

THE NEW SOUTH WALES INDUSTRIAL RELATIONS SYSTEM: 1998 TO THE *WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) ACT 2005*

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I INTRODUCTION

This paper intends to discuss in some detail the implications of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*WorkChoices Act*') for industrial relations in New South Wales. The scope of this work does not permit – nor would it be appropriate to include – an examination of the extent to which the *WorkChoices Act* may invalidate or render inoperative New South Wales industrial laws. However, it is possible to undertake a comparison of the respective federal and state industrial laws with a view to exploring, in a preliminary way, the nature of the federal reforms and the reasons why they may have attracted controversy. I say preliminary, as the changes to the federal scheme are so profound and the legislation so complex (including, as I have noted, a pending challenge to its validity) that this review must necessarily be limited. Thus this discussion focuses on some important issues and potential implications for employers and employees who will ultimately fall within the purview of the Act.

Further, the passing of time since the delivery of the speech on which this paper is based¹ has also allowed for a discussion of some recent developments in the jurisprudence of the NSW Industrial Relations Commission and other courts in relation to industrial and occupational health and safety laws.

* This paper is based on a speech given to a symposium held by the School of Business, University of Sydney, on 26 August 2005 to discuss developments in industrial law in New South Wales since 1998 including the anticipated significant federal changes to industrial law. Since then, the *Workplace Relations Amendment (Work Choices) Act 2005* has been passed by the federal Parliament and came into full effect on 27 March 2006. Further, a challenge has been brought in the High Court to its constitutional validity by most of the states and territories and a number of union organisations. This has been listed for hearing in May 2006: *State of New South Wales & Ors v Commonwealth* ('*Workplace Relations Challenge*') (High Court matter numbers S592 of 2005, P66 of 2005, B5 of 2006, A3 of 2006, B6 of 2006, S50 of 2006 and M21 of 2006).

1 Justice Michael Walton, 'The Industrial System in New South Wales: 1998 to the Reform Proposals of 2005' (Speech delivered at the Symposium of the Business and Labour History Group, University of Sydney, 26 August 2006).

With these premises in mind, the most useful starting point is an analysis of the nature of the industrial systems in this country and their relationship to each other prior to the *WorkChoices Act*.

II A LEGAL FOUNDATION FOR THE NEW SOUTH WALES AND OTHER INDUSTRIAL SYSTEMS

The Industrial Relations Commission² of New South Wales ('Commission') is an essentially conservative institution that has, as its philosophical underpinning, the maintenance of the rule of law in the state of New South Wales. It conducts judicial and quasi-judicial proceedings in conformity with the mores of courts within the general legal system of the State. All industrial systems in this country have, to a greater or lesser extent, such a legal heritage but none more so than the industrial system of New South Wales.

This is not to suggest that the industrial institutions are not themselves unique bodies. The respective legislatures have historically empowered these bodies to varying degrees to resolve industrial conflicts (often involving significant issues in the public interest) and provide remedies to employees unavailable at law or in equity. For example, the common law still operates under the illusion that contracts of employment are negotiated between individuals having equal bargaining powers³ and limits remedies in employment cases to damages rather than to specific performance. (These situations are to be compared in the first instance with the unfair contracts jurisdiction in New South Wales and in the second with the power of industrial institutions to reinstate unfairly dismissed workers.) By contrast, it may be noted, the *WorkChoices Act*, in its further insistence that employees may have to sign individual contracts as a condition of employment (and as the sole mode of regulating their employment), has reinstated at least conceptually this common law illusion by effectively undermining the right to collective bargaining.

In New South Wales, the operative industrial legislation, the *Industrial Relations Act 1996* (NSW), permits the Commission to grapple with the full range of industrial issues and gives ample powers to resolve such matters. This has proven essential to the operation of an effective and practical dispute resolution system. As I shall discuss later, the *WorkChoices Act* significantly reduces the powers of the Australian Industrial Relations Commission, particularly in relation to arbitration and the making of awards.

Due to their common legal tradition, the industrial institutions have inherited the great strength of common law systems — an independent judiciary devoted to the administration of justice. Courts in common law systems have proven remarkably robust and resilient (even in the face of rapidly changing political, economic and social circumstances), essentially because the courts have remained scrupulously independent of political and economic influences so they

2 From 9 December 2005, following the *Industrial Relations Amendment Act 2005* (NSW), the Industrial Relations Commission in Court Session is to be known as the Industrial Court of New South Wales.

3 John Hendy and Michael Walton, 'An Individual Right to Union Representation in International Law' (1997) 26 *Industrial Law Journal* 205, 206.

may do justice amongst all manner of people, organisations, corporations and the state. They also have been able to adapt to changes over time. These common traits – together with their own unique characteristics – have enabled industrial institutions to function effectively in the midst of often intense political, economic and social forces, and to meet their statutory charters to do justice and to provide fair and equitable outcomes in the workplace by agreement or arbitration, irrespective of the interests involved in such proceedings.

These same factors have also allowed a high degree of comity between industrial institutions over a long period of time. Such relations were strained only in more recent times by the provisions of the *Workplace Relations Act 1996* (Cth) (before the *WorkChoices Act*) which reduced the scope of the jurisdiction and discretion of the Australian Industrial Relations Commission with respect to dispute resolution by comparison with the powers exercised by state industrial tribunals.

This tension was described recently by the Full Bench in the *State Wage Case 2006*,⁴ which confirmed the long-established practice of this Commission in adopting the federal approach to the setting of minimum, or in more recent times, safety net wages in awards and the justifications for this. This Commission must not depart from that practice ‘unless satisfied that it is not consistent with the objects of this Act or that there are other good reasons for not doing so.’⁵ The case also noted the differing statutory bases for the operation of the two tribunals. In the same case, the Full Bench observed that ‘[t]he diverging path upon which the two systems were set some years ago clearly continues.’⁶

Over time, this diverging path has gradually eroded a significant basis for strict adherence by this Commission to federal decisions, that is, more specifically the general coincidence of legislative purpose. This has been noted in various decisions scrutinising the underlying basis of decisions of the Australian Commission and its award-making power.⁷

III THE WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) ACT 2005 (CTH)

It is in this context that we may consider the changes to industrial relations systems in this State brought about by the federal government as encouraged by various organisations.

4 [2006] NSWIRComm 67, [24]–[25].

5 *Industrial Relations Act 1996* (NSW) s 50.

6 *State Wage Case 2006* [2006] NSWIRComm 67, 208.

7 *State Wage Case 1999 (NSW)* (1999) 88 IR 363, 389; *Re Pastoral Industry (State) Award* (2001) 104 IR 168, 172–179 (where the Full Bench noted that the difference between the two schemes was ‘stark’ and that this Commission’s ‘award making powers under the Act are, at this point in time, considerably broader than those of the AIRC pursuant to the *Industrial Relations Act 1996* (NSW) and are substantially directed to considerably different purposes’); *State Wage Case 2001* (2001) 104 IR 438, [69]–[70].

A A Unitary System?

It may be recalled that it was initially announced that the purpose for bringing about the changes was to remove the confusion, cost and complexity of having six separate legislative systems regulating employment issues. However, this apparent rationale appears to have become somewhat subsidiary to the announcement of policies designed to change the nature of the industrial relations systems themselves and it appears this initial announcement has since only been faintly argued.

I pause briefly to raise some doubts about the correctness of this initially stated rationale. First, the new system represents such a departure from the existing industrial systems that it bears little resemblance to a policy designed to merely remove duplication and ambiguity, even allowing for some convergence of laws under a rationalised, unitary system. Secondly, there has been a high degree of comity between the industrial systems based not only upon their common heritage but also upon the fact that they operated under consistent policies and largely similar laws within the various federal or state legislative schemes. That is to say, there has been a common framework for their operation.

As mentioned earlier, disconformity has emerged only in recent times as federal legislative changes have created divergence at a fundamental level between the systems.⁸ Even so, there has remained considerable comity between the systems and a reasonable degree of uniformity. I refer for example to the continuation of the system of counterpart awards in New South Wales⁹ and to the maintenance of complementary statutory provisions providing for co-operation between the industrial systems.¹⁰

Additionally, evidence of some actual complexity or significant cost arising from the existence of the respective federal and state award systems is somewhat scant. Cases involving a genuine conflict of laws are few. It is likely that the prominence given to the rare cases of conflict is simply because of their rarity. A dispassionate analysis would show that the real complexity of the industrial laws and industrial relations in Australia has stemmed essentially from the federal system and no system of reform is likely to alleviate that situation. On the contrary, as I shall discuss, the *WorkChoices Act* dramatically exacerbates it.

The state of industrial relations in the metal industry in New South Wales contradicts any proposition that there are significant deficiencies in the present federal and state mix. The Federal Metal Industry Award operates with respect to that industry in New South Wales. There is a state counterpart award which regulates employers who have not become respondent to the federal award. This could be for a variety of reasons, including difficulty identifying individual employers operating in the industry or their non-membership of employer associations. Various state awards co-exist, covering other employees of these businesses such as clerks. No difficulty arising from this interaction has been

8 See, eg, *State Wage Case* [2006] NSWIRComm 67; *Re Pastoral Industry (State) Award* (2000) 104 IR 168.

9 *Re Motels, Accommodation & Resorts (State) Award* [2005] NSWIRComm 248.

10 See, eg, *Industrial Relations Act 1996* (NSW) pt 9 ch 3.

reported. It could not seriously be suggested that, if they desired, the sophisticated employers and their organisations in that industry could not have taken steps to bring about the regulation of all of the areas covered by a single federal award or certified agreement. But they have not, and it may be suggested that this is because there is either an absence of motivation (by which I mean an absence of factors compelling them) or there are aspects of the divergence which have been regarded as actually beneficial.

The principal point emerging from this discussion is that, while there may have been a theoretical basis for discussing a unitary system, there was no compelling impetus for such change based upon known problems or deficiencies. Furthermore, the 'solution' provided by the *WorkChoices Act* has, when unveiled, given rise to the potential for significant problems, as I shall now discuss.

The *WorkChoices Act* has dramatically increased in complexity. Instead of amending the existing law by enacting a clear, simple legislative model, the *Workplace Relations Act 1996* (Cth) is now 1388 pages long, with an additional 402 pages of accompanying regulations.

Some aspects of the *WorkChoices Act* are unclear, prolix and fraught with uncertainty. Professor Andrew Stewart went so far as to estimate that the Act breaches almost every principle for assessing regulatory quality prepared by the Office of Regulation Review.¹¹ He criticised the federal government's attempt to anticipate and provide for every eventuality (thus limiting the Australian Commission's discretionary powers) rather than creating a framework for the sensible application of broad guidelines.

The source of the complexity is clear enough. The *Workplace Relations Act 1996* (Cth) (before the *WorkChoices Act*), which was designed to inter alia, reduce the role of the Australian Industrial Relations Commission, did so by increasing regulation of the federal industrial system so as to put in place such limitations and controls over the functions of that tribunal. That complexity has been enhanced by the *WorkChoices Act* by following a similar pattern to 'deregulate' the system (by removing third party elements) by means of a high level of regulation – in this case by the extraordinary step of bringing about the changes by an Amendment Act. Thus, the already complex *Workplace Relations Act 1996* (Cth) has had an even more complicated layer of legislative prescription superimposed.

The amending legislation contains no less than three sets of transitional arrangements. One for existing federal awards and agreements as they apply to constitutional corporations (and other businesses in Victoria and the Territories); one for corporations currently covered by state instruments; and yet another for unincorporated businesses threatened with falling out of the federal system.

¹¹ Andrew Stewart, 'Labour Market Reform in a Federal System: Making the Best of a Flawed Framework' in The Productivity Commission, *Productive Reform in a Federal System*, Roundtable Proceedings (2006) 175.

In addition to the uncertainty of how these complex arrangements will interact with existing state legislation, there is the uncertainty created by the numerous state and union constitutional challenges currently before the High Court.

In short, although there may be proponents of any argument, I do not believe it can be maintained with any credibility that, contrary to Professor Stewart's analysis, the *WorkChoices Act* simplifies the law regulating industrial or workplace relations. Even if the High Court ultimately upholds the validity of the Act, these voluminous provisions and regulations represent a bonanza for employment lawyers. An explosion in litigation concerning the meaning and effect of the Act and the accompanying regulations (and their interaction with the provisions of the Act), the operation of the transitional provisions and their combined interaction with various state Acts (both current and proposed countervailing) is inevitable.

To this it may be added that the new system has not achieved the unitary aspect of its rationale. The state systems continue with a full range of powers including in New South Wales the general powers under s 51 of the *Industrial Relations Act 1996* (NSW), albeit with some potential confinement to Crown employment and the non-corporate sector.

Moreover, the advent of the *WorkChoices Act* threatens, finally, to overcome the harmony achieved by comity between the federal and state systems, guaranteeing greater complexity. As the Full Bench of the Industrial Relations Court of New South Wales noted in the recent *State Wage Case*,¹² the significant changes effected by the *WorkChoices Act* (which I will discuss below) have eroded the coincidence of legislative purpose to the point where it is difficult to envisage how a national decision could be consistent with the first object of the *Industrial Relations Act 1996* (NSW), namely to provide a framework for the conduct of industrial relations which is 'fair and just'.¹³

It is, therefore, very likely that the originally stated ground for the changes effected by the *WorkChoices Act* neither represents a real motivation for those pursuing the new policies, nor, for that matter, a real basis for the heightened controversy now generated over industrial relations reforms.

B The Controversy

There has been an unprecedented level of controversy, protest and media attention surrounding the federal changes to industrial relations law, raising significant questions about which aspects of the changes cause such disquiet. This is particularly noteworthy given that controversy and change are generally commonplace in industrial relations and industrial law and seldom produce such widespread and heated reaction. Take, for example, laws in relation to industrial relations in New South Wales. Here the community has managed to accommodate substantial reforms to employment laws through three successive Acts of Parliament. Those Acts substantially changed industrial laws within a period extending from 1990 to date. Indeed, change is prevalent, from the type

¹² [2006] NSWIRComm 67.

¹³ *Industrial Relations Act 1996* (NSW) s 3(a).

of employment systems to management structures. For example, there are now all manner of managers in front-line industrial relations roles – industrial relations managers, personnel managers, line managers, and, more recently, human resources managers.¹⁴ All of this has occurred with not much more than a grumble.

One explanation for the controversy is that the *WorkChoices Act* does not merely seek to engulf the state systems into a unified federal system, but actually threatens to eliminate them by the substitution of a quite different system. The transitional provisions, which purport to draw state awards and state enterprise agreements into the federal scheme as ‘Notional Agreements Preserving State Awards’ which, after three years, will cease to operate in favour of federal awards rationalised along industry lines,¹⁵ is testimony to this.

While I admit it may have parochial overtones to say so, the state industrial systems offer substantial advantages, which it may be thought worth preserving. Those benefits extend beyond those I have mentioned as being associated with a court system in the common law tradition. By this I do not mean advantages for any particular interest, but simply system-based advantages in the New South Wales Commission's industrial jurisdiction, such as the following:

1. Simplicity – Despite the Commission's adherence to the formalities commensurate with a court-based system for the resolution of disputes, it performs the actual function of dispute resolution in an informal way with a heavy emphasis on conciliation. Indeed, most industrial disputes are resolved by conciliation. The present rate of success of conciliations in unfair dismissal matters is well in excess of 80 per cent and, with general industrial disputes, the rate is even higher.
2. Accessibility – Access to the Commission's dispute resolution function is affordable and straightforward.¹⁶ Access is not hindered by constitutional problems. Further, the institution has a genuine state-wide reach providing dispute resolution and unfair dismissal functions to all regions of the State.
3. Timeliness – All industrial dispute and unfair dismissal processes work to short timeframes. Unfair dismissal matters receive their first listing within 21 days and industrial dispute matters are generally listed well under five days of notification and in more urgent matters, virtually immediately. The process involved is generally speedy.
4. Practicality – The system is geared to produce common sense and practical outcomes to industrial and employment problems. This can be achieved as the Commission is made up of members with substantial

14 A title which, I must say, is unfortunate as it seems to connect with the philosophy of economism.

15 Unless converted earlier into individual Australian Workplace Agreements.

16 For example notifications may be given in writing, by fax and by telephone and listings may occur at the Commission's own initiative.

practical experience across a broad range of industries, professions, dispute resolution and wage-fixing processes.

These system-based advantages make it difficult to understand the rationale behind the Australian Labor Party's new policy on unfair dismissals. That is to introduce a new 'lawyer-free' claims process amenable to small business, modelled on small claims tribunals, involving informal mediation and the possibility of resolution by an independent 'umpire'. The proposal for a new system suggests that there is some difficulty with the present system; this suggestion is seemingly without merit. The progress of matters in the New South Wales system is already rapid with a high emphasis on conciliated outcomes¹⁷ to ensure prompt completion times. They are not occasioned by undue formality and it is certainly not a lawyer-dominated system.¹⁸ In any event, the small number of cases that reach arbitration may often be assisted in their resolution by the involvement of solicitors and counsel.

There are three other important factors that contribute to the success of the existing form of the state system. First, there is a cultural aspect. In general, participants accept the role and function of the Commission. The nature of the available remedies and the stature of the institution create an environment in which disputes may be resolved readily, often without the need for frequent recourse to the institution. Mr Ian Cummin, the Executive Vice-President of BlueScope Steel Ltd, made the following statement in a recent ceremony to mark the appointment of a Commissioner of the Commission:

As an employer who was a participant in both the New South Wales state industrial system and the federal industrial system, two relevant and important distinctions can be observed. Firstly, under the New South Wales system all parties have swift access to effective remedies against the misuse of industrial power without the need for crippling economic damage. Second, the existence of these remedies is often sufficient to create the expectation that disagreements ought to or most often are resolved constructively and directly between the parties involved. In other words, people understand and accept and work within the boundaries. Nevertheless, exceptional and destructive circumstances do arise. In recent years and in a measured way this Commission has demonstrated its resolve to restore and maintain respect for the processes of constructive dispute resolution.¹⁹

In a practical endorsement of the advantages of the New South Wales state industrial system, BlueScope negotiated new state awards (which were made by consent) for a term of three years from January 2006.²⁰ It may be hoped that the current inroads to the state system proposed by the federal scheme do not serve to undermine the significant advantages offered by these awards.

17 Conciliation is reached within 21 days of filing and 90.3 per cent of matters are settled at this stage (or shortly thereafter). The remaining 9.7 per cent of matters which continue to arbitration are centrally listed in accordance with Practice Direction 17 (made pursuant to Rule 89 of the *Industrial Relations Commission Rules 1996*).

18 It has been estimated that less than 30 per cent of applications in the Commission are filed, and therefore prosecuted, by lawyers.

19 Ian Cummin (Speech delivered at the Swearing in Ceremony of John Stanton, Sydney, 16 June 2005).

20 *Bluescope Steel Limited - Springhill and CRM Employees Award 2006 and Bluescope Steel (AIS) Limited - Port Kembla Steel Works Employees Award 2006* [2006] NSWIRComm 3.

Secondly, there is the principle of fairness, which is the statutory mandate of the Commission in its award-making and dispute resolution functions. This remains a strong feature of the New South Wales system. Thirdly, in addition to the industrial relations system in New South Wales providing choice of the form of employment regulation within that system, there is also, in fact, a choice for any party to participate within either the federal or state system. While movement between the systems has been relatively modest, the choice exists nonetheless. Unlike other policy initiatives which have tended to emphasise the importance of choice (such as in relation to superannuation), this is not so within the new system which proceeds on the basis of removing choice from the industrial relations participants.

For example, as the Full Bench discussed in the *State Wage Case 2006*,²¹ the new system specifically purports to remove state awards or access to existing state awards. This appears to be contrary to the choice of many. A large number of participants in the state system (including major employers such as BlueScope), have sought to preserve their involvement in the New South Wales system by making awards immediately before the commencement of the *WorkChoices Act* with the maximum term permitted under State legislation.

In keeping with this desire for choice, the New South Wales Parliament enacted the *Industrial Relations Amendment Act 2006 (No 1)*, which came into force on 13 March 2006. Amongst other things, that Act enables the New South Wales Industrial Relations Commission to resolve certain disputes using existing state industrial law mechanisms and provides for certain awards made by the Commission to have effect as state enterprise agreements provided both parties to the dispute have agreed in writing for the Commission to do so. This may circumvent the extent to which the *WorkChoices Act* purports to restrict the Commission's jurisdiction to resolve disputes which parties wish to have resolved or managed within the state system. As I will discuss below, the new federal system also removes the choice of arbitration at the federal level (the capacity of parties to even select 'alternative' dispute resolution arrangements is highly circumscribed).

It should be noted that the provision of 'choice' may itself be problematic. In truth it may not, in all cases, be the embodiment of a universal, natural good. Archbishop Rowan Williams raises some interesting observations as to how the language of choice may be deceptive.²² If the development of norms of acceptable behaviour (either politically, culturally or by the distribution of power) significantly narrows the dimensions for real choice, then the so-called choice is illusory and may itself cause disquiet. Thus, as former Justice Macken described,²³ an employee may be offered 'Hobson's Choice' between, say, an individual contract offering less than existing conditions and dismissal (or a refusal to engage a new employee). However, the predicament may be created more subtly. Take, for example, a case where an employer's philosophy about the

21 [2006] NSWIRComm 67.

22 Rowan Williams, *Lost Icons: Reflections on Cultural Bereavement* (2002).

23 ABC Radio National, 'Faith, Works and Industrial Relations', *The Religion Report*, 17 August 2005.

mode of engagement is promulgated to the workforce and then individual employees are given a so-called 'choice' to join in such a system (without necessarily a threat of dismissal).

Rowan Williams raises another interesting moral question about choice, that is, the current culture of the choice of the 'individual' in modern societies, and the vigorous pursuit of individual self-fulfilment which may dampen understanding that choice may mean 'loss' either for the individual or others and particularly eliminates questions about how such losses may be 'distributed'.

It would have to be acknowledged, however, that it is unlikely that the mere loss of the benefits offered by the New South Wales industrial system is sufficient to entirely explain the significant reaction to the *WorkChoices Act*. Reactions such as public protest, campaigns on television and constant debate in the print media have been too widespread and protests have been focused on particular issues arising from that legislation.

I suspect that the major source of the controversy is that the powerful, inherent values and strengths which are reflected in and underpin the New South Wales system and other industrial systems in this country have been challenged and, indeed, are threatened to be replaced with radically different philosophies. At the launch of the workplace relations package in May 2005, the radical nature of the proposed changes was recognised. Notwithstanding the Prime Minister's assertion in Parliament that the changes effected by the *WorkChoices Act* were 'not extreme',²⁴ they were described at the policy launch as 'the most fundamental modernisation of our system yet seen.' In short, the drivers for change derived the changes from a fundamentally different value system.

It would appear that the true distinguishing feature of the current amendments to the *Workplace Relations Act 1996* (Cth) is that they challenge root and branch, for the first time, the (sometimes unstated) philosophies and values which have underpinned the industrial model in Australia or so fundamentally alter the balance in the system away from employees as to perhaps create a sense of injustice or unfairness. For example they may aggravate the economic adversities faced by the low-paid or vulnerable work groups. To illustrate these concepts I will identify five key issues underpinning the current changes that have caused or have the real potential to cause controversy:

1. The aspects of the *WorkChoices Act* discussed below reflect the view that 'fairness' is an out-moded concept and is, in fact, counter-productive in employment relationships, decision-making or award and agreement-making. This approach is antithetical to the objectives of the current industrial systems (if not to the ethos of our society). By the operation of principles of fairness and equity, the current state industrial relations systems provide an effective safety-net for wages and conditions. The New South Wales system has, in this respect, particular application for vulnerable work groups, such as women, migrants, the low-paid and unskilled workers.

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 2006, 5 (John Howard, Prime Minister of Australia).

2. It has never been seriously suggested that unrepresented, individual employees would have equivalent bargaining power to employers. Yet this presumption appears to underpin some aspects of the reform legislation. For example the absence of any obligation on an employer to recognise the right of a trade union to bargain collectively on behalf of its members and to engage in collective bargaining, notwithstanding Australia's ratification of the International Labour Organisation's Convention 98 - Right to Organise and Collective Bargaining or the provisions of the *WorkChoices Act* enabling employers to reach agreements with employees without scrutiny by the Australian Industrial Relations Commission (or any other entity) as to whether such employees may be disadvantaged by comparison to relevant award provisions.
3. The diminution of the Australian Industrial Relations Commission's powers to arbitrate industrial disputes is so substantial as to involve a virtual elimination of the compulsory conciliation and arbitration systems established at a federal level since Federation and reflects a view that the regulation of collective disputes often involving strikes and lock-outs by industrial institutions is unproductive or unnecessary. Yet hitherto it has never been suggested that either the market or general laws²⁵ could effectively regulate such situations. Indeed, history would suggest otherwise. Further, the elimination of compulsory arbitration systems also raises questions about the attainment of equitable (or just) outcomes in the workplace.
4. A key principle underpinning the *WorkChoices Act* is the view that the provision of employment for the unemployed rates as equal to or above the maintenance of conditions of employment for those who are employed. The provisions of the *Workplace Relations Act 1996* (Cth) before the *WorkChoices Act* imposed an obligation on the Australian Industrial Relations Commission to ensure a safety net of fair wages and conditions of employment having regard to the need to provide fair minimum standards in the context of living standards generally prevailing in the Australian community and to the needs of the low-paid. As I shall discuss below, these criteria have been removed. The primary focus now appears to rest upon economic considerations falling outside the relevant employment relationship. This has profound implications not only at a practical level for individual employees, but also as to the philosophical underpinning of the system which hitherto has striven to provide some measure of equity for employees faced by an unequal position of power in the workforce.

25 Or solely punitive measures under industrial laws: see, eg, the possible removal of the discretion of the Australian Industrial Relations Commission where orders are sought under s 496 of the *Workplace Relations Act 1996* (Cth).

5. Although the Act has retained some limited recourse to court actions for unlawful termination,²⁶ it has severed rights to arbitral remedies for a large proportion of the population in the case of unfair dismissals and notably has done so in conjunction with a significant erosion of the safety net conditions formerly in the *Workplace Relations Act 1996* (Cth).

I will now discuss three of the above issues in greater detail:

1 *Changes to Unfair Dismissal Laws*

The extent of the controversy over these changes may be better explained by reference to the scope of the existing remedies, their derivation, the practical significance of remedying injustice and the context in which exclusions from such remedy have arisen under the *WorkChoices Act*.

Assuming that this aspect of the *WorkChoices Act* is found valid and would operate with respect to all constitutional corporations in New South Wales – subject to any residue of power under state industrial Acts to arbitrate industrial disputes concerning the dismissal of employees by constitutional corporations – a large proportion of the New South Wales population has been excluded from this right (or at least remedy). This conclusion is available having regard to the exception of corporations with less than 101 employees²⁷ and the likely scope of the exclusions to such remedies in large workplaces. The exclusions in the case of employers with more than 100 employees appear to be quite wide, first extending the qualifying period from three months to six months (which can be lengthened even further if ‘reasonable’)²⁸ and, secondly, allowing employers latitude to dismiss workers for ‘genuine operational reasons’ or on grounds which include operational reasons.²⁹ On any view, and regardless of how the term is ultimately interpreted by a court, it is a broad exception.

The description of redress for unfair dismissal in federal law as a ‘right’ may seem questionable given that the unfair dismissal jurisdiction was only introduced in 1994 by the *Industrial Relations Reform Act 1993* (Cth). However, remedies were earlier available federally in collective disputes.³⁰ The position is stronger in New South Wales. There has, in fact, been a long-standing regime of remedies for unfair dismissal in this State,³¹ in the course of tracing the development of the jurisdiction through the 1940, 1991 and 1996 Acts, a well-settled and consistent jurisprudence (although general rights of access to such remedies only derived from the *Industrial Relations Act 1991* (NSW)).

26 That is, limited both as to the scope and content of the remedy available and its accessibility in a court-based system, which may expose the applicant to costs orders in limited circumstances.

27 *Work Choices Act* s 643(10).

28 *Ibid* s 643(7).

29 *Ibid* s 643(8), (9).

30 See, eg, *Printing and Kindred Industries Union v Vista Paper Products Pty Limited* (1992) 45 IR 268 and the decision of the High Court of Australia in *Re Printing and Kindred Industries Union; Ex parte Vista Paper Products Pty Ltd* (1993) 67 ALJR 604.

31 *Beahan v Bush Boake Allen Australia* (1999) 47 NSWLR 648, 675.

It is also significant that the remedies for unfair dismissal in the federal jurisdiction derive or stem from international law and convention. They were introduced following the federal government's ratification of the International Labour Organisation's Termination of Employment Convention³² (No 158) on 26 February 1993 and their withdrawal should, therefore, be examined in that context. It is the very nature of such conventions to describe universal rights.

This review of likely sources of controversy should also include a discussion of the everyday application of the jurisdiction. These laws have been used to redress some real acts of unfairness or, in some cases, even oppression. There are many decisions of this Commission which vividly demonstrate that some dismissals are, on any objective view, harsh, unjust or unreasonable. Indeed, if one looks across the large number of cases dealt with by the New South Wales Industrial Relations Commission it is relatively easy to find cases of quite dire, capricious and harsh conduct towards dismissed employees. This is not a reflection upon the conduct of employers generally, but describes some aspects of the value of the present system. Now, however, the *WorkChoices Act* excludes the vast majority of employees from these rights.

Putting aside legal questions as to the scope of the *WorkChoices Act*, it is clear that employees will still have rights in relation to unfair dismissal in New South Wales if they are employed by non-constitutional corporations. This is a matter of some significance as many in this group might be described as 'vulnerable' employees (due to ethnicity, gender, age, the precarious nature of their employment, their position in low skilled employment, the absence of union organisation, etc). However, many employees of constitutional corporations may also be so described.

However, the most controversial aspect in this area may well arise from the interaction of the unfair dismissal amendments with other features of the *WorkChoices Act* which diminish the safety net protections formerly found under the *Workplace Relations Act 1996* (Cth). The comprehensive restriction of the remedy for unfair dismissal has been effected in concert with the tantamount abolition of independent scrutiny of employment contracts (in the form of judicial approval of awards, enterprise agreements or Australian Workplace Agreements). There has been a great deal of controversy following the recent dismissal of employees by Cowra Abattoir concerning the scope of the 'operational' exception (which dispute now appears to be resolved). I suspect, however, that the underlying controversy is that provisions of the *WorkChoices Act* may, on one view of the legislation, allow an employer to dismiss employees without redress in circumstances where they may be re-employed on conditions which are not only less than they may have experienced previously, but which have the potential to be less than any relevant safety-net award. As I shall discuss next, following the *WorkChoices Act* there is no machinery in the Australian Industrial Relations Commission to restore by arbitration benefits lost by the unilateral act of an employer.

³² *Termination of Employment Convention*, 22 June 1982, ILO Convention C158 (entered into force 23 November 1985).

There is also the consideration that Australian Workplace Agreements are no longer confined by the requirements of a no-disadvantage test vis-à-vis the relevant award, and therefore, may arguably provide the basis by which a former employee (removed under the *WorkChoices Act* provisions for reasons which would not attract redundancy payments) may be reintroduced to his or her former position at a lower rate of pay or inferior conditions.³³ It is also interesting to note that the General Regulations of the *Workplace Relations Act 1996* (Cth) prohibit a term of a workplace agreement which confers a right or remedy to a dismissed employee 'for reasons that [it] is harsh, unjust or unreasonable'.

2 *Changes to Dispute Resolution Laws*

The *WorkChoices Act* has affected a critical change to dispute resolution in removing of the century-old power for compulsory conciliation and arbitration, the foundation stone upon which the industrial systems in this country were developed. In its place, the legislation has established something akin to a voluntary arbitration system without the essential components of the compulsory system. Such components include the ability to compel a resolution at the initiative of one or other of the parties and taking into account public interest considerations. Furthermore, it may also be observed that the voluntary system itself is severely constrained in its operation, as I will discuss below.

The evolution to this point commenced with the enactment of the *Workplace Relations Act 1996* (Cth). A Full Bench of the New South Wales Industrial Relations Commission recently considered the limited nature of the powers of the Australian Industrial Relations Commission to arbitrate and some undesirable consequences of such a lacuna under that Act prior to the *WorkChoices Act* in *Re Inquiry into the Boeing Dispute at Williamtown*:

Whether such a situation is 'fair' in some abstract sense is a matter for debate, as Senior Counsel for Boeing correctly submitted. But what is clear is the federal system of industrial regulation substantially limits the ability of employees to have their claims and grievances arbitrated by an independent tribunal applying the usual criterion of fairness in the resolution of industrial disputes. It should be added that the same failing in the federal system affects employers who find themselves with little opportunity to gain relief in the face of industrial action by a union or unions that hold the upper hand in terms of bargaining power. It is a bargaining system based on survival of the fittest.

The bargaining process that obtains federally does not have sufficient regard to substantial imbalances in bargaining power. Its operation depends almost entirely upon the economic and industrial power of the participants without reference to the public interest.

Accordingly, we conclude that such remedies as are available under the *Workplace Relations Act* are inadequate to resolve the current industrial dispute. There is no power presently available under the *Workplace Relations Act* to bring about a

33 In this respect, see, eg, the requirements for approval of Workplace Agreements (s 340), the limited scope of protective award conditions and conditions for their removal or alteration (s 354), the limited scope of prohibited content conditions for agreements (see s 356), the General Regulations for the *Workplace Relations Act 1996* (Cth) (Div 7.1) and the removal or modification of former ss 170 VPA and 170 VPB of the *Workplace Relations Act 1996* (Cth).

cessation of the industrial action and the employees have no prospect of obtaining a collective agreement or of obtaining a remedy for their grievances based on some objective, independent consideration of their claims (subject to the usual constraints of fairness, reasonableness and economic balance). Having regard to the statutory scheme of the *Industrial Relations Act 1996*, this could not be described as adequate because it entrenches inequality, removes redress for those in weak bargaining positions and largely disregards the public interest.³⁴

As I mentioned earlier, what little opportunity existed for employees to have their claims and grievances arbitrated by an independent tribunal at the federal level has now gone.

The *WorkChoices Act* seems to limit the dispute resolution role of the Australian Industrial Relations Commission in many respects to little more than that of a mediator or in some cases a private arbitrator. In relation to disputes under the Model Dispute Resolution Process³⁵ or disputes concerning bargaining over a collective agreement,³⁶ the Commission does not have the power to compel a person to do anything. This includes arbitrating the matter or matters in dispute; otherwise determining the rights or obligations of a party to the dispute; making an award or order in relation to the matter or matters in dispute; or appointing a board of reference, even if the parties agree that the Commission should do any of those things. This excludes the case of a model dispute resolution process, in which the Commission may, by agreement, arbitrate and determine rights or obligations of a party. 'Dispute resolution processes' must be conducted in private and no information may be revealed or used as evidence in any legal proceedings. On one interpretation, it seems that the Commission will not have the power in this context to arbitrate or otherwise determine the rights or obligations of a party to the dispute in the case of disputes arising in the course of bargaining for a proposed collective agreement, even if the parties agree the Commission should have these powers.³⁷

If a dispute arises under a Workplace Agreement which specifically refers to the Australian Industrial Relations Commission or does not exclude it, the Commission will have the powers given to it by the agreement of the parties, which presumably includes the power to arbitrate, but (regardless of the agreement) does not have the power to make orders.³⁸ Justice Guidice has suggested that the Commission may still have the powers under the former s 170LW in relation to 'old' Certified Agreements regarding the power to settle disputes over the application of the agreement and the power to appoint a board of reference. This will, no doubt, require further consideration.

The former provisions of the *Workplace Relations Act 1996* (Cth) as to the notification of and resolution of disputes and the conferral of limited powers of arbitration upon the cessation of a bargaining period³⁹ have been repealed. The power of the Australian Industrial Relations Commission to vary awards is

34 [2006] NSWIRComm 52, [234]–[236].

35 *WorkChoices Act* pt 13, div 3.

36 *WorkChoices Act* pt 13, div 4.

37 See *Workplace Relations Act 1996* (Cth) ss 701, 706.

38 *WorkChoices Act* s 711.

39 See, eg, ss 99, 170MW, 170MWA, 170MX.

severely circumscribed with respect to pre-reform awards (covering constitutional corporations).⁴⁰ There is a power for the Australian Industrial Relations Commission to vary transitional awards (that is federal awards created before the *WorkChoices Act* which cover employers that are not constitutional corporations) by arbitration but those powers are extremely limited.⁴¹

By way of contrast, the Full Bench in *Re Inquiry into the Boeing Dispute at Williamstown*⁴² made these observations about the comprehensive dispute resolution mechanisms in New South Wales:

This conclusion [that the Boeing dispute would have been resolved under the *Industrial Relations Act 1996*] represents no criticism of the AIRC but experience indicates that the panoply of powers available to this Commission would produce such a result (as it regularly does even in relation to the most intractable disputes). This requires some brief further explanation. Take, for example, conciliation. We would not wish it to be taken that we are of the view that a member of this Commission possesses any greater conciliatory skills than a member of the AIRC. However, the powers available under the *Industrial Relations Act* enhance the prospect of reaching a conciliated outcome (such as the power to direct parties to confer in good faith, to summons parties to compulsory conferences and to make recommendations or give directions). Further, the prospect of arbitration in itself is a real catalyst for a conciliated outcome.

Ultimately, however, the efficacy of the remedies under the *Industrial Relations Act* lies with the power to arbitrate. This power is not subject to the restrictions contained in the *Workplace Relations Act* earlier identified – in particular, there is no requirement that any award made must be a minimum rates, and not a paid rates, award. Thus, it would be open to the Commission, if persuaded to do so, to make an award which dealt directly with the issues between the parties by setting actual terms and conditions of employment for the relevant employees at Williamstown. While the Commission cannot directly order the parties to negotiate – or not to negotiate – a collective agreement, any determination by the Commission to make – or not to make – an award would effectively resolve the collective/individual bargaining aspect of the dispute. Further (assuming remedies under the *Industrial Relations Act* are available), to the extent that any strike action persisted after the Commission moved into the arbitration phase, it would be open to the Commission to make a dispute order requiring that industrial action to cease.

The powers referred to by the Full Bench have long played a role in effectively resolving industrial disputes (25 per cent to 30 per cent of which, in the last three years, have been notified by employers). I refer, for example, to the efficient management of industrial relations in the power and steel industries in New South Wales where there can be no doubt that the industrial relations system has effectively diffused serious industrial problems, as I discuss further below. Just how these disputes will be resolved following the *WorkChoices Act* is unclear.⁴³

40 *Workplace Relations Act 1996* (Cth) pt 10, div 5.

41 See *Workplace Relations Act 1996* (Cth) sch 6, pt 3, div 2, cl 29.

42 [2006] NSWIRComm 52, [271]–[272].

43 See especially the report of Dr Chris Briggs of the University of Sydney that there has been a dramatic rise in lockouts since the introduction of the *Workplace Relations Act 1996* (Cth): that is, after the reduction of dispute resolution mechanisms under that Act: Nick O'Malley, 'Staff Lockouts Rise Tenfold in Decade', *Sydney Morning Herald* (Sydney), 15 August 2005, 5.

3 *Changes to the Determination of Minimum Wages*

Following the *WorkChoices Act*, the majority of employees subject to awards of the Australian Industrial Relations Commission will have their minimum wages determined by a non-judicial body which will not be obliged to conduct public hearings to hear arguments about contested issues. This newly emergent body is entitled the Australian Fair Pay Commission, which has as its chairman a Professor of Economics, Professor Ian Harper. The other members of the AFPC include a labour market economist, two corporate executives and a former union representative. Although the Australian Industrial Relations Commission will continue to have the responsibility for setting minimum wages for so-called 'transitional employees', this must be done having regard to the desirability of consistency with AFPC decisions. In practice, there appears to be little, if any, scope for the Australian Industrial Relations Commission to act independently.

The new s 23 of the *Workplace Relations Act 1996* (Cth) provides that the AFPC, in performing its wage-setting function, must have regard to the capacity for the unemployed and low-paid to obtain and remain in employment. There is no explicit requirement for the AFPC to have regard to questions of fairness in its wage setting function, or to the 'needs of the low paid' (as opposed to a safety net for the low paid). Nor is there an explicit requirement to fair minimum standards for employees in the context of living standards generally prevailing in the Australian community.⁴⁴ Furthermore, as the Full Bench noted recently in the *State Wage Case 2006*:

In the *WorkChoices Act*, the emphasis in wage setting has clearly shifted from the fixing of fair minimum wages for those in employment to more of a focus on wage levels that, according to the legislation, will increase the capacity for the unemployed to obtain employment and for the low paid to remain in employment (regardless of whether their minimum wage is fair) in the interests of promoting employment and competitiveness across the economy.

Whilst the New South Wales statute requires the Commission to take into account the public interest in the exercise of its functions and, for that purpose, it must have regard to the state of the economy of New South Wales and the likely effect of its decisions on that economy (s 146(2)), its functions do not extend, for instance, to the speculative realm of job creation for the unemployed by slowing the rate of increase of minimum wages for the low paid or by not increasing minimum wages. The Commission's statutory mandate is to set award wages that are fair and reasonable for the work to be done.

Thirdly, any deliberations of the AFPC cannot be initiated by any person or organisation representing the low paid. There will be no public hearings and a union body will have no automatic right to have its views considered. Rather, the AFPC will initiate any consideration relating to minimum wages on its 'own motion' at a time of its choosing and will consult only those it chooses to consult, or only those it is required to consult as prescribed in any Regulation. There is no statutory requirement for the AFPC to review minimum wages annually or within any regularised timeframe. Any consequential consideration by the Australian Commission would necessarily have to follow the timing of the AFPC's deliberation. This represents a significant departure from the regular annual reviews of minimum wages that have occurred over the past decade at least, which has

44 See the *Workplace Relations Act 1996* (Cth) ss 23, 176.

provided this Commission with the opportunity of reviewing issues such as the maintenance of the real value of the wages of the low paid.

In these circumstances, given there is no statutory requirement for the Australian Commission to set minimum award wages that are fair and which have regard to the needs of the low paid, and given a statutory regime that does not subject minimum wages to regular reviews on the application of organisations that represent the low paid, it is difficult to envisage how a National decision could be said to be consistent with the first object of the *Industrial Relations Act*, set out in s 3, namely: (a) to provide a framework for the conduct of industrial relations that is fair and just.⁴⁵

The new federal laws have seemingly turned industrial regulation on its head. Previously, the lynchpin of employment law was the notion of fairness as between an employer and employees (often represented by unions). Under the *Industrial Relations Act 1996* (NSW), outcomes could be tempered by economic sensibility and the public interest requirements (such as the state of the economy of New South Wales) listed in s 146(2), but the overriding requirement is that established by s 10; namely, that awards set fair and reasonable conditions of employment. This approach was described by the Full Bench in *Crown Employees (Teachers in Schools and TAFE and related Employees) Salaries and Conditions Award*:

In *Re Health and Community Employees Psychologists (State) Award* (2001) 109 IR 458 the Commission held (at [52]):

In other words, it seems to us, in discharging our statutory duty to make an award setting fair and reasonable conditions of employment the cost implications, whilst most important, are to be taken into account as one factor, but not decisively so in itself, which may cause the refusal of a claim. We think that may appropriately be accommodated in a case, and the present is but an instance, by tempering the final outcome so as to result, as par (e) in s 3 – Objects of the Industrial Relations Act suggests, in facilitating ‘appropriate regulation of employment through awards’.

We note that these statements of principle were adopted in *Health Employees Pharmacists (State) Award*, and we also adopt them in this matter. The economic and financial position of the State and the effects of our decision on the New South Wales economy have played a significant role in our decision, but not a determinative one. It is our statutory duty to fix fair and reasonable rates of pay and conditions. In a matter, such as this one, where a compelling basis for increases in rates of pay has been demonstrated, then the Commission must give recognition to that conclusion even though it may temper the final result in recognition of economic considerations. The terms of s 146 of the Act require no more than this, particularly in the light of the paramount requirements of s 10 of the Act. It is those duties that we will discharge in this matter. We shall exercise those duties without fear or favour and in order to do justice between the parties in the light of the evidence and submissions in the proceedings.⁴⁶

There can be little doubt that the criteria for wage setting has shifted in the federal arena from giving primacy to fair and equitable outcomes to employees earning low or minimum wages, to other economic factors which, in many respects, may be extraneous to the employment relationship or the needs of those

45 [2006] NSWIRComm 67, [41]–[44].

46 (2004) 133 IR 254, [431]–[432].

in low paying jobs. There can be little doubt that an objective of this refinement to wage setting is the restraint of movements in minimum wages.

Professor Harper recently described the task of assessing a new minimum wage as consisting of a balancing of considerations between not fixing a wage that is so generous that employees 'may lose work' and not driving down 'the minimum wage so far that people who are on low-paid jobs can't live.' He also stated that the setting of a minimum wages was ultimately 'a judgment call – not a scientific formula'.⁴⁷

These statements are somewhat ironic in that he appears to contemplate a very similar process of 'judgment' making or assessment to those which have been undertaken for decades by the Australian Industrial Relations Commission in national wage and safety net review cases. However, the statement at once reveals a major difference with the previous system of wage fixing in that the Professor is referring to essentially a private process of deliberation and not the transparent court-based process formerly undertaken by the Australian Industrial Relations Commission. More importantly, the statements reveal a more significant difference and gives further insight into the approach being contemplated by the AFPC under the WorkChoices legislation. It is reasonably clear that the overriding criteria for the assessment of minimum wages (or adjustments in wages for the low-paid) by the AFPC is 'unemployment' (although the precise indicator is unclear) or the prospect of unemployment changes with a possible restraining influence being the basement of poverty for low-paid workers. The overlay of notions such as 'fairness' or concepts of 'balance' (which do not appear in the legislation governing the AFPC), do little to allay fears that may reasonably be held that the criteria for the assessment of minimum wages has shifted significantly away from such concepts (the historical assessment of the needs of the low-paid based on notions of fairness tempered by the economic climate) to pure economic management criteria which place the position of those actually in employment as secondary.

This raises profound general social equity or justice issues, as well as having specific adverse implications for the low-paid and vulnerable in the workforce. The observations of Adam Bandt are quite instructive in this respect:

With WorkChoices, the government has restumped the industrial relations house. For the first time since Federation, the legislative underpinning is no longer that part of the constitution that gives Parliament the power to prevent and settle industrial disputes by way of conciliation and arbitration. Instead, almost the whole of the new laws are based on the power to make laws on the activities of corporations. This is not simply a technical legal point. It represents a fundamental tenet of the new form of government: the conflicting expectations and interests of employers and workers are no longer broader social questions but narrow questions of economic management.⁴⁸

To similar effect, I refer to the observations of Professor Ron McCallum:

My concern with making the corporations power the primary power for federal labour law, about which I have written in detail elsewhere, is that in time federal

47 Misha Schubert, 'New Body Tries the 'Great Balancing Act' Over Wages', *The Age* (Melbourne), 6 April 2006, 4.

48 Adam Bandt, 'State Waxes, Rights Wane', *The Age* (Melbourne), 4 April 2006, 15.

labour law will become little more than a sub-set of corporations law. Its utility and validity will no longer turn primarily upon whether it assists employees to obtain fair wages and working conditions, but rather whether these laws assist corporations to be more productive in our globalized [sic] world.⁴⁹

The apparent rationale for this change to the *Workplace Relations Act 1996* (Cth) is that the restriction of movements in the minimum wage may increase employment prospects. However, this hypothesis may itself be contentious. For example, Ross Gittins notes that those most likely at risk of unemployment (and most likely to be affected by the minimum wage) – mature-age people who have not completed high school – fare better under the present Australian systems than their counterparts in the highly deregulated labour market of the United States which has a significantly lower minimum wage.⁵⁰ After reviewing comparative statistics, Mr Gittins concluded that the deregulated US system has produced lower pay for least educated people, but not more jobs.

Recent comments by Professor Ian Harper raise even more questions. Professor Harper stated that it will be a priority for the AFPC (in setting minimum wages) to consider families' incomes from welfare.⁵¹ The expectation that families will manage on a combination of welfare and a minimum wage (rather than simply a minimum wage) places new demands on the welfare system to provide general subsistence for the low-paid in lieu of fair wages set by reference to Australian living standards. In the absence of any significant tax reform (and I am not aware of any proposals to introduce remedial taxes for employers), this is a cost borne by the tax-payer which, although uncertain as to whether it will produce any reduction in unemployment, is certain to produce greater profits for employers.

It is sufficed to say that the federal reforms represent a bold social experiment, which had its genesis, as Professor McCallum describes, in a desire to sharply deregulate federal labor law to create a 'regime of individual workplace agreements.'⁵² Professor McCallum also refers to the potential under this scheme to lessen the role of trade unions and Commissions. This conclusion would seem to be reasonably open. I suspect, at the end of the day, the changes will, in fact, result in profound changes for those in employment and ultimately for our society.

IV OTHER FACETS OF THE JURISDICTION OF THE COMMISSION

Before I turn to consider developments in the New South Wales jurisdiction during the incumbency of the current President, his Honour Lance Wright J, it is necessary to identify plainly a singular aspect of the New South Wales industrial

49 Ron McCallum, 'Plunder Downunder: Transplanting the Anglo-American Labor Law Model to Australia' (2005) 26 *Comparative Labor Law & Policy Journal* 381, 397-398.

50 Ross Gittins, 'Deregulated US Job Market Meaner, But Not Better', *Sydney Morning Herald* (Sydney), 13 February 2006, 21.

51 Ian Harper (Speech delivered at Business Council of Australia Annual Dinner, Melbourne, 16 February 2006).

52 Gittins, above n 50.

system which distinguishes itself from other systems and creates a unique legislative environment in this State. I refer here to the jurisdiction of the Industrial Court of New South Wales in two major areas. First, the Court hears prosecutions under the *Occupational Health and Safety Act 2000* (NSW). The second area requiring attention is the Court's unfair contract jurisdiction found under s 106 of the *Industrial Relations Act 1996* (NSW). These judicial functions both inform and complement the industrial functions of the Commission. They reach into the vital area of the protection of employees' health, safety and welfare and also concern quasi-employment (or work), now common in industry where workers are engaged as independent contractors or in some other category outside normal contracts of employment.

A Particular Developments since 1998 in Industrial and Occupational Health and Safety Matters

The following is a very broad overview of developments in New South Wales since 1998 in two main areas: industrial matters and occupational health and safety.

1 Industrial Matters

Since the introduction of the *Industrial Relations Act 1996* (NSW) the award-making and agreement-approving powers (under Chapter 2) and the dispute resolution powers (under Chapter 3) of the Commission have been used extensively for the purposes of resolving industrial disputes, employment grievances and for regulating the terms and conditions of employment of a large proportion of the New South Wales workforce.

Since the year 2000, after an extensive process of review⁵³ there are now 904 State awards. Since 1996, the Commission has dealt with, on average, 1020 industrial disputes each year. The Commission approved 325 enterprise agreements in 2004 and 384 in 2005.

While these statistics might give some superficial insight into the dimensions of the industrial system in New South Wales, they do not fully reflect the significance of that system for this State. Industrial disputes may vary from small employment grievances to massive industrial disputes affecting vital industries. The dispute resolution process occurs state-wide. The awards of the Commission affect a substantial number of those employed in New South Wales whether or not they become members of trade unions. Those awards reach into virtually all occupations, and, significantly, establish minimum conditions for classes of employees in the State who have little or no bargaining power and who I have earlier described as vulnerable workers. These areas have hitherto often been untouched by Federal regulation and depend upon the operation of the State system to provide a true safety net, for both terms and conditions of employment and protection against unfair dismissal.

Much of what I have described thus far concerning dispute resolution and award making could fairly be said to reflect the position under the *Industrial*

53 *Industrial Relations Act 1996* (NSW) s 19.

Arbitration Act 1940 (NSW) which operated (in a variety of forms) in this State for most of the last century. There was a brief interlude between 1991 and 1995 where the Commission's powers in many of these areas were curtailed with adverse industrial relations and employment consequences, but otherwise an industrial tribunal existed in this State for most of the last century with wide powers to resolve industrial disputes.

However, there are four aspects of the period since 1998 which are particularly notable and to some extent distinguishable from any earlier period of the Commission's operation.

First, since 1998 there have been a substantial number of general award applications brought under the 'Special Case Principle,' which involved very significant matters of public interest. Many of these cases relate to the area of public employment (although not exclusively so) and resulted in the introduction of a Practice Direction concerning Major Industrial Cases in order to accommodate such matters in a timely way within the Commission's busy lists. These claims involved applications for significant wage increases. Examples of the broad areas of employment affected by these cases are public hospital nurses,⁵⁴ government school and TAFE teachers,⁵⁵ catholic school teachers,⁵⁶ social welfare workers,⁵⁷ hospital and community psychologists,⁵⁸ aged-care nurses⁵⁹ hospital pharmacists and other employees in the health system,⁶⁰ operational ambulance drivers,⁶¹ fire-fighters, police, transport workers⁶² and early-childhood workers.⁶³

Secondly, notwithstanding the equal pay cases in the 1970s⁶⁴ following Justice Glynn's Report to the Minister for Industrial Relations in the *Pay Equity Inquiry* in December 1998, the Commission heard and ultimately determined an application for a new equal remuneration principle.⁶⁵ That principle was unique even though it derived, in part, from the operation of s 23 of the Act. The first case brought under that principle concerned Crown librarians and resulted in salary increases for librarians, library officers and archivists.⁶⁶

54 See *Re Public Hospital Nurses (State) Award* (2002) 115 IR 183; *Re Public Hospital Nurses (State) Award* (2002) 118 IR 336.

55 *Re Crown Employees' (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* (2000) 102 IR 202; (2003) 129 IR 135; (2004) 141 IR 166.

56 *Teachers (Archdiocese of Sydney and Dioceses of Broken Bay and Parramatta) (State) Award 2004* (2004) 134 IR 71.

57 *Re Social and Community Services Employees (State) Award* (2001) 113 IR 119.

58 *Re Health and Community Employees Psychologists (State) Award* (2001) 109 IR 458.

59 *Re Nursing Homes, & Nurses' (State) Award and Others Award* (2001) 110 IR 433.

60 *Health Employees Pharmacists (State) Award and Others* (2003) 132 IR 244.

61 *Re Operational Ambulance Officers (State) Award* (2001) 113 IR 384.

62 *Re Transport Industry (State) Award* (1996) 95 IR 126, (2002) 120 IR 151.

63 *Teachers (Non-Government Pre Schools) (State) Award* [2001] NSWIRComm 335; *Employers First v NSW/ACT Independent Education Union* (2002) 115 IR 8.

64 See, eg, *Re State Equal Pay Case* 1973 AR (NSW) 425.

65 *Re Equal Remuneration Principle* (2000) 97 IR Comm 177.

66 *Re Crown Librarians, Library Officers and Archivists Award Proceedings - Applications under the Equal Remuneration Principle* (2002) 111 IR 48.

Childcare workers have latterly brought an application relying upon the Equal Remuneration Principle. This was a very significant matter not only because of the occupation and industry affected by it but also because it represented the first application of the Principle in the private sector in a matter that was wholly contested.

In *Re Miscellaneous Workers Kindergartens and Child Care Centres (State Award)*,⁶⁷ the Full Bench found that the work value change was sufficient to satisfy the requirements of the Work Value principle in relation to child care workers and co-ordinators. Furthermore, a case of gender-based undervaluation was established in the case of child care workers, authorised supervisors and co-ordinators.

The evidence established that, despite the importance of their work (underscored by the increasingly detailed attention that all arms of government have paid to the regulation of this industry), child care workers are generally perceived to have low pay and low status. Over 95 per cent of those employed in that industry are women. Although the industry had experienced difficulty in the attraction and retention of staff, increasingly employers in the industry were operating for profit (including at least one substantial corporate employer which was rapidly growing and generating substantial and growing profits for its shareholders). Despite this, very few employers chose to pay staff above minimum award rates. These female employees, working with vulnerable children in their care had, in the main, themselves been unable to negotiate appropriate rates of pay directly with their employers on an over-award basis. The Commission awarded significant increases in wages (to be phased-in over a period of time) and a number of employment conditions were also reviewed.

Thirdly, a number of significant cases before the Commission since 1998 have involved the operation of s 50 of the Act, which is triggered when there is a national decision. A national decision is a decision of the Full Bench of the Australian Industrial Relations Commission that generally affects or is likely to generally affect the conditions of employment of employees in New South Wales who are the subjects of its jurisdiction.

These cases have not been uncommon in the history of the Commission and have most typically involved State Wage Cases. However, matters arising under s 50 from a National decision can be expected to diminish significantly in the light of the decision of the Full Bench in *State Wage Case 2006* concerning the effect of the *WorkChoices Act*:

Based on the foregoing considerations, which point to divergent purposes in so far as wage fixing is concerned under the respective statutes, the strength of the contention that comity should be maintained is significantly weakened. It was submitted, nevertheless, by the federal Minister that we should await the decision of the AFPC in Spring 2006, and by the major employers that we should await the subsequent decision of the Australian Commission, before proceeding to hear and determine the present application by Unions NSW. Of course, a decision of the AFPC has no statutory relevance for this Commission and it is only a 'National decision' of the Australian Commission that we are required to consider under s 50 of the Act.

67 [2006] NSWIRComm 64.

... In other words, subject to the validity of the WorkChoices Act in respect of, *inter alia*, the powers and functions of the AFPC, a decision of the Australian Commission in relation to award classification wages for transitional employees who are subject to the coverage of a federal award will not be a 'National decision' for the purpose of Pt 3 of Ch 2 of the *Industrial Relations Act*.⁶⁸

In more recent times, however, a variety of such matters that are of a different character have surfaced in New South Wales, such as proceedings concerning parental leave. The most recent of these cases is the adoption of the Family Provisions decision of the Australian Industrial Relations Commission in the *Family Provisions Case*.⁶⁹

It should be emphasised that s 51 of the Act (which complements s 50) represents a considerable departure from previous systems. This section enables a Peak Council to apply for a state decision, which by its nature may have a general application or effect in a manner not dissimilar to proceedings under s 50 of the Act. The *Secure Employment Test Case*⁷⁰ represented a very significant application under s 51 and involved a wide range of issues concerning the terms and conditions of casual employees and persons affected by contracting out or labour hire arrangements. In that case, Unions NSW sought a test case standard relating to security of employment; that is, protecting the job security of employees who regularly and systematically work on a casual basis by limiting the circumstances in which an employer can use the services of a labour hire business, contract out work being performed by its own employees, as well as reinforcing the occupational health and safety obligations applicable to labour hire companies.

The Full Bench was satisfied that, in view of the significant changes in the circumstances in which casual employees are engaged, the regulation of casual employment by industrial awards was becoming less relevant to the actual experience of casual employment. Accordingly, the special case principle was satisfied. The Full Bench further found that there had been profound changes in the prevalence and nature of casual engagements which had significantly altered the structure and regulation of employment in New South Wales. In many cases, those changes had substantial adverse consequences for employees, particularly those in long term casual employment.

On that basis, the Full Bench held that a State decision should be made pursuant to s 51 of the Act establishing by general principle a Secure Employment test case standard setting out the rights of casual employees to elect to convert from ongoing, systematic and casual employment to permanent employment. However, the Full Bench, whilst noting the significant growth of labour hire contracts, declined to grant the general prescription sought by Unions NSW in relation to both labour hire and contracting out. Finally, the Full Bench was satisfied, in view of the general confusion in industry as to who bears responsibility for health and safety, that the Secure Employment Test case standard should include provisions setting out the obligations imposed on an

68 [2006] NSWIRComm 67, [45], [52].

69 [2005] NSWIRComm 478.

70 [2006] NSWIRComm 38.

employer relating to the health and safety of workers who are engaged through a labour hire business to perform work for the employer. In its decision the Full Bench actually ordered that the *Storemen and Packers Bond and Free Stores (State) Award* and the *Storemen and Packers Wholesale Drug Stores (State) Award* be varied to incorporate the test case provision.

Fourthly, proceedings before the Commission since 2001 concerning the Port Kembla Steelworks demonstrate both the scope and effectiveness of the Commission's dispute resolution powers. In about 2001, an industrial dispute at the steelworks emerged due to two events, both of which significantly affected industrial relations in the steel industry in Port Kembla. These were the restructuring of the steel operations of the merged corporation BHP Billiton Limited (later known as BlueScope Steel) and the expiry of a previously significant industrial agreement. Industrial relations at the steelworks reached a flashpoint culminating in significant industrial stoppages (actual and threatened) as the result of the corporation's determination to bring about wholesale changes to longstanding industrial employment relationships which had arisen under the steel industry plan and subsequent steel industry agreements.

In a sense the parties were faced with the need to reconsider industrial regulation and their own relations in the light of the significant change in the corporation and its business. As the Commission observed in its original decision to resolve the dispute, the determination of the issues at the time was 'no less than a watershed for industrial relations and employment in the steel industry in the Illawarra region'.⁷¹

This industrial dispute and a series of related, subsequent industrial disputes in the steel industry in Port Kembla are an excellent illustration of the effectiveness of the Commission's dispute resolution powers at a number of different levels which may be briefly described in the following.

The first stage of the dispute resolution process in 2002 involved a very substantial number of disputed matters. It is important to note, in the context of the *WorkChoices Act*, that, even though some issues were ultimately resolved by a form of arbitration involving the parties agreeing to submit to any recommendation of the Commission, the critical ingredient in the resolution of the dispute was the compulsory nature of the proceedings. Neither party saw it in their tactical interests to notify an industrial dispute. However, after the notification of an industrial dispute by the Minister for Industrial Relations under s 130 of the *Industrial Relations Act 1996* (NSW), a compulsory conference was convened in which the parties were compelled to address the issues in dispute, despite any desire they may have had to engage open conflict of one kind or another. It was out of this process that agreements were forged through conciliation and by arbitration. Both parties were restrained during the process from engaging in industrial action or conduct which may have led to such a result. Those processes resulted in the approval of the *BHP Steel Port Kembla Operations Enterprise Agreement 2002*. In other words, the whole of the industrial dispute was resolved by the parties executing a consensual agreement

71 *BHP Billiton v Australian Workers Union, New South Wales* [2002] NSWIRComm 378.

(as opposed to the imposition of an award by the Commission). That agreement was achieved by relatively little dislocation to the industry by industrial action and resulted in a comprehensive regulation of virtually all facets of employment at the Steelworks including special conditions providing for a continuity of work and prohibiting actions resulting in a loss of product.

The enterprise agreement had a difficult phasing-in period. This meant that the Commission was called upon, in a series of decisions, to exercise its power to interpret awards and agreements and to compel adherence to them. In fact, the Commission required strict adherence to the terms of the awards and agreements. This meant that the parties were not only bound to the terms of their agreements in a strict legal sense but were also precluded from manoeuvring designed to extricate themselves from good faith bargaining.⁷² Ultimately, the Commission made dispute orders requiring adherence to the terms of the enterprise agreement⁷³ and imposed penalties for failure to comply.⁷⁴

In the continuing contests between the parties since the agreement was made, the Commission has used similar mechanisms to maintain industrial stability and to obtain fair outcomes for employees and employers. Thus, the Commission maintained the integrity of the provisions, interpreting them in a way which leads to commonsense and practical outcomes and issuing dispute orders in the face of attempts to resile from them or engage in other action designed to undermine them.⁷⁵ It was this complicated history before the Commission which prompted Mr Cummin to emphasise that company's understanding of the importance of the industrial system in New South Wales in his speech, to which this paper previously referred.⁷⁶

The same practical approach to dispute resolution (often involving a combination of conciliation and arbitration) has been applied to other aspects of the conflict between the parties at the steelworks. For example, the Commission has made awards retaining employees who were due to be displaced following the outsourcing of parts of the business, requiring continuing work and training to place those employees within the restructured steelworks. Furthermore, they have made recommendations requiring alterations and refinements to the drug and alcohol policies BlueScope Steel has sought to introduce at the steelworks.⁷⁷

Fortunately, the terms of the enterprise agreement became the foundation for a further industrial instrument with modifications arising from a bargaining process, and a very similar process to that embarked upon by the Commission in

72 See generally *Re Broken Hill Commerce and Industry Consent Award (No. 2)* (2002) 120 IR 429, 436-437; *BHP Steel (AIS) Pty Limited v Australian Workers Union, New South Wales and Others* (2003) 125 IR 216.

73 See, eg, *BHP Steel (AIS) Pty Limited v Australian Workers' Union, New South Wales* (2003) 125 IR 207.

74 See, eg, *BlueScope Steel (AIS) Pty Limited v Australian Workers Union, New South Wales (No. 2)* (2004) 136 IR 48; *BlueScope Steel Ltd (formerly BHP Steel Ltd) v Australian Workers' Union, New South Wales (No. 2)* (2005) 141 IR 329.

75 See, eg, *BlueScope Steel (AIS) Pty Limited - Port Kembla Steelworks Employees Award* (2004) 137 IR 363.

76 Cummin, above n 19.

77 *Australian Workers Union, NSW (on behalf of Stojanovski) v Bluescope Steel (AIS) Pty Ltd* (2004) 137 IR 211.

2002. That further industrial instrument, which was made in 2004, became known as the *Re BlueScope Steel (AIS) Pty Ltd - Port Kembla Steelworks Employees Award*.⁷⁸ Again, this resulted in an industrial instrument comprehensively regulating the terms and conditions of employment of employees at the Steelworks which in turn improved benefits for employees (arising from productivity improvements) without significant loss of time.

As earlier noted, in *Bluescope Steel Limited - Springhill And CRM Employees Award 2006* and *Bluescope Steel (AIS) Limited - Port Kembla Steel Works Employees Award 2006*, the parties applied to continue, in effect, the operation of the 2004 Awards (which had produced real benefits for both the steelworks business and its employees) until 2008. In addition, on 23 March 2006, BlueScope Steel (AIS) Pty Limited and the Australian Workers Union applied for, and were granted, a significant consent award covering a major building and construction project at the steelworks, the 'Unions NSW Port Kembla Steelworks Construction Award 2006' to operate for a period of three years.⁷⁹

In summary, a very complex and heated industrial dispute involving a very significant transition in the steelworks' business and the circumstances of employment in that business was resolved under the Act with minimal loss of time by a combination of conciliation and arbitration. The resolution of those issues was a matter of great public interest because of the significance of the enterprise to the economy of this State. It was also in the public interest for employees to receive substantial gains in employment conditions without disruption to the industry. The Commission required adherence to the terms of the bargains reached. Indeed, the agreements reached through this process actually led to a significant reduction in lost time and production in the industry.

2 Occupational Health and Safety

The *Occupational Health and Safety Act 2000* (NSW), and its 1983 predecessor, represent the culmination and extension of a long history of criminal sanctions to improve standards of health and safety in factories and shops and to stop the exploitation of child labour. Today, the *Occupational Health and Safety Act 2000* (NSW) constitutes a vital piece of social legislation with profound implications for huge numbers of New South Wales citizens, be they employees, sub-contractors or members of the public coming into contact with workplaces. Its enactment, operation and enforcement has had the important practical result of making workplaces safer in New South Wales.

There seem to be suggestions that this area, too, may become the subject of federal regulation or prescription. Following recommendations by the Productivity Commission for deregulation, the Federal Attorney-General commented that the 'red tape' associated with occupational health and safety (along with other laws, such as privacy laws) had become 'out of hand'.⁸⁰ It is interesting to note the similarities between the opening of this public debate by

78 (2004) 137 IR 363.

79 *Re an Industrial Dispute between Unions NSW and BlueScope Steel Ltd*, Matter no. IRC 6774 of 2005.

80 Samantha Maiden, 'Ruddock Outlines Red-tape Attack', *The Australian* (Sydney), 20 March 2006, 5.

the federal government and the policy launch of the industrial relations overhaul last year, ostensibly to remove ‘the confusion, cost and complexity’ of the federal system. Such a gloss on the occupational health and safety legislation does little to recognise its significance to the criminal law of the states and its importance as an instrument of social policy for the protection of working people.

The principal and particular purpose of the *Occupational Health and Safety Act 2000* (NSW) is the protection of workers from breaches of safety, health and welfare, and to compel attention to occupational health and safety issues so that persons are not exposed to risks to their health and safety at the workplace. Sentencing reflects that fundamental objective.

It is important to note that the Industrial Commission of New South Wales (the predecessor of the Industrial Relations Commission of NSW) did not acquire summary original jurisdiction under the 1983 Act until 1987. Before that, proceedings were brought before the Supreme Court of New South Wales in its summary jurisdiction. The Commission’s jurisdiction was confined to appeals from the Chief Industrial Magistrate.

There appears to have been very little activity under the 1983 Act before 1987, with only one reported case in the Supreme Court: *Collins v State Rail Authority of New South Wales*,⁸¹ an unusual case which may well have turned on the prosecution’s failure to provide adequate particulars.

The Commission’s new summary jurisdiction was slow to take effect. There were only 23 filings under the *Occupational Health and Safety Act* in 1989; 13 in 1990; 62 in 1991 and only 9 in 1992. In 2004 there were 186 filings and in 2005 there were 174 filings. Perhaps of even greater significance is the size and complexity of the cases now being regularly heard by this Commission. Moreover, the tenor of decisions since the mid 1990s has expanded the significance and practical import of occupational health and safety legislation, transforming the statute into remedial legislation with real clout.

I will briefly outline the most significant developments in the areas of liability and sentencing since 1995 to illustrate my point.

V LIABILITY DECISIONS

There have been profound developments in the law relating to liability. This has predominantly occurred in areas relating to the responsibilities of labour-hire companies, the meaning of strict liability offences in this context, employers’ obligations to protect workers faced with unpredictable risks outside the control of the employer and the inability of employers to delegate their responsibilities.

Many of these developments stem from the pivotal case of *Haynes v C I & D Manufacturing Pty Limited*.⁸² In that decision, the Full Bench emphasised the vital importance of distinguishing between risks and the circumstances of the actual accident. As the Commission noted, an offence can be committed, even in

81 (1986) 5 NSWLR 209.

82 (1995) 60 IR 149.

the absence of an accident, if employees are exposed to risks. The Act imposed both preventative and remedial obligations on employers.

*Drake Personnel Ltd t/a Drake Industrial v WorkCover Authority of New South Wales (Inspector Ch'ng)*⁸³ naturally followed *Haynes v C I & D Manufacturing Pty Limited* by emphasising that there must be a causal connection between the relevant risk (not the actual accident) and the alleged failures. More importantly, the Commission rejected the argument of the defendant (a labour-hire company) that it could not have committed an offence because it did not have sufficient knowledge of the risk to the safety of its employee working at a customer's factory. Notwithstanding the defendant's efforts, the Commission reaffirmed the absolute nature of liability under the Act. Put plainly, the duties are not merely duties to act as a reasonable or prudent person would in the same circumstances; thus it was no answer to liability to assert that a risk to safety was not reasonably foreseeable.

This concept has been extended to several relatively recent cases.⁸⁴ Each case held that employers are obliged to minimise or reduce risks created by external factors outside the employer's control such as the uncontrollable, unpredictable acts of a violent armed member of the public⁸⁵ or the violent acts of severely intellectually disabled students.⁸⁶ An employer fails to ensure the health, safety and welfare at work of its employees if it fails to appropriately equip or protect them from risks inherent in their work. This is so notwithstanding that such risks may be caused by external factors (known or unknown) and notwithstanding that it may not be possible to eliminate those risks entirely. The Act requires employers to eliminate or reduce the risk so far as possible.

As the Full Bench noted in *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan*, the fact that a risk was not created by, or under the control of a defendant is not to the point. The obligation to ensure safety may be done by eliminating, or preventing, or minimising exposure to any risk however it may have come about or, given the defence of reasonable practicability, by taking all reasonably practicable steps to ensure employees are not exposed to risk. In relation to causation, the Court's inquiry was not confined to whether any failure was the sole or exclusive cause of the risk (in that case, of assault). If the appellant's failure was a substantial or significant cause of the risk, or the failure materially contributed to that risk, then the causal connection is made out. Causation should be approached in a commonsense way.

83 (1999) 90 IR 432.

84 *WorkCover Authority of New South Wales (Inspector Keelty) v The Crown in the Right of New South Wales (Police Service of New South Wales) (No 2)* (2001) 104 IR 268 ('Police Service of New South Wales (No 2)'); *O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)* (2003) 125 IR 361; *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan* (2005) 143 IR 57; *South Sydney Junior Rugby League Club Limited v WorkCover Authority (Inspector Bestre)* (2005) 142 IR 373.

85 *Police Service of New South Wales (No 2)* (2001) 104 IR 268; *South Sydney Junior Rugby League Club Limited v WorkCover Authority (Inspector Bestre)* (2005) 142 IR 373.

86 *O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)* (2003) IR 361.

The meaning of risk was further analysed by the Full Bench in *Morrison v Powercoal Pty Ltd and Anor.*⁸⁷ In that case, the particulars in both charges referred to ‘a potential risk’ of the mine roof falling. The Full Bench held that they did not:

find the reference to a ‘potential’ risk at all helpful. Either a risk exists or it does not. Section 15(1) is directed to obviating actual risks to safety in the workplace even absent any actual incident causing injury either by eliminating the risk or by protecting employees from the dangers presented by the risk. Use of the word ‘potential’ could be interpreted as meaning the risk was yet to come into being but it is clear from the appellant’s case, both at first instance and on appeal, that what was being alleged was that a risk existed, and that is how we have approached the matter.⁸⁸

Nor can an employer delegate the duty. In *WorkCover Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Ltd*,⁸⁹ the Commission held that the corporate respondent could not simply appoint a manager, instruct him to develop safe systems of work (including work methods and systems for training, supervision and the like) and then, having done so, turn its back on matters of occupational health and safety, thus taking no further steps to ensure that these systems of work, training and otherwise, had been adequately established and were being complied with.

VI SENTENCING DECISIONS

The development of sentencing principles in the Commission has most significantly emerged in the 1990s, both as a result of the evolution of the common law and parliamentary initiative to significantly increase penalties under the Act. Sentencing in occupational health and safety matters is now closely aligned with sentencing in traditional criminal matters, taking into consideration the same balance between the objective seriousness of an offence, specific and general deterrence, and any relevant subjective or mitigating factors including prior convictions. This approach was crystallised in *Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales (Inspector Ch’ng)*,⁹⁰ which held that the primary factor to be considered in determining the appropriate sentence is the objective seriousness of the offence charged. Subjective matters rank well behind considerations as to the nature and quality of the offence.

An example of the alignment of OHS sentencing with traditional criminal sentencing can be seen in the application of the principles of totality to multiple offences in *Crown in Right of the State of New South Wales (Dept of Education and Training) v Keenan*.⁹¹ That case concerned the risks which gave rise to injuries caused when a groundsman attempted to assist a ‘job training’ student who had lost control of the tractor he was operating. The Commission followed

87 (2004) 137 IR 253.

88 Ibid [100].

89 (2003) 123 IR 121.

90 (1999) 90 IR 464.

91 (2001) 105 IR 181.

the approach of the High Court in *Pearce v The Queen*⁹² to sentencing for multiple offences. Namely, in sentencing a defendant for more than one offence, the court is required to fix an appropriate sentence for each offence and then consider questions of cumulation, concurrence and totality. It is only after determining an appropriate sentence for each offence that the court should consider whether the sum of the separate sentences properly reflects the totality of the criminality involved.

*WorkCover Authority of New South Wales (Inspector Ankucic) v McDonald's Australia Limited and Another*⁹³ ('McDonald's') illustrates the court's focus on individual culpability in sentencing proceedings. That case concerned the relevance of third parties (unconnected to the criminal proceedings but connected to the underlying facts) to the sentencing of the defendant. A young man died by electrocution at work. Proceedings against the equipment supplier and the equipment installer were discontinued. McDonald's Australia Pty Ltd (who co-ordinated the McDonalds' franchises in Australia), the owner of the premises, and the restaurant operator each pleaded guilty.

In the context of contentions that the court should embark on an enquiry as to whether prosecutions should have been commenced or continued against various entities, the Court held that third party entities helped to illustrate the contribution of the defendant, and hence could assist in understanding whether or not the objective seriousness of the offence should be mitigated. In other words, they help to define the extent of the defendant's criminality. What they do not do is exonerate the defendant in some way, as this would be going too far. It is not acceptable to plead guilty on the one hand and then attempt to run a de facto defence during a sentencing hearing based on such factors. Nor is it appropriate to apportion the maximum penalty notionally so as to, in fact, reduce the maximum available (or apportion the penalty that would have been given) by reference to the contribution of third parties. This approach to the 'contribution' of third parties has been followed in a significant number of proceeding cases.⁹⁴

*McDonald's*⁹⁵ also illustrated the strengthening alignment between sentencing in OHS matters and the traditional criminal law by reviewing the general principles behind all criminal punishment such as the protection of society, deterrence of the offender, retribution and reform and confirming their application in the context of occupational health and safety. This application involved an assessment of both objective factors such as the gravity of the potential risk, its foreseeability, the availability of simple measures which would have avoided it and subjective factors such as the accused's co-operation, contrition and measures taken to rectify the breach.

92 (1998) 194 CLR 610.

93 (1999) 95 IR 383.

94 *WorkCover Authority of New South Wales (Inspector Page) v Walco Hoist Rentals Pty Ltd and Another (No 2)* (2000) 99 IR 163; *Inspector Sharpin v A-Team Concrete (Aust) Pty Ltd and A-Team Concrete Pty* (2004) IR 182; *Inspector Green (WorkCover) v Metropolitan Administrative Services Pty Ltd*, *Inspector Green (WorkCover) v Metropolitan Demolitions and Recycling Pty Ltd*, *Inspector Green (WorkCover) v Giannikouris* [2005] NSWIRComm 12.

95 (1999) 95 IR 383.

The importance of general and specific deterrence in occupational health and safety sentencing was stressed in *Capral Aluminium Ltd v Work Cover Authority (NSW)*.⁹⁶ That case concerned the disintegration of an aluminium reduction cell (known as a 'pot') at an aluminium smelter due to hot material coming into contact with the concrete floor. This caused the concrete to spall (splinter or chip) and ultimately caused an explosion of molten metal which was sprayed across the workplace. In discussing the importance of general deterrence, the Full Bench emphasised that the fundamental duty of the Court in this important area of public concern was to ensure a level of penalty for a breach which will compel attention to occupational health and safety issues and deter the commission of offences so that persons are not exposed to risks to their health and safety at the workplace. The case also emphasised the importance of reasonable foreseeability in sentencing, affirming a previous decision⁹⁷ that the degree of reasonable foreseeability is a significant factor to be taken into account when assessing culpability and the gravity of the offence.

The recent case of *Inspector Stephen Campbell v James Gordon Hitchcock*⁹⁸ (currently on appeal) illustrates the significant increase in fines imposed by the court and the vital importance of general deterrence. In that case, a long-distance truck driver employed by a haulage company died in a fatigue-related accident. The court found that the company's operations exacerbated the risks of driving when fatigued – sometimes to the point of actual danger – by requiring drivers to meet delivery deadlines, ultimately leading to a man's death. The risks of fatigue were well-known in the trucking industry and capable of remedy by simple measures. The sentence imposed – 69 per cent of the maximum available penalty – reflected the seriousness of the offences and the need to deter companies from operating under systems which, by failing to manage the risk of fatigue, endanger both their employees and the public of New South Wales. Following *Inspector Stephen Campbell v James Gordon Hitchcock*,⁹⁹ the Transport Workers' Union of New South Wales filed an application for a new award and contract determination to be known as the *Transport Industry - Mutual Responsibility for Road Safety (State) Award* to ensure that long distance road transport work is carried out safely; is properly planned in order to prevent driver fatigue and that safety is not compromised due to underpayment of employees and contract carriers. That application has been heard and a decision reserved.

As foreshadowed, the court looks at a range of subjective factors when considering whether a sentence reflecting the objective seriousness of an offence should be ameliorated. For example, in *O'Sullivan v The Crown in the Right of the State of New South Wales (Department of Education and Training)*,¹⁰⁰ the Court considered the defendant's contrition, its efforts after the charges to improve workplace safety and its prior record. Recently, in *Morrison v*

96 (2000) 49 NSWLR 610.

97 *Department of Mineral Resources (NSW) (McKensy) v Kembla Coal & Coke Pty Ltd* (1999) 92 IR 8, 27.

98 [2005] NSWIRComm 34.

99 Ibid.

100 (2003) 125 IR 361 (which was upheld on appeal in *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan* [2005] NSWIRComm 198).

Powercoal Pty Ltd (No 3),¹⁰¹ the issue of the construction of a statutory provision permitting an increased penalty for an offender with a prior conviction was considered. The Full Bench held that the provision was not enlivened where a person was sentenced for two offences involving the same factual matrix, nor where the previous conviction was for an offence committed after the offence for which the person was being sentenced. Also considered was the effect of a statutory provision permitting the court to make an order that the relevant charge be dismissed, and the circumstances in which it could be used.

VII CONCLUSION

There can be little doubt that the New South Wales industrial relations system in its present form has the potential to act as a bulwark against at least some of the more radical policies now enacted in the *WorkChoices Act*.

This is because the *Industrial Relations Act 1996* (NSW) retains a system which maintains the essential bargain struck implicitly under the Australian Constitution and explicitly in employment legislation from 1900. That is, the exercise of industrial power will be curtailed in return for the provision of fair and equitable conditions of employment derived from agreement or by means of conciliation and arbitration before an independent tribunal. The weak and vulnerable in employment will be protected from the excesses of market or economic power just as employers will be shielded from an excess of industrial power.

Those notions run contrary to many aspects of the current federal amendments. On the present political view in New South Wales, the New South Wales system will therefore continue to stand as an alternative model for employment regulation in Australia.

101 (2005) 147 IR 117.