wage fixation, and that the award-making powers of the federal Commission should be circumscribed to providing minimum labour standards through a safety net of award terms and conditions of employment (Frenkel and Peetz 1990).

Other more radical groups like the H. R. Nicholls Society (1986) asserted that collective labour relations mechanisms should be dismantled altogether and be replaced primarily by individual employment contracts, and these groups were heartened in 1991 when the New Zealand Government enacted its Employment Contracts Act. In 1992, the Australian State of Victoria, whose manufacturing industrial base was hardest hit by global competition, abandoned its conciliation and arbitration regime altogether and replaced it with employment agreements (Creighton 1993; Victorian Industrial Relations Taskforce 2000: Ch. 2).

By the early 1990s, however, the Australian Council of Trade Unions was faced with neo-liberal labour law enactments at the State level. It fell into line with moderate business groups and the federal Government and threw its political and industrial weight behind enterprise bargaining as a bulwark against further neo-liberal deregulation. After limited legislative changes to encourage enterprise bargaining in 1988 (McCallum 1990) and in 1992 (McCallum 1993), the Keating Government enacted its fully operational voluntary collective bargaining mechanism in 1993.

THE KEATING VOLUNTARY BARGAINING LAWS AND THE ASAHI CASE

The primary purpose of the Keating Government's 1993 voluntary collective bargaining laws was to increase productivity by shifting the determination of wage rates and work rules from industry level to individual enterprises. This was to be achieved by enabling trade unions and employing undertakings to negotiate enterprise-specific wage outcomes in collective agreements. These were to become enforceable once certified by the federal Commission. In order to increase flexibility, it was permissible for collective agreements to provide terms and conditions of employment less favourable than those in the awards, which were binding upon the parties, provided that the workers did not suffer an overall disadvantage. This feature of the certification process became known as the "no disadvantage" test. For example, a collective agreement might provide a substantial wage increase, but in return the starting and finishing times of work as specified in the relevant award might be overridden by more flexible arrangements. When certifying the collective agreement, it was the function of the federal Commission to specify that such flexible arrangements did not disadvantage the employees (Naughton 1994; Ross 1995).

Unlike its counterparts in Canada and the United States, Australian collective agreements are not entire codes that nullify individual employment contracts. Juridically speaking, they are akin to awards in the sense that they prescribe a floor of wage rates and work rules. They are enforceable but do not prohibit the employer from bestowing more favourable wage rates and terms and conditions on employees, either generally or selectively.

For the Keating Australian Labor Party Government and the Australian Council of Trade Unions, the drafting of the 1993 bargaining laws required them to come to grips with three labour law issues. First, should trade unions and employers be entitled to utilize the economic weapons of the strike and the lock-out when bargaining for a collective agreement? Second, should enterprise bargaining take place in the growing non-union sector of the workforce? Finally, what legal mechanisms should be put in place to require employing undertakings to bargain with trade unions?

Up until the passage of the 1993 laws, all strike action was illegal, either because it was prohibited by one or more statutes and because it violated one or more of The Australian Common Law civil wrongs, which are called torts (Ewing 1989; Creighton 1991; for a recent exposition of the current strike laws, Di Felice 2000). Up until the 1980s, what Breen Creighton has aptly named "the Australian paradox" occurred with respect to strike action (Creighton 1991). While strikes were illegal, instead of

seeking remedies through the courts, employers were content to broker a settlement of these disputes in the relevant federal or State Commission. By the mid-1980s, however, as employers faced stiffer competition, they became more prepared to seek court remedies against industrial action that violated statutory provisions and the Common Law torts. Matters came to a head in late 1989 when the airline employers and the Hawke Australian Labor Party Government took proceedings against striking airline pilots and obtained a judgment awarding the airline employers several million dollars in damages¹² (McEvoy and Owens 1990; Smith 1990).

If the 1993 laws did not enable trade unions to take industrial action to press their demands, employers would have the upper hand as they could utilize the law and obtain injunctive relief and damages whenever employees engaged in strike activity. Accordingly, the 1993 laws provided a narrow legal window where lawful primary strikes would be permitted, provided they were confined to the employees of the relevant employing undertaking. When a trade union and an employing undertaking were engaged in bargaining, the employer or the employees of the undertaking who were members of the trade union could take industrial action to press their demands. This became known as protected action.

As globalization increased the pace of economic restructuring and manufacturing declined in favour of service oriented occupations, trade union membership began to fall. A growing number of Australian workplaces contained none or very few union members. If the collective bargaining laws confined bargaining to the level of the undertaking and only permitted trade unions and employing businesses to sign collective agreements, this would disadvantage non-union undertakings. They would be governed by the existing industry-wide arrangements in awards and would not be able to enter into more flexible arrangements. Prime Minister Keating made his views clear that labour flexibility was required in all workplaces, whether unionized or not.

The 1993 bargaining laws established two bargaining streams. First, trade unions could enter into collective agreements with employing undertakings. Second, incorporated employers could enter into what were called enterprise flexibility agreements directly with their workers. Provided that a majority of employees voted in favour of the agreement, and provided the federal Commission certified the agreement as passing the "no disadvantage" test, these employers could enter into these more flexible arrangements. As a safeguard, trade unions with award coverage of

12. *Ansett Transport Industries (Operations) Pty Ltd and Ors v Australian Federation of Air Pilots and Ors* [1991] 1 VR 637.

the employees could intervene in certification proceedings before the federal Commission and argue that certification should be withheld.

In my view, the Keating Government and the trade union movement did not squarely face the issue of anti-union employers refusing to bargain with trade unions. More importantly, they did not appreciate that trade union bargaining at the level of the employing undertaking was of a different juridical nature from obtaining award coverage through an industry-wide arbitrated settlement by the federal Commission. In the United States and Canada, for example, collective bargaining almost always occurs between the employing undertaking and the local union whose members are employed in the undertaking. In Australia, on the other hand, the local union does not exist and the trade unions, which are registered on an industrial and/or occupational basis, are juridically ill-equipped to engage in collective bargaining at the level of the enterprise.

The 1993 laws did not contain a trade union recognition provision requiring employing undertakings to recognize and to bargain in good faith with the relevant union or unions. Instead, they bestowed rather limited bargaining in good faith powers upon the federal Commission. As part of its conciliation apparatus, the Commission could order the parties to meet and to negotiate (Naughton 1995).¹³

The limitations of these provisions and the change in the concept of trade union representation that resulted from enterprise bargaining became apparent in 1995 when the federal Commission handed down its decision in the *Asahi Case*¹⁴ (Frazer 1995; Naughton 1995; Shaw 2001). *Asahi Diamond Industrial Australia Pty Ltd (Asahi)* operated a small industrial plant in Sydney and it was bound by an award to which the Metal Workers' Union (AMWU)¹⁵ was a party. *Asahi* did not employ any members of the AMWU. Although union officials had visited the plant on a couple of occasions, they had not signed up any members. However, the AMWU served a bargaining notice on *Asahi* seeking to negotiate a collective agreement with it as part of a pattern bargaining exercise. The 1993 laws did enable a union and an employer who were parties to an award to negotiate a collective agreement, even when the union did not have members employed in the employing undertaking.¹⁶ When *Asahi* refused to meet with the AMWU, the union sought and, at first instance, obtained bargaining orders from

13. IR Act s. 170QK which must be read together with s. 111(1)(t).

14. *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385.

15. Automotive, Food, Metals and Engineering Union (AMWU).

16. IR Act s. 170MA.

the federal Commission requiring Asahi to meet and to negotiate with the AMWU. However, a Full Bench of the federal Commission overturned these orders.

In a narrow reading of its powers, the federal Commission said that these types of orders were designed to assist actual conciliation proceedings, and that these provisions should not be utilized to compel negotiations. The Full Bench were mindful that the 1993 laws did enable employers to enter into enterprise flexibility agreements directly with their workers, and they did not wish to have this avenue blocked by unions who did not have members in the employing undertaking.

This decision made it clear that even if registered unions remained parties principal when seeking award coverage, they no longer possessed this status when engaging in voluntary bargaining. Within the confines of the 1993 laws, no legal mechanism existed mandating employers to bargain with trade unions, even if a union did have majority support amongst its employees. Of course, where the union had industrial muscle, its members in the undertaking could take protected action to press their demands. However, both secondary boycotts and sympathy strikes are illegal in Australia. It was also open to the federal Commission to make a market wage rates award for the undertaking and it did exercise these powers on occasions, but without great success.¹⁷

THE HOWARD GOVERNMENT'S VOLUNTARY BARGAINING LAWS AND THE BHP IRON ORE LITIGATION

The Howard Government's 1996 voluntary bargaining laws are squarely designed to enable employing undertakings to choose their most appropriate form of labour regulation and, to this end, the powers of trade unions and the federal Commission have been curtailed. This aim is specifically set forth in the Workplace Relations Act 1996, where it is provided that one of its objects is to enable " ... [E]mployers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this act."¹⁸ Although this provision speaks of employee choice, in reality, the Workplace Relations Act 1996 places the levers of choice firmly in the hands of employers.

17. See, e.g., *Re Aluminium Industry (Comalco Bell Bay Companies) Award 1983* (1994) 56 IR 403 (the *Bell Bay Case*) which was overruled on technical grounds in judicial review proceedings *Comalco Aluminium (Bell Bay) Ltd v O'Connor and Ors* (1994) 59 IR 133; *Australian Manufacturing Workers' Union and Ors v Alcoa of Australia Ltd and Ors* (1996) 63 IR 138 (the *Weipa Case*).

18. WR Act s. 3(c).

No longer may trade unions intervene in certification proceedings with respect to non-union agreements merely on the basis that they are parties to the relevant awards. Instead, they are only entitled to represent any of their members over which they have coverage in negotiations with an employer concerning a non-union agreement, provided the member has requested their assistance.¹⁹ Where assistance has been requested, the trade union will have standing to intervene in certification proceedings but not otherwise.²⁰ The legislation makes it clear that apart from greenfield agreements, which are entered into before the hiring of employees, a trade union may only make a collective agreement with an employing undertaking, where the union has at least one member employed in the undertaking.²¹ The ill-fated bargaining in good faith powers that the 1993 laws had bestowed upon the federal Commission have been repealed.

A further way in which the capacities of trade unions have been limited is because the Workplace Relations Act 1996 has established a freedom of association regime²² that also covers the State labour law systems with respect to private sector employment. These laws protect the right of employees and contractors to join or not to join trade unions and employer associations. However, they also prevent trade unions from seeking union security, that is preference to trade union members provisions, either in awards handed down by the federal and state Commissions, or in collective agreements with employers. In my view, these freedom of association laws have played a part in the steady decline of trade union membership in Australia because union security provisions did create a climate in which employees understood that their employers were not opposed to them joining the relevant trade union. The outlawing of all forms of trade union security arrangements has hastened the drop in trade union membership. In the year 2001, trade union membership has fallen to 24.5% of the workforce, with less than one in five private sector employees (19.2%) being a trade union member, but with almost half of the public sector workforce (47.9%) being enrolled in trade unions (Australian Bureau of Statistics 2002).

The award-making powers of the federal Commission have been narrowed. First, awards may only cover minimum wage rates and a slim range of matters, which in most instances specify employment standards like minimum rates of wages, hours of work, annual leave and parental leave.²³

19. WR Act s. 170LK(4).

20. WR Act s. 43(2)(a).

21. WR Act s. 170LJ(1)(a).

22. WR Act Part XA.

23. WR Act s. 89A(1), (2).

Second, and more importantly, the federal Commission may only make minimum rates awards²⁴ and may not make market rates awards. This means that where an employer is engaging in anti-union tactics, the federal Commission is unable to step in and use its award-making powers to bind the parties by arbitrating market terms and conditions of employment.

Under the Workplace Relations Act 1996, most employers within federal coverage may choose either to conclude a collective agreement with one or more trade unions, to enter into a non-union agreement directly with the workforce, to make statutory workplace agreements with its employees or, provided it abides by the existing awards, the employer may utilize unilateral employer control via the Common Law contract of employment. Unless an employer agrees to engage in collective bargaining with a trade union, no legal mechanism exists to force the employer to recognize and to bargain in good faith with a trade union, no matter that the vast bulk of employees are also its members (for details on all aspects of these 1996 laws, see *Australian Journal of Labour Law* 1997; Riley 1997; Mac Dermott 1997, 1998; Coulthard 1999; McCallum 1997, 2001).

In the year 2000, slightly more than one third of Australian workers (35.2%) had their wage rates and work rules governed by collective agreements certified by the federal and State Commissions (Australian Bureau of Statistics 2001). This includes both collective agreements made with trade unions and agreements entered into directly with the employees of the undertaking. When these collective agreements covering 35.2% of the workforce are divided between the federal and State jurisdictions, 21.7% of the Australian workforce are covered by agreements certified by the federal Commission, with 13.5% of employees being governed by collective agreements certified by the State commissions (Australian Bureau of Statistics 2001). When the level of collective bargaining is further analyzed, however, as is the case with Canada, collective bargaining is far more prevalent in the public sector where four out of every five employees (83.2%) are subject to collective agreements (Australian Bureau of Statistics 2001). In the private sector, on the other hand, slightly less than a quarter of the workforce (22.3%) operate under collective agreements (Australian Bureau of Statistics 2001).

The legal weakness of trade unions under Australia's bargaining laws came to the fore in the *BHP Iron-Ore* litigation, which spanned the two year period from November 1999 to November 2001 (see Riley 2000; Richardson 2000; McCallum 2000). BHP Iron Ore Pty Ltd (BHP) carries out iron ore production and processing in a remote area of the State of Western Australia known as the Pilbara. Under Western Australian labour

24. WR Act s. 89A(3).

law,²⁵ BHP had signed collective agreements with the relevant unions and, in 1999, was seeking to negotiate further collective agreements. However, in November of that same year, in an endeavour to cut labour costs, BHP offered its employees individual statutory workplace agreements under Western Australian law²⁶ and refused to continue collective bargaining with the trade unions. The implementation of this strategy, if successful, would mean that the unionized workforce would become de-unionized. This is because, for all practical purposes, the acceptance of individual statutory agreements would leave no room for the trade unions to operate collectively and most employees would cease to maintain their status as trade unionists. In order to persuade its workforce to sign the statutory workplace agreements, these individual contracts contained higher wage rates and greater employee benefits than those specified in the awards and collective agreements that covered the employees. By 24 January, approximately 46% (481 out of 1039 employees) had signed individual statutory agreements.

The trade unions brought proceedings in the Federal Court of Australia in order to obtain interlocutory injunctions, that is temporary restraining orders that would operate until a full trial. They sought to prevent BHP from offering its employees further statutory workplace agreements on the grounds that these offers violated the federal freedom of association regime. The primary arguments of the unions were that BHP had breached these provisions in two ways. First, the Workplace Relations Act 1996 prohibits employers from engaging in conduct that will “injure an employee in his or her employment,”²⁷ or “alter the position of an employee to the employee’s prejudice”²⁸ because the employee is a member of a trade union. Second, the Workplace Relations Act 1996 forbids employers from inducing an employee, “whether by threats or promises or otherwise ... to stop being a member” of a trade union.²⁹

On 31 January 2000, Justice Gray issued interlocutory injunctions holding that there was a serious question to be tried concerning whether BHP had breached these provisions.³⁰ First, he held that it was arguable that in offering employment benefits to employees who would sign workplace agreements, BHP injured and prejudiced its remaining employees.

25. Industrial Relations Act 1979 (WA).

26. Workplace Agreements Act 1993 (WA).

27. WR Act s. 298K(1)(b).

28. WR Act s. 298K(1) (c).

29. WR Act s. 298M.

30. *Australian Workers' Union and Ors v BHP Iron Ore Pty Ltd* (2000) 96 IR 422.

In fact, the vast bulk of them were unionists and they were receiving lesser benefits from collectively determined instruments. Second, it was also arguable that BHP had induced employees to leave their union, not by threats or promises, but because a consequence of offering more beneficial workplace agreements was that accepting employees would resign their union membership and that this amounted to inducement. In other words, to prove an inducement it was not necessary to show that BHP intended to induce, only that the effect of conduct amounted to an inducement.

On 7 April 2000, a Full Federal Court upheld the interlocutory injunctions,³¹ but not on the ground that the offering of more beneficial workplace agreements injured or prejudiced the remaining employees. In a rather narrow reading of these provisions, the judges emphasized that they were written in the singular and held that the offering of more beneficial arrangements could not amount to injury or prejudice to each remaining employee because this did not amount to intentional conduct to injure or to prejudice. Rather, it was conduct designed to offer more beneficial terms to signing employees, but not to detract from the existing conditions of employees governed by collective instruments. In my view, this interpretation means that when offering more beneficial individual contracts, employers can never be held to have injured or prejudiced non-accepting employees. However, the Full Court did uphold the injunctive relief because the judges held that there was a serious question to be tried as to whether BHP had engaged in impermissible inducement. Although their reasoning is difficult for this commentator to follow, they do contemplate the possibility that conduct, if it is of a sufficient nature, may amount to an inducement even though there was no evidence that the perpetrator intended to induce.³²

This matter went to trial and, on 10 January 2001, Justice Kenny held that on the evidence BHP had not contravened the freedom of association provisions when offering individual statutory workplace agreements³³ (Noakes and Cardell-Ree 2001). In relation to inducement, she found that there was no evidence of a course of conduct of such an unequivocal nature that it could be said that there was inducement otherwise than by threats or promises. Given the pronouncements of the Full Court and the evidence of BHP that its primary motives in offering the individual contracts was to cut costs in a competitive and volatile industry, this holding was unsurprising.

31. *BHP Iron Ore Pty Ltd v Australian Workers Union and Ors* (2000) 102 FCR 97.

32. See the thoughtful comments on inducement by Finkelstein J in *Finance Sector Union v Commonwealth Bank of Australia* (2000) 106 IR 139.

33. *Australian Workers' Union and Ors v BHP Iron Ore Pty Ltd* (2000) 106 FCR 482.

Once the injunctions were lifted, BHP was free to offer further statutory workplace agreements to its workforce. However, perhaps owing to the legal proceedings and re-grouping by the trade unions, very few employees accepted these offers. BHP found itself in the position of having half of its workforce on workplace agreements with the remainder on awards and collective agreements. On 2 November 2001, the Western Australian Industrial Relations Commission utilized its powers and handed down an award rescinding all existing awards and collective agreements and specifying market wage rates and terms and conditions of employment that appear to be comparable to the provisions of the workplace agreements.³⁴ While there were differences between the parties, BHP acquiesced in the making of a new award. In my view, it did so in order to simplify the existing pattern of awards and collective agreements, as well as to bring about a symmetry of arrangements between its workers on workplace agreements and collective instruments. However, it is important to appreciate that had the workers been covered by federal labour law, it would not have been possible for the federal Commission to have made a market wages rates award because it only possesses the capacity to hand down safety net awards containing minimum wage rates and minimum terms and conditions of employment.

STRENGTHENING AUSTRALIA'S NEO-LIBERAL VOLUNTARY BARGAINING LAWS

Australia's neo-liberal voluntary bargaining laws fail to uphold the right of employees to be represented by trade unions when collectively bargaining with their employers. Although what follows concentrates upon the federal voluntary bargaining regime, much also applies to the State systems. Even where the overwhelming majority of a workforce desires to be represented by a trade union in collective bargaining, no legal mechanism exists under federal labour law where the employees can enforce this outcome. If an employer simply refuses to bargain, the federal Commission lacks the power to make a market rates award to impose a fair settlement upon the parties. Furthermore, the BHP litigation has shown that the freedom of association regime will not protect the right of trade union members to be collectively represented by their trade unions.

The current voluntary bargaining laws were enacted by the Howard Government. In November 2001 it was elected for a third term, which

34. *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch v BHP Iron Ore Pty Ltd and Ors Western Australian Industrial Relations Commission in Court Session* [2001] WAIRC 040822, 2 November 2001.

makes it quite unlikely the Parliament will amend these laws to strengthen the rights of employees to be represented by trade unions over the next three years. However, in my view, the present is an opportune time to explore in what ways our laws may be altered to strengthen collective bargaining by trade unions. It may well be that one or more of Australia's six States—all now being governed by Australian Labor Party governments—may amend those laws by enacting a balanced regime where employees are able to exercise the right to have their trade union represent them in collective bargaining.

In its 1998 Declaration on Fundamental Principles and Rights at Work, the International Labour Organization (International Labour Organization 1998) re-stated four fundamental rights at work, which should be respected and promoted by all member States (including Australia). Three of these rights concern the abolition of forced labour, child labour and discrimination in employment. However, the first right upholds “freedom of association and the effective recognition of the right to collective bargaining” (International Labour Organization 1998). This right is embodied in the International Labour Organization Convention 87 on freedom of association³⁵ and also in its Convention 98 on the right to organize and bargain collectively,³⁶ which have been ratified by Australia.

The voluntary bargaining laws in the Workplace Relations Act 1996 fail to uphold freedom of association and the effective recognition of the right to collective bargaining because no mechanisms exist to require employers to recognize and to bargain in good faith with representative trade unions. Accordingly, these laws are contrary to the jurisprudence interpreting Convention 87 on the right to organize and bargain collectively. In my view, they are also contrary to the collective bargaining right contained in the International Labour Organization's 1998 declaration on fundamental principles and rights at work. As a first step, the federal Commission should again be given powers to order employers and trade unions to bargain in good faith.³⁷ However, the *Asahi* decision makes it clear that without a trade union recognition procedure, these powers are necessarily limited in a legal regime that also permits employers to choose to make non-union agreements and statutory workplace agreements.

35. *Freedom of Association and Protection of the Right to Organise Convention*, International Labour Organisation, Convention No. 87, 1948.

36. *Right to Organise and Collective Bargaining Convention*, International Labour Organisation, Convention No. 98, 1949.

37. On 26 June 2000, the then leader of the opposition, Mr Kim Beazley, introduced into the Commonwealth Parliament the Workplace Relations Amendment Bill 2000, Bill No. 00121, which sought to give the federal Commission power to make bargaining in good faith orders. See proposed ss 170MKA–170MKC.

A second and equally important step is to enact a trade union recognition mechanism that fits Australia's history of labour regulation and its current mix of labour laws which, to varying degrees, permit the operation of arbitral collective bargaining and individual contract mechanisms.

In my judgment, it would be inadvisable for Australia to engraft upon its laws the rigid North American model of Trade union recognition. Under this procedure, a trade union must establish majority status in a bargaining unit whereupon it becomes the sole bargaining agent of the workers and the employer is required to recognize and bargain with it. In the United States and in some Canadian provinces, majority status is established through an election and in other Canadian jurisdictions by proving membership in the union by a majority of employees through the signature of membership cards (Gould 1998; Summers 1998; Adams 2001; Carter et al. 2002). This mechanism of single and exclusive union representation cuts across Australian traditions of representative national unions and appears ill-suited in an era characterized by the increasing fragmentation of large workplaces.

In 1999, the Tony Blair Labor Party Government of Great Britain in furtherance of its policy of creating partnerships at work (*Fairness at Work* 1998: Ch. 4; Forsyth 1999), enacted a more flexible trade union mechanism modelled in part upon the recognition mechanisms in the United States and Canada (Oliver 1998; Shaw 2001). The legislation promotes voluntary recognition of one or more trade unions by an employer,³⁸ but where this is not achieved, the Central Arbitration Committee may assist the trade union and the employer to agree upon voluntary recognition, which may occur even where trade union members do not make up a majority of the workforce. This differs from the position in the United States and Canada where it is contrary to the collective bargaining laws for an employer to recognize and bargain with a trade union that does not have majority support. Failing an agreement, the Central Arbitration Committee may grant recognition in either of two ways, First, a trade union will be granted recognition where it can prove that a majority of the workforce are members. Second, recognition will be ordered where the trade union receives majority support in a secret ballot election where at least 40% of the eligible employees cast votes.

The recently enacted Employment Relations Act 2000 of the Helen Clarke Labor Party government in New Zealand promotes collective bargaining by requiring employers to bargain in good faith with registered trade unions. No trade union recognition procedure operates because the legislation takes a different tack. Trade unions are not empowered to

38. Employment Relations Act 1999 (UK) schedule 4.

conclude collective agreements for all of the employees in an employing undertaking: instead, any collective agreements negotiated will only bind an employer with respect to present and future members of the union.³⁹ The advantage of this mechanism appears to be that trade union members are able to insist upon their trade union bargaining on their behalf. However, a disadvantage is that any collective agreement concluded will only cover union members unless the employer extends its terms to the entire workforce.

In my judgment, the rights of Australian employees to be represented by trade unions in collective bargaining should be protected by a trade union recognition procedure which, like its British counterpart, encourages voluntary trade union recognition. The State and federal Commissions are well equipped to facilitate such negotiations. Where voluntary recognition does not occur, then some form of recognition mechanism is obviously warranted. Perhaps thought could be given to allowing trade unions automatic recognition where they would be permitted to bargain only on behalf of their members in the employing undertaking as is the case in New Zealand. However, it would also be appropriate to permit the federal and State Commissions to determine whether one or more unions had sufficient support in an undertaking, either via membership records or through the holding of ballots of the employees of the undertaking. If this type of mechanism was coupled with powers to make binding good faith bargaining orders, Australian collective bargaining law would uphold the right of employees to choose to be collectively represented by trade unions in the determination of wages and terms and conditions of employment.

CONCLUSION

The burden of this article has been to examine the neo-liberal bargaining laws enacted over the last decade in Australia, especially the federal bargaining laws of 1993 and 1996. Responding to economic pressures associated with globalization, these laws partially replaced Australia's mechanisms of compulsory conciliation and arbitration. However, it was argued that they fail to uphold the right of Australian employees to be represented by trade unions for the purpose of collective bargaining with their employers. In the case of the 1993 bargaining laws of the Keating Government, the lack of sufficient safeguards for trade union bargaining were highlighted. The 1996 Howard Government's neo-liberal bargaining laws made it more difficult again for trade unions to engage in collective bargaining. The freedom of association laws were found wanting in the BHP

39. Employment Relations Act 2000 (NZ) s. 56.

Iron Ore litigation because they failed to protect the collective bargaining aspirations of trade union members.

In accordance with determinations of the International Labour Organization, Australian employees should be given the right to be represented by trade unions when engaging in collective bargaining. I have argued that a combination of bargaining in good faith laws and trade union recognition procedures suitable for Australian conditions will enhance and protect the right of Australian employees to be represented by trade unions when collectively determining their wages and other terms and conditions of employment.

Australia is an interesting case study of the manner in which the pressures of economic globalization, coupled with information technologies, have played a part in altering labour relations regimes by tipping the balance away from industry regulation, and towards the determination of wages, either by union and non-union agreement-making at the level of the employing undertaking or through unilateral employer control via the contract of employment. Unlike the comparable Common Law federations of the United States and Canada, whose labour laws did not greatly inhibit a shift to the setting of wages and terms and conditions of employment on an individual basis in their private sectors, Australia was in a different position. Its federal and State mechanisms of compulsory conciliation and arbitration, which largely operated on an industry basis, did inhibit the setting of wages and work rules at the level of the employing undertaking. When Australia deregulated its economy in the 1980s and brought itself more fully into the globalized economy, socio-economic and political pressures built up leading to the dismantling, albeit to varying degrees, of Australia's federal and State systems of conciliation and arbitration in favour of collective bargaining and unilateral employer control at the level of the employing undertaking. Rather sadly in my view, the 1993 federal level voluntary bargaining laws failed to adequately safeguard the position of trade unions. The great irony is that these were enacted by the Keating Australian Labor Party government with the support of the Australian Council of Trade Unions as a response to economic and business pressures and to the neo-liberal amendments to some of the State labour law mechanisms.

■ REFERENCES

ACTU/TDC. 1987. *Australian Council of Trade Unions and Trade Development Council, Australia Reconstructed: Australian Council of Trade Unions and Trade Development Council mission to Western Europe: A Report by the Mission Representatives to the Australian Council of Trade Unions*

- and the Trade Development Council*. Canberra: Australian Government Publishing Service.
- ADAMS, George. 2001. *Canadian Labour Law*. Toronto: Canada Law Book, looseleaf.
- ADAMS, Roy. 1993. "The North American Model of Employee Representational Participation: 'A Hollow Mockery.'" 15 *Comparative Labor Law Journal*, 4–14.
- ADAMS, Roy. 1995. "A Pernicious Euphoria: 50 Years of Wagnersim in Canada." 3 *Canadian Labour and Employment Law Journal*, 321–355.
- AKYEAMONG, Ernest. 2001. "Fact-Sheet on Unionization." 13 *Perspectives on Labour and Income*, 46–50, table 1, p. 49.
- ARTHURS, Harry. 1996. "Labour Law Without the State." 46 *University of Toronto Law Journal*, 1–45.
- ARTHURS, Harry. 2000. "Reinventing Labour Law for the Global Economy: The Benjamin Aaron Lecture." 22 *Berkeley Journal of Employment and Labor Law*, 271–292.
- AUSTRALIAN BUREAU OF STATISTICS. 1990. *Award Coverage Australia, May 1990*. Catalogue No. 6315. Canberra: Australian Bureau of Statistics.
- AUSTRALIAN BUREAU OF STATISTICS. 2001. *Employee Earnings and Hours, May 2000*. Catalogue No. 6306.0. Canberra: Australian Bureau of Statistics.
- AUSTRALIAN BUREAU OF STATISTICS. 2002. *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2001*. Catalogue No 6310.0. Canberra: Australian Bureau of Statistics.
- AUSTRALIAN JOURNAL OF LABOUR LAW. 1994. Special issue containing articles examining the Industrial Relations Reform Act 1993 (Cth) which amended the Industrial Relations Act 1988 (Cth). 7 *Australian Journal of Labour Law*, 105–226.
- AUSTRALIAN JOURNAL OF LABOUR LAW. 1997. Special issue containing articles examining the Workplace Relations and Other Legislation Amendment Act 1996 (Cth) which amended the Industrial Relations Act 1988 (Cth) and which also re-named this statute as the Workplace Relations Act 1996 (Cth). 10 *Australian Journal of Labour Law*, 1–157.
- BUSINESS COUNCIL OF AUSTRALIA. 1989. *Enterprise-based Bargaining Units: A Better Way of Working, Report to the Business Council of Australia by the Industrial Relations Study Commission*. Volume 1. Melbourne: Business Council of Australia.
- CARTER, Donald, Geoffrey ENGLAND, Brian ETHERINGTON and Gilles TRUDEAU. 2002. *Labour Law in Canada*. 5th edition. The Hague: Kluwer Law International.
- COULTHARD, Amanda. 1999. "The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion Under the Workplace Relations Act 1996 (Cth)." *Employment Relations, Individualisation and Union Exclusion: An International Study*. S. Deery and R. Mitchell, eds. Sydney: The Federation Press, 48–68.

- CREIGHTON, Breen. 1991. "Enforcement in the Federal Industrial Relations System: An Australian Paradox." 4 *Australian Journal of Labour Law*, 197–225.
- CREIGHTON, Breen. 1993. "Employment Agreements and Conditions of Employment Under the Employee Relations Act 1992 (Vic)." 6 *Australian Journal of Labour Law*, 140–158.
- DABSHECK, Braham. 1989. *Australian Industrial Relations in the 1980s*. Melbourne: Oxford University Press.
- DABSHECK, Braham. 1995. *The Struggle for Australian Industrial Relations*. Melbourne: Oxford University Press.
- DI FELICE. 2000. "Stopping or Preventing Industrial Action in Australia." 24 *Melbourne University Law Review*, 310–348.
- EWING, Keith. 1989. "The Right to Strike in Australia." 2 *Australian Journal of Labour Law*, 18–39.
- FAIRNESS AT WORK. 1998. *Fairness at Work*. London, Cmnd 3968.
- FORSYTH, Anthony. 1999. "Proposals for Statutory Union Recognition Rights in Britain and Implications for Australia." 12 *Australian Journal of Labour Law*, 32–42.
- FRAZER, Andrew. 1995. "Trade Unions Under Compulsory Arbitration and Enterprise Bargaining: A Historical Perspective." *Enterprise Bargaining, Trade Unions and the Law*. P. Ronfeldt and R. McCallum, eds. Sydney: The Federation Press, 52–83.
- FRENKEL, Stephen and David PEETZ. 1990. "Enterprise Bargaining: the B.C.A.'s Report on Industrial Relations Reform." 32 *Journal of Industrial Relations*, 69–99.
- FUDGE, Judy and Harry GLASBEEK. 1995. "The Legacy of PC 1003." 3 *Canadian Labour and Employment Law Journal*, 357–399.
- FUDGE, Judy and Leah VOSKO. 2001. "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy." 22 *Economic and Industrial Democracy*, 271–310.
- FUDGE, Judy and Leah VOSKO. 2001a. "By Whose Standards? Re-Regulating the Canadian Labour Market." 22 *Economic and Industrial Democracy*, 327–356.
- GOULD, William. 1998. "Recognition Laws: The U.S. experience and its Relevance to the U.K." 20 *Comparative Labor Law and Policy Journal*, 11–27.
- H R NICHOLLS SOCIETY. 1986. *Arbitration in Contempt*. Melbourne: H R Nicholls Society.
- INTERNATIONAL LABOUR ORGANIZATION. 1997. *World Employment Report, 1996/97*. Geneva: International Labour Office.
- INTERNATIONAL LABOUR ORGANIZATION. 1998. "Declaration on Fundamental Principles and Rights at Work." International Labour Conference, 86th session, June 1998, Geneva, 137 *International Labour Review*, 253–257, available at <http://www.ilo.org/public/english/standards/decl/declamtion/text/index.htm>.

- ISAAC, Joe and Ron McCALLUM. 1987. "Australia." in "The Role of Neutrals in the Resolution of Shop Floor Disputes: A Twelve Nation Study by the National Academy of Arbitrators' Overseas Correspondents." 9 *Comparative Labour Law Journal*, 6–29.
- MAC DERMOTT, Therese. 1997. "Industrial Legislation in 1996: The Reform Agenda." 39 *Journal of Industrial Relations*, 52–76.
- MAC DERMOTT, Therese. 1998. "Australian Labour Law Reform: The New Paradigm." 6 *Canadian Labour and Employment Law Journal*, 127–145.
- McCALLUM, Ron. 1990. "Collective Bargaining Australian Style: The Making of Section 115 Agreements Under the Industrial Relations Act 1988 (Cth)." 3 *Australian Journal of Labour Law*, 211–226.
- McCALLUM, Ron. 1993. "Enhancing Federal Enterprise Bargaining: The Industrial Relations Legislation (Amendment) Act 1992 (Cth)." 6 *Australian Journal of Labour Law*, 63–68.
- McCALLUM, Ron. 1994. "The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993." 16 *Sydney Law Review*, 122–135.
- McCALLUM, Ron. 1996. "The New Millennium and the Higgins Heritage: Industrial Relations in the 21st Century." 38 *Journal of Industrial Relations*, 294–312.
- McCALLUM, Ron. 1997. "Crafting a New Collective Labour Law for Australia." 39 *Journal of Industrial Relations*, 405–422.
- McCALLUM, Ron. 2000. "Beyond Dispute." 10 *Eureka Street*, 14–16.
- McCALLUM, Ron. 2001. "Introduction." *Butterworths Industrial Law Federal*. Sydney: Butterworths, 1011–1025.
- McCALLUM, Ron and Paul RONFELDT. 1995. "Our Changing Labour Law." *Enterprise Bargaining, Trade Unions and the Law*. P. Ronfeldt and R. McCallum, eds. Sydney: The Federation Press, 1–30.
- McEVOY, Kathleen and Rosemary OWENS. 1990. "The Flight of Icarus: Legal Aspects of the Pilot's Dispute." 3 *Australian Journal of Labour Law*, 87–129.
- MITCHELL, Richard and Esther STERN. 1989. "The Compulsory Arbitration Model of Industrial Dispute Settlement: An Outline of Legal Developments." *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914*. S. MacIntyre and R. Mitchell, eds. Melbourne: Oxford University Press, 104–131.
- MITCHELL, Richard and Malcolm RIMMER. 1990. "Labour Law, Deregulation, and Flexibility in Australian Industrial Relations." 12 *Comparative Labor Law Journal*, 1–34.
- NAUGHTON, Richard. 1994. "The New Bargaining Regime Under the Industrial Relations Reform Act." 7 *Australian Journal of Labour Law*, 147–169.
- NAUGHTON, Richard. 1995. "Bargaining in Good Faith." *Enterprise Bargaining, Trade Unions and the Law*. P. Ronfeldt and R. McCallum, eds. Sydney: The Federation Press, 84–106.

- NOAKES, David and Andrew CARDELL-REE. 2001. "Individual Contracts and the Freedom to Associate: *Australian Workers Union v BHD Iron Ore Pty Ltd* [2001] FCA 3." 14 *Australian Journal of Labour Law*, 89–96.
- NOLAN, Dennis, ed. 1998. *The Australasian Labour Law Reforms: Australia and New Zealand at the End of the Twentieth Century*. Sydney: The Federation Press.
- OLIVER, Hazel. 1998. "Trade Union Recognition: 'Fairness at Work'?" 20 *Comparative Labor Law and Policy Journal*, 33–45.
- PORTUS, John. 1958. *The Development of Australian Trade Union Law*. Melbourne: Melbourne University Press.
- REITH, Peter. 2000. "The Case for Change" (see appendix D for the tables and figures), which is the first of a series of discussion papers under the general title, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*. Canberra: Department of Employment, Workplace Relations and Small Business, available at <http://www.simplerwrsystem.gov.au/discussion/newstructure.html>.
- RICHARDSON, Sarah. 2000. "Freedom of Association and the Meaning of Membership: An Analysis of the BHP Cases." 22 *Sydney Law Review*, 435–450.
- RILEY, Joellen. 1997. *Workplace Relations: A Guide to the 1996 Changes*. Sydney: The Law Book Co.
- RILEY, Joellen. 2000. "Individual Contracting and Collective Bargaining in the Balance: *Australian Workers' Union v BHP Iron Ore Pty Ltd* [2000] FCA 39." 13 *Australian Journal of Labour Law*, 92–98.
- ROSS, Iain. 1995. "Bargaining in the Federal System." *Enterprise Bargaining, Trade Unions and the Law*. P. Ronfeldt and R. McCallum, eds. Sydney: The Federation Press, 31–51.
- SHAW, Jeff. 2001. "Observations on Trade Union Recognition in Britain and Australia." 24 *University of New South Wales Law Journal*, 214–227.
- SMITH, Graham. 1990. "From Consensus to Coercion: The Australian Air Pilots Dispute." 32 *Journal of Industrial Relations*, 238–253.
- SUMMERS, Clyde. 1998. "Exclusive Representation: A Comparative Inquiry into a Unique American Principle." 20 *Comparative Labor Law and Policy Journal*, 47–69.
- TRADE UNION STATISTICS. 1990. *Trade Union Statistics*. December 1990. Catalogue No. 6323.0.40.001. Canberra: Australian Bureau of Statistics.
- VICTORIAN INDUSTRIAL RELATIONS TASKFORCE. 2000. *Final Report of the Victorian Industrial Relations Taskforce*. Chair Ron McCallum. Melbourne: Victorian Industrial Relations Taskforce.
- WILLIAMS, George. 1998. *Labour Law and the Constitution*. Sydney: The Federation Press.

RÉSUMÉ

La reconnaissance syndicale et les lois néo-libérales sur la négociation volontaire en Australie

L'Australie présente une étude de cas probante sur la façon dont les pressions de la mondialisation et des technologies de l'information ont modifié les régimes libéraux collectivistes. À mon avis, en Australie, ce sont les pressions exercées par la mondialisation de l'économie qui ont guidé les changements introduits tant par les politiciens fédéraux que ceux des États à la législation du travail au cours de la décennie 1990. Les mécanismes de conciliation et d'arbitrage obligatoires, qui dataient du début du 20^e siècle, servaient à déterminer la plupart des taux de salaire de marché sur la base d'une industrie et protégeaient les conditions d'emploi des travailleurs en éliminant une bonne partie de la concurrence dans les marchés du travail spécifiques à l'industrie. Pour accroître la flexibilité de la main-d'œuvre, les politiciens de toute allégeance ont cherché d'une manière ou d'une autre à démanteler l'arbitrage et la conciliation obligatoires et à établir des mécanismes de détermination des salaires et des conditions de travail au niveau de l'entreprise, de l'unité d'affaires et de l'usine. De fait, les changements apportés à la législation du travail néo-libérale au cours de la dernière décennie ont été d'une ampleur telle que la législation actuelle ressemble très peu aux lois d'avant 1990 qui prévoyaient la conciliation et l'arbitrage obligatoires comme moyens de règlement des conflits du travail.

En 1993, dans une tentative en vue de protéger les relations collectives du travail de la tempête de la mondialisation, le parti travailliste australien du premier ministre Paul Keating au palier fédéral fit adopter le projet de loi de 1993 sur la réforme des relations du travail, qui introduisait plus de changements à la législation fédérale du travail qu'on en avait connu depuis son adoption quelque quatre-vingt-dix années plutôt. La législation fédérale du travail a été déréglementée au moment où ses mécanismes d'arbitrage et de conciliation obligatoires étaient abandonnés pour préparer la venue la négociation collective volontaire sur la base de l'entreprise.

Trois années plus tard, avec l'élection du parti libéral du premier ministre John Howard et la coalition du parti national au niveau du gouvernement fédéral, des changements importants ont encore été apportés à la législation vers la fin de 1996. Ces changements étaient basés sur la déréglementation partielle du gouvernement Keating, mais l'objectif visé par les réformes néo-libérales de 1996 consistait à réduire le rôle des syndicats et à faciliter un accroissement du contrôle unilatéral de l'employeur.

Ces nouvelles dispositions facilitaient le contrôle de l'employeur de bien des manières : par une réduction des pouvoirs de la commission des relations industrielles; par l'introduction de dispositions sur la liberté d'association qui rendent illégale toute forme d'atelier syndical; en facilitant les aménagements directs entre employeur et salariés libres de toute interférence syndicale; en créant la possibilité d'ententes individuelles, connues comme étant les ententes australiennes sur les lieux de travail.

Cet article analyse la législation sur la négociation collective volontaire adoptée en 1993 et modifiée en 1996. Mon argumentation est à l'effet que ces changements n'arrivent pas à protéger adéquatement la négociation collective impliquant les syndicats. Je cherche à démontrer qu'au moment de légiférer en 1993 en faveur de la négociation collective volontaire, le gouvernement Keating (parti ouvrier australien) — qui aurait dû le savoir — n'a pas réussi à adopter les procédures juridiques favorisant la reconnaissance syndicale, en grande partie parce qu'il ignorait la manière dont cette nouvelle législation allait refaçonner le mouvement ouvrier en Australie. On croyait alors que si on accordait aux syndicats le droit de recourir à la grève pour promouvoir leurs demandes à la table des négociations, un mécanisme de reconnaissance judiciaire des syndicats ne serait plus nécessaire.

Les modifications apportées en 1996 à la législation fédérale sur la négociation réduisaient encore davantage la capacité des syndicats de s'engager dans la négociation collective. Le conflit BHP Iron-Ore qui a duré deux ans a démontré que les lois de 1996 sur la liberté d'association n'a pas créé chez les employeurs l'obligation de reconnaître les syndicats pour fins de négociation collective.

Pour assurer le maintien et la croissance de la négociation collective par les syndicats, la législation australienne sur la négociation volontaire, et plus particulièrement celle de niveau fédéral, devrait être modifiée de façon à permettre aux employés d'être représentés par des syndicats à la négociation. En particulier, je procède à une analyse des procédures de reconnaissance syndicale aux États-Unis, au Canada, en Grande-Bretagne et en Nouvelle-Zélande en cherchant à préciser ce que les législateurs en Australie peuvent apprendre de ces régimes. À mon avis, ils devraient accorder une certaine considération à l'idée de l'adoption de mécanismes de reconnaissance syndicale qui tiennent compte du passé de la réglementation du travail en Australie et de l'assortiment unique de lois en matière d'arbitrage, de négociations individuelles et de négociations collectives.